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ABBREVIATIONS

AC	–	Appeal Cases
ACHPR	–	African Charter on Human and Peoples' Rights
ACHR	–	American Convention on Human Rights
Afr.JICL	–	African Journal of International and Comparative Law
AIR	–	All India Reporter
AJIL	–	American Journal of International Law
All ER	–	All England Reports
BLD	–	Bulletin of Legal Developments
Brooklyn JIL	–	Brooklyn Journal of International Law
BYIL	–	British Yearbook of International Law
Chin.YBIL	–	Chinese Yearbook of International Law
Chin.YBILA	–	Chinese Yearbook of International Law and Affairs
Cmnd	–	Command Papers (UK)
Col.JTr.L	–	Columbia Journal of Transnational Law
Denver JILP	–	Denver Journal of International Law and Policy
ECHR	–	European Convention on Human Rights
EJIL	–	European Journal of International Law
Eur.Ct.HR	–	European Court of Human Rights
ESCAP	–	Economic and Social Commission for Asia and the Pacific
EXCOM	–	Executive Committee of the UN High Commissioner for Refugees
FEER	–	Far Eastern Economic Review
GATT	–	General Agreement on Tariffs and Trade
GAOR	–	General Assembly Official Records
Geo Wash.JILEc	–	George Washington Journal of International Law and Economics
Harvard ILJ	–	Harvard International Law Journal
H.C.	–	House of Commons
H.L.	–	House of Lords
HRQ	–	Human Rights Quarterly
IAEA	–	International Atomic Energy Agency
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
ICRC	–	International Committee of the Red Cross
IHT	–	International Herald Tribune
IJECL	–	International Journal of Estuarine and Coastal Law
IJIL	–	Indian Journal of International Law
IJRL	–	International Journal of Refugee Law
ILM	–	International Legal Materials

ILO	–	International Labour Organisation
ILR	–	International Law Reports
IMF	–	International Monetary Fund
IMO	–	International Maritime Organisation
Int'l. Org.	–	International Organization
IRAC	–	Indochina Resource Action Centre
Iran-US CTR	–	Iran-U.S. Claims Tribunal Reports
J.Space L	–	Journal of Space Law
JDI	–	Journal de Droit International
JENRL	–	Journal of Energy and Natural Resources Law
JIA	–	Journal of International Arbitration
JT	–	Judgements Today (India)
JWT	–	Journal of World Trade
LegCoProc	–	Legislative Council Proceedings (Hongkong)
LJIL	–	Leiden Journal of International Law
MLJ	–	Malayan Law Journal
ML Rep.	–	Mealey's Litigation Reports (Iranian Claims)
MTCR	–	Missile Technology Control Regime
NRC	–	NRC Handelsblad (Netherlands)
NST	–	New Straits Times
NYIL	–	Netherlands Yearbook of International Law
NYUJILP	–	New York University Journal of International Law and Policy
ODIL	–	Ocean Development and International Law
PCIJ	–	Permanent Court of International Justice
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 Haye
RIA	–	Review of International Affairs (Belgrade)
SCMP	–	South China Morning Post
SCRA	–	Supreme Court Reports Annotated (Phil.)
Stan JIL	–	Stanford Journal of International Law
STAR	–	The Star (Malaysia)
Tex.ILJ	–	Texas International Law Journal
TiF	–	Treaties in Force (US)
UDHR	–	Universal Declaration of Human Rights
UKTS	–	Treaty Series (UK)
UNESCO	–	United Nations Educational, Scientific and Cultural Organisation
UNGA	–	United Nations General Assembly
UNHCR	–	United Nations High Commissioner for Refugees
UNTAC	–	United Nations Transitional Authority in Cambodia
UNTS	–	United Nations Treaty Series

VaJIL	–	Virginia Journal of International Law
Vanderbilt JTL	–	Vanderbilt Journal of Transnational Law
WIPO	–	World Intellectual Property Organisation
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— RETROSPECTIVE AND PROSPECTS*

Shigeru Oda**

As a jurist, I am greatly honoured by the opportunity to be present at the meeting of such a distinguished organization as the Asian-African Legal Consultative Committee (AALCC) and I would like to express my sincere gratitude for its kind invitation which has enabled me to return to the Committee.

I have a particular reason for using the word "return", as my association with the AALCC goes back to its 12th Session in January 1971 in Colombo, when the meeting took up the subject of the law of the sea for the first time, and when I participated as an alternate member for Japan. In fact, the AALCC met to discuss the law of the sea in Colombo in January 1971, several weeks before the UN Sea Bed Committee started its deliberations in March of that year on the general problems of the law of the sea. Thus, the AALCC may well claim to have taken the initiative in beginning discussions on the law of the sea well in advance of UNCLOS III which commenced in 1973 and terminated in 1982.

At its Colombo session in 1971, the AALCC set up a sub-committee on the law of the sea with a small working group of five members which included among others FRANK NJENGA of Kenya (now Secretary-General of the AALCC) and myself. I attended the meetings of the sub-committee and the working group, as well as the regular sessions of the Committee held in the

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* Text prepared for a presentation made at the thirty-second session of the Asian-African Legal Consultative Committee on 1 February 1993 in Kampala, Uganda, as an observer representing the International Court of Justice.

** Vice-President of the International Court of Justice.

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five-year period between 1971 and 1975 in Colombo, Lagos, New Delhi, Tokyo and Tehran, and thus I took part in all the discussions on the law of the sea at the AALCC until I had to leave to take up my post at the International Court of Justice (ICJ) in 1976.

Furthermore, I was honoured to be invited from the ICJ to speak when the AALCC met for its 20th Session in Seoul in 1979 and its 23rd Session in Tokyo in 1983. You may now understand why I said at the beginning that I am delighted to *return* to the AALCC.

As far as I can recall, the attention of the AALCC was first focused upon the subject of the role and work of the ICJ at the Seoul session in 1979, where I had the honour of speaking on the opening day. In 1985, the AALCC prepared a very valuable report entitled "A Study on the Question of Possible Wider Use of the ICJ by Agreement of States Parties" and, since that time, the AALCC has collaborated with the United Nations (UN) in promoting means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the ICJ—the subject which has now been proposed as a programme under the UN Decade of International Law.

The AALCC has become particularly interested in the role which the ICJ can play in the settlement of disputes arising from matters of environmental law, and last year it produced a very valuable study on the enhanced utilization of the ICJ in matters relating to the protection and preservation of the environment. In view of such a growing interest in the ICJ by the AALCC, it is my particular pleasure and privilege to talk about the ICJ in its present situation and to consider what demands may be made upon it in future.

In June last year, Mr. BOUTROS-GHALI, the United Nations Secretary-General, stressed in his well-known report "Agenda for Peace—the Preventive Diplomacy, Peacemaking and Peace-keeping" (drafted pursuant to the statement adopted at the summit meeting of the Security Council in January 1992) that "[the ICJ] remains an under-used resource for the peaceful adjudication of disputes [and] a greater reliance on the Court would be an important contribution to United Nations peacemaking".

I recall that an appeal of a similar nature was made nearly 20 years ago by the UN General Assembly to promote the more frequent use of the ICJ: around 1970, attention had been drawn to the stagnation of the Court. At the 1970 annual session of the American Society of International Law, Mr. WILLIAM P. ROGERS, then Secretary of State of the United States, proposed the revival of the "neglected and moribund" Court in order to establish the rule of law in the international community.

After discussions over a period of several years, the UN General Assembly proceeded, in November 1974, to adopt Resolution 3232 (XXIX) on the "Review of the Role of the International Court of Justice", in which the General Assembly made an appeal to revitalize the Court and referred to six distinct suggestions aimed at bringing this about.

Nearly 20 years have passed since the UN General Assembly appealed to the world community, at a time when the Court was so inactive, to direct its attention to the important role that it might play in the years to come. What, then, has been happening at the ICJ during these past two decades?

In the 1974 resolution to which I have just referred, the UN General Assembly recognized, *first*,

> "the desirability that States study the possibility of accepting, with as few reservations as possible, the compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute".

In 1974, 45 of 141 States Parties to the Statute had accepted the compulsory jurisdiction of the Court under Article 36, para. 2, of the Statute. Since then, the number of accepting States has not increased considerably, despite the increased number of States Parties to the Statute. Today the States Parties to the Statute of the Court number 181. However, only 56 of 181 States Parties to the Statute have accepted the compulsory jurisdiction of the Court, and of these 56, 15 are from Africa including Uganda, and seven are from Asia. The United Kingdom is the only permanent member of the Security Council to have maintained a declaration of acceptance.

If, moreover, we consider that most of the declarations of acceptance of that compulsory jurisdiction are accompanied by various reservations, it would seem that the objective of attaining full acceptance of the Court's jurisdiction with as few reservations as possible will not so easily be attained.

Second, in the 1974 resolution the General Assembly pointed out

> "the advantage of inserting in treaties, in cases considered possible and appropriate, clauses providing for the submission to [the Court] of disputes which may arise from the interpretation or application of such treaties".

Regarding the acceptance of the Court's jurisdiction through the insertion of a compromissory clause into treaties, there were already quite a few such treaties in 1974, most of which were bilateral. During the past 20 years the number of these treaties has increased by approximately 20, and these recent additions include some multilateral treaties such as the 1979 International Convention against the Taking of Hostages; the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the 1985 Vienna Convention for the Protection of the Ozone Layer; the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. It is also worth mentioning that the 1982 UN Convention on the Law of the Sea, which has not

yet come into force, incorporates a very comprehensive compromissory clause as an integral part of this 320-Article treaty.

Third, the General Assembly in 1974 "call[ed] upon States to keep under review the possibility of identifying cases in which use can be made of the International Court of Justice". During its 40-year history the Court has rendered judgments in about 30 contentious cases, but the cases submitted to the Court by *compromis*, that is to say by special agreement between the Parties concerned, have remained very limited in number. Since 1974 the full Court has had only two cases of this kind: the case between Tunisia and Libya in 1982, and another between Libya and Malta in 1985—both cases were related to the delimitation of the continental shelf of these countries.

The submission of disputes by means of a *compromis*, or special agreement, is really the most ideal way in which to settle such disputes, and the judgments in these instances were fully complied with by the respective Parties—Tunisia, Libya, and Malta. I am pleased to note that these two recent cases, brought to the Court by special agreement, involved two African countries. A further case was recently submitted to the Court by means of a special agreement between Chad and Libya for the delimitation of the land borders between them. This territorial dispute originated from the time of the colonial period prior to the independence of the two States. The written proceedings have been completed and the next phase will be the oral proceedings which will commence June 1993. The judgment of the Court may well be handed down early next year.

In connection with the need to promote the more frequent use of the Court, particularly by the developing countries, the then United Nations Secretary-General, Mr. PÉREZ DE CUÉLLAR, put forward a new proposal to the General Assembly in November 1989, aimed at setting up a Trust Fund to assist developing States in the settlement of disputes through the International Court of Justice. The purpose of the proposed fund was to make available financial assistance to States for expenses, such as the hiring of counsel and the preparation of written documents for pleadings. This project has now come into operation, but the fund will only be available in connection with disputes submitted to the Court by means of a special agreement, or to assist with the execution of a judgment of the Court resulting from such a special agreement.

It is known that the recent *Chad/Libya* case is the first instance in which this funding procedure has been applied, and that an award was made to Chad for its pleadings before the Court. It is my hope that this measure will make it easier for the developing countries, which would otherwise have had to face great financial difficulties relating to the hiring of counsel and the preparation of documents, to refer their disputes to the Court.

Fourth, the UN General Assembly in 1974 "[drew] the attention of States to the possibility of making use of chambers as provided in Articles 26 and 29 of the Statute of the International Court of Justice and in the Rules of Court".

When the General Assembly made this suggestion, the chamber procedure had never been used, in spite of its being provided for in the Statute and the Rules. Now, however, the procedure involving *ad hoc* Chambers formed for dealing with particular cases—one of three Chamber procedures for which provision is made—has been resorted to on four occasions.

The first of those Chamber cases was the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, brought in 1981 jointly by Canada and the United States. The 1984 Judgment settled, in a manner accepted by both Parties, the long-standing fisheries dispute between those two States in the Gulf of Maine area.

The *Frontier Disputes* case between Burkina Faso and Mali concerning their land boundary, was brought in 1983 likewise by special agreement and in 1986 it was settled by an *ad hoc* Chamber of the Court to the satisfaction of both Parties.

The *Elettronica Sicula S.p.A. (ELSI)* case, which the United States instituted against Italy in 1987 (evidently with that country's consent, since both Parties accepted referral to a Chamber), concerned the bankruptcy/confiscation of an American-owned company in Sicily. In July 1989 it was decided by a judgment in favour of the respondent.

The *Land, Island and Maritime Frontier Dispute* case between El Salvador and Honduras, in which Nicaragua was eventually permitted to intervene, was jointly referred to a Chamber of the Court in 1986. The judgment delivered by the Chamber in September 1992 settled the delimitation of the borders in six separate sectors of land, and also determined the legal situation of certain islands in the Gulf of Fonseca and of maritime spaces both inside and outside that Gulf.

The *ad hoc* Chamber procedure is, by its nature, based on the consent of the Parties in dispute. In three of the four cases mentioned above, the respective Parties jointly consented in advance, by special agreement, to refer their disputes to the Court, on the understanding that a Chamber would be constituted to hear them. In the fourth instance, the *ELSI* case, the dispute was unilaterally brought to the Court by the United States, but with the full understanding that Italy would accept the Court's jurisdiction and agree to the composition of a Chamber. Thus, the *ad hoc* Chamber procedure may be seen as one type of joint submission by special agreement between the States in dispute.

In fact, in all of these four cases the Parties complied with the judgments, and I must particularly mention that, in the case of El Salvador and Honduras, the Parties had repeated in advance that they would comply with the judgment whatever the outcome. On the day of the delivery of the judgment in September of last year, the Presidents of both those countries got together with the Presidents of other Central American countries to celebrate the removal of a source of conflict from their region.

Fifth, the UN General Assembly in 1974 also recommended that

"United Nations organs and specialized agencies should ... study the advisability of referring [legal questions that have arisen or will arise during their activities] to the Court for an advisory opinion".

Prior to that time the Court had delivered advisory opinions in 16 instances. Yet since 1974 the Court has been asked to give only six advisory opinions, including two responding to applications for review of judgments of the United Nations Administrative Tribunal which had dealt with the terms of appointment of individual United Nations staff members. The issues dealt with in the four other advisory opinions were brought to light by disputes of some political significance.

The *Western Sahara* case (1975) involved claims by Morocco and Mauritania to sovereignty over the former Spanish territory and the incidence of the principle of self-determination. The case concerning *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (1980) related to the proposed transfer of the WHO regional headquarters in Alexandria to another country at a time when there was tension between Egypt and other Arab nations in the region. In both these cases the Court delivered a balanced opinion.

The status of the office of the PLO observer mission at the UN in New York was at issue in the case concerning the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (1988), and the Court rendered an opinion to the effect that the United States should, under the Headquarters Agreement, engage in an arbitration procedure with the United Nations before taking any action to close the office.

In the case concerning the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (1989), the Court delivered its opinion, shortly before the collapse of the CEAUCESCU Government in Romania, disapproving of that government's actions in refusing to allow a former rapporteur of the UN Human Rights Committee to leave his country to present his report in person to a meeting in Geneva.

In the light of the significant role which the Court can play by giving advisory opinions aimed at the settlement of disputes, even when these are of a political nature, proposals relating to a more frequent use of this procedure have recently been advanced from different sources. For example, in a speech made during the general debate at the 1990 Session of the UN General Assembly, Mr. SHEVARDNADZE, the then Foreign Minister of the Soviet Union, suggested by implication that, in connection with the Iraqi invasion of Kuwait, the advisory opinion of the Court might properly be sought.

Finally, the General Assembly in its 1974 Resolution "reaffirm[ed] that recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States".

It may, of course, be difficult to ascertain whether there has been any change in the attitude of States in this respect but the increasing incidence of joint referrals of disputes by African States either to the full Court or to an *ad hoc* Chamber of the Court may be interpreted as implying that States, particularly those in Africa, have been inclined to favour the judicial settlement of such disputes as have arisen between them.

This is an account of the ICJ's caseload during the past two decades since the UN General Assembly appealed in its resolution of 1974 for a "more frequent use of the Court". The Court, which was at that time described as inactive, is now extremely busy handling about ten contentious cases of an international nature, including:

(1) the *Jan Mayen* case, concerning the maritime delimitation between Jan Mayen, a small Norwegian island, and the Danish territory of Greenland, the oral phase of which has just been completed;
(2) the Libya/Chad *Territorial Dispute* case filed by a special agreement of the Parties in 1990 (in which, as previously mentioned, oral proceedings will begin in a few months' time);
(3) the *East Timor* case between Portugal and Australia, which involves the present political situation of East Timor, as well as a maritime delimitation (already agreed upon between Australia and Indonesia) in the Timor Gap;
(4) the *Qatar/Bahrain* case, which relates, *inter alia*, to the delimitation of a maritime boundary in the Gulf—this case is in a phase devoted to questions of jurisdiction and admissibility;
(5) the *Guinea-Bissau/Senegal* case concerning the delimitation of a single maritime boundary between these two States off the western coast of Africa;
(6) the *Nauru/Australia* case concerning the extent of Australia's responsibility for alleged breaches of what is seen as its legal obligation to rehabilitate certain phosphate lands that were mined out on Nauru during the period of UN trusteeship—in this case the Court has in a first phase, established its jurisdiction;
(7) the *Iran/US* case concerning the Iranian civil aircraft which was shot down in 1988 by a US cruiser in the Gulf;
(8) the cases (in effect one case) brought last spring by Libya against the US/UK concerning the extradition of the Libyan suspects alleged to be responsible for the bombing of the Pan Am flight in 1988 over Lockerbie in Scotland. The Court, in April last year, made an Order in that case, in which it rejected the application for preliminary measures sought by Libya pending the delivery of a judgment. The substance of the case has yet to be fully submitted to the Court;
(9) the case brought in October 1992 by Hungary against the Czech and Slovak Federal Republic in respect of a dispute concerning some constructions on the Danube which divert that international river

constituting the border between the two countries—with the dissolution of the Czech and Slovak Republic, which had not formally accepted the Court's jurisdiction, this case does not appear to have any future in its present form;

(10) the case instituted by Iran in November 1992 against the United States with respect to the destruction of Iranian oil platforms in 1987 and 1988 by the United States Navy.

At the moment there is no case on the docket of the Court being dealt with through the *ad hoc* Chamber procedure and no request for an advisory opinion.

I would like to make a few comments on what may lie in store for the Court in the light of the experience gained during those past 20 years and of various suggestions made recently with a view to promoting a more frequent use of the Court for the maintenance of world peace.

First, in connection with the contentious function of the Court one question has been raised, namely the question of whether the existing restriction allowing States, and only States, to bring a case can be lifted to allow wider access to the Court.

There have been some suggestions which, however, are not being given much attention today, that private individuals or corporations should be given access to the Court.

More importantly, some further suggestions have been made to the effect that certain international organizations, such as the United Nations or specialized agencies, might be empowered to be parties on the same footing as States before the Court in contentious cases. Such suggestions appear to have some grounding, in the light of the fact that certain international organizations have been given a legal status similar to that of sovereign States in the international community, as was particularly indicated in the advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (1948) and that it is now normal practice for the United Nations and the specialized agencies to conclude treaties and agreements with States, while various international organizations are allowed to be parties to some multilateral conventions.

More discussions may be required on the possibility that the UN and specialized agencies as well as other international organizations may be given access to the Court as parties in contentious cases.

Secondly, it is a fact that while over the past 20 years there have been only two instances (three, if I include a case now in process) of a joint submission to the full Court of a case based upon a *compromis* or special agreement, four disputes have been dealt with by *ad hoc* Chambers which were referred to the Court with the consent of both parties. This would seem to mean that it is far easier for the States in dispute to come to a Chamber of the Court rather than to the full Court.

The Parties seemed to consider that it is easier to use the Chamber procedure, presumably because of a belief that they have a choice in the composition of what is, generally, a five-member Chamber. Whether the

Judges of the Chamber may in fact be nominated from among the 15 judges of the Court by the Parties themselves remains open to question, given the provisions of the Statute and the Rules of Court, but it is known that in each of the past four Chamber cases, the composition of the Chamber met the wishes—though not perhaps the original wishes—of the parties.

This certainly makes the use of Chambers in some ways similar to recourse to *ad hoc* arbitration. In other words, the Chamber procedure may be used as a substitute for arbitration in the sense that the bench can be virtually chosen by the Parties in dispute. The Rules of Court provide that a judgment given by the Chamber is considered as rendered by the Court. However, frequent use of the Chamber procedure may, perhaps inevitably, bring about a dispersal of the jurisprudence which ought preferably to be kept coherent and uniform by being formulated through the rendering of a judgment by the full Court. In the light of the resulting sacrifice of the proper development of a uniform and coherent jurisprudence, the question remains as to whether the use of the Chamber procedure should or should not be recommended for the purpose of encouraging the joint submission of disputes between States.

In addition, the Chamber procedures were originally instituted with a view to the speedy dispatch of business and, with that aim in mind, the Court was expected to hear and determine some cases by summary procedure. In fact, however, the experience gained from the four *ad hoc* Chamber cases shows that neither the expeditious dispatch of business nor the summary procedure which were originally supposed to characterize Chamber proceedings have in fact been realized. In the *Gulf of Maine* case, a huge volume of documents was exchanged in the course of three rounds of written pleadings, and there were 26 sittings of oral argument. In the case between El Salvador and Honduras, the volume of written documents accumulated through three rounds of written pleadings (not counting the intervention procedure) was almost without precedent and the phase of oral arguments took as many as 50 sittings, extending over a period of two months. This experience as well as the moribund condition of the Chamber of Summary Procedure shows that the advantages foreseen have turned out to be illusory because, regardless of the number of judges, proceedings before the Court can be protracted and complex.

Third, in connection with the advisory function of the Court, one needs to consider whether this function should be confined to the mere giving of opinions to international organizations on their legal problems or whether the Court should play a much wider role in giving advice for the solution of inter-State disputes.

It is recalled that, during the period of the PCIJ, most advisory opinions were sought in order to obtain some guidelines on legal principles to promote the settlement of disputes among States which could not be submitted to the Court as contentious cases. There were even, during the inter-war period, some cases in which the actual Parties in dispute were willing to seek an advisory opinion of the Court through the Council of the League of Nations. In that

respect it may well be said that, at that time, the advisory function had to some extent overlapped with the contentious case function.

The practice of the ICJ has been different, and there are very few cases in which an advisory opinion has been sought in connection with an existing dispute between States. The question of whether this course of action, in other words the function aimed at the settlement of disputes, should in future be envisaged as a type of advisory function of the Court is one that requires careful consideration.

The former UN Secretary-General, Mr. PÉREZ DE CUÉLLAR, in his General Report on the Work of the Organization at the 1990 Session of the General Assembly, asked that the authority to request advisory opinions be extended to the office of the UN Secretary-General, considering that almost all situations bearing upon international peace and security require the strenuous exercise of his good offices. This appeal, if granted, may or may not require an amendment to the UN Charter, depending on the interpretation of its Article 26, as to whether the "other organs of the United Nations" which could, by permission of the General Assembly, be allowed to ask for an advisory opinion, do or do not include the Secretary-General. The Secretary-General's proposal to facilitate access to advisory opinions may, however, be noted with interest.

Fourth, if the Court is to become busier now that it is called upon to deal with an increasing number of contentious cases, either as a full Court or through the medium of *ad hoc* Chambers, as well as with requests for advisory opinions, one may well ask whether it can maintain its present internal judicial practice, which in fact inhibits it from hearing and deciding more than two cases per year.

In fact, under the present practice, every case takes a few years to be completed. The procedures of the Court are governed by the Rules of Court, last amended in 1978, and the 1976 Resolution Concerning the Internal Judicial Practice of the Court. Most contentious cases in the past have required two (or, sometimes, even three) exchanges of written pleadings. The phase of oral arguments has taken longer to complete. For instance, the *Tunisia/Libya* case in 1982 required 30 sittings of oral argument, the *Libya/Malta* case in 1985 32 sittings. After the hearings, several months are required for the Court to complete the text of the judgment, which now generally reaches 100 pages or more in print, and is accompanied by a number of separate or dissenting opinions.

If this procedure is to be followed it will be physically impossible to dispose of more than two or three cases per year. The Court faces a paradox, that is, whether it should handle more cases in response to requests from the international community, either in its contentious or advisory function, or whether it should maintain its very cautious procedures for applying international law as scrupulously as possible in each particular case.

I have just exposed four distinct problems which the ICJ faces today in

connection with the expectations of the world community for the more frequent use of the Court in promoting means and methods for the peaceful settlement of disputes between States, the subject for a programme under the UN Decade of International Law.

Three of the problems I have outlined hinge upon the desirability of enlarging the Court's jurisdiction or widening the doors of access to the Court. The fourth relates to its capacity to meet any increased demands that might result from such innovations, if not indeed to manage its workload under the status quo.

I have dealt with all four in the same context because it may well be precisely on account of the meticulous, but time-consuming, procedures followed by the Court that the world community had developed sufficient confidence in its decisions to consider entrusting it with a broader role.

ENVIRONMENT AND DEVELOPMENT: FORMULATION AND IMPLEMENTATION OF THE RIGHT TO DEVELOPMENT AS A HUMAN RIGHT*

Antônio Augusto Cançado Trindade**

1. INTRODUCTORY REMARKS: HUMAN RIGHTS AND THE ENVIRONMENT

In a recent study we have drawn attention to affinities in the parallel evolutions of human rights protection and of environmental protection[1] which seem deserving of closer attention. International regulation in both domains of protection has taken place in the form of *responses* to specific challenges or threats; one and the other have undergone a process of *internationalization* and, more recently, of *globalization*.[2] The indivisibility of human rights, and the emergence of global environmental issues, as common concern of mankind,[3]

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* The original text served as a basis for one of the author's lectures in the Inter-American Seminar on Human Rights and the Environment (Brasília, 4–7 March 1992) and will serve as part of a book currently in the course of preparation by the author on *Human Rights Protection and Environmental Protection: A Parallel.*

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1 A.A. CANÇADO TRINDADE, "The Parallel Evolutions of International Human Rights Protection and of Environmental Protection and the Absence of Restrictions upon the Exercise of Recognized Human Rights", 13 *Revista del Instituto Interamericano de Derechos Humanos* (1991) pp. 35–76.

2 Cf. ibid, pp. 37–47.

3 Cf. A.A. CANÇADO TRINDADE and D. ATTARD, "The Implications of the 'Common Concern of Mankind' Concept on Global Environmental Issues", in *Policies and Laws on Global Warming:, International and Comparative Analysis* (ed. T. IWAMA, Tokyo, Environmental Research Centre, 1991, pp. 7–13; and cf. UNEP, *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (Malta, 1990), Valletta/Nairobi, 1991, report by A.A. CANÇADO TRINDADE and D.J. ATTARD, pp. 19–26.

Asian Yearbook of International Law, Volume 3 (Ko Swan Sik *et al.*, eds.; 0-7923-2708-X; pp. 15–45

bear witness of this phenomenon. The globalization of the regimes of human rights protection and environmental protection[4] heralds the decline and end of reciprocity in those domains and the emergence of *erga omnes* obligations.

Just as concern for human rights protection can be found in the realm of international environmental law (Preamble and Principle 1 of the 1972 Stockholm Declaration on the Human Environment; Preamble and Principles 6 and 23 of the 1982 World Charter for Nature; Principles 1 and 20 proposed by the World Commission on Environment and Development in its 1987 report),[5] concern for environmental protection can also be found in the express recognition of the right to a healthy environment in two recent human rights instruments, namely: the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Article 11) and the 1981 African Charter on Human and Peoples' Rights (Article 24). In the former, it is recognized as a right of "everyone" (§ 1), to be protected by the States Parties (§ 2), whereas in the latter it is acknowledged as a peoples' right.[6]

Concern for the protection of the environment likewise can now likewise be found in the realm of international humanitarian law, namely: Articles 35(3) and 55 of the 1977 Additional Protocol I to the 1949 Geneva Conventions (prohibition of methods or means of warfare severely damaging the environment), added to the 1977 UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, and to the 1982 World Charter for Nature (paras 5 and 20), among other provisions.[7] Similarly, recent developments in international refugee law are worthy of attention, such as the possible assimilation of victims of environmental disasters to protected [displaced] persons under refugee law (e.g., the 1984 Cartagena Declaration on Refugees, recommending for use in Central America an expanded concept of refugee).[8]

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4 On the relationship between human rights and the environment, cf. further A.A. CANÇADO TRINDADE, *Human Rights and the Environment*, Report commissioned by UNEP's Environmental Law and Institutions Programme Activity Center, Nairobi/Brasília, 1991, pp. 1–22 (restricted circulation); and cf. UNEP, *Beijing Symposium on Developing Countries and International Environmental Law* (August 1991), Beijing/Nairobi, 1991, Report by A.A. CANÇADO TRINDADE and A. MALHOTRA, p. 7.

5 Cf. A.A. CANÇADO TRINDADE, "The Contribution of International Human Rights Law to Environmental Protection, with Special reference to Global Environmental Change", in *International Law and Global Environmental Change: New Dimensions* (ed. E. BROWN WEISS), United Nations University (UNU) Project, 1992, 93 pp. (in print).

6 Cf. ibid (in print).

7 Cf. ibid.

8 Furthermore, the protection of vulnerable groups (e.g., indigenous populations, ethnic and religious and linguistic minorities, mentally and physically handicapped persons) appears today at the confluence of international human rights law and international environmental law: as we have indicated in another study, concern for the protection of vulnerable groups can nowadays be found in international instruments and initiatives pertaining to both human rights protection and

In fact, the fundamental rights to life and to health lie at the basis of the *ratio legis* of international human rights law and of environmental law. Taken in its wide and proper dimension, the fundamental right to life comprises the right of every human being not to be deprived of his life (*right to life*, belonging to the realm of civil and political rights)[9] and the right of every human being to have the appropriate means of subsistence and a decent standard of life (preservation of life, *right of living*, belonging to the domain of economic, social and cultural rights).[10] It affords an eloquent illustration of the indivisibility and interrelatedness of all human rights. International supervisory organs such as the Human Rights Committee (on distinct occasions) and the European Commission of Human Rights (e.g., in the *Association X* v United Kingdom case, 1978) have espoused the view that the right to life imposes upon States also positive measures to protect life.[11]

2. THE SIGNIFICANCE OF THE RECOGNITION OF THE RIGHT TO A HEALTHY ENVIRONMENT

From this perspective, the right to a healthy environment appears as a natural extension of the right to life, in so far as it safeguards human life itself under the two aspects of the physical existence and health of human beings, and the dignified conditions and quality of life. The right to a healthy

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cont.

environmental protection, where the issue has been approached on the basis of both human and environmental considerations (cf. references and sources in 10 cit. n.5.

9 Cf. UN Covenant on Civil and Political Rights, Article 6 (1); European Convention on Human Rights, Article 2; American Convention on Human Rights, Article 4(1); African Charter on Human and Peoples' Rights, Article 4.

10 Cf. UN Covenant on Economic, Social and Cultural Rights, Articles 11–12, following Article 25(1) of the 1948 Universal Declaration of Human Rights.

11 In its general comments 6 (16), of 1982, and 14 (23) of 1985, the Human Rights Committee has advanced a particularly wide interpretation of the right to life (as enshrined in Article 6 of the UN Covenant on Civil and Political Rights) to the point of expressing its concern with the current proliferation of weapons of mass destruction representing one of the "gravest threats" to the right to life which "confronts mankind" today. And both the UN General Assembly and the Inter-American Commission of Human Rights have on distinct occasions been attentive to address the requirements of *survival* as components of the right to life. In this respect, the UN General Assembly (Resolution 37/189A, of 1982) as well as the UN Commission on Human Rights (Resolutions 1982/7, of 1982, and 1983/43, of 1983) have firmly propounded that *all individuals* and *all peoples* have an inherent and foremost right to life, the safeguard of which is an essential condition for the enjoyment of the entire range of civil and political, as well as economic, social and cultural rights. This brings to the fore the safeguard of the right to life of all persons as well as of all human collectivities, with special attention to the requirements of survival (as component of the right to life) of vulnerable groups. Cf. A.A. CANÇADO TRINDADE, "The Parallel Evolutions ...", loc. cit. n. 1 at pp. 50–59, and sources referred to therein.

environment thus encompasses and enlarges the right to health and the right to an adequate standard of living.[12] Thus, the basic right to life, encompassing the right of living, entails negative as well as positive obligations in favour of preservation of human life: its enjoyment is a precondition of the enjoyment of other human rights. It belongs at a time to the realm of civil and political rights and to that of economic, social and cultural rights, thus illustrating the indivisibility of all human rights. It establishes a "link" between the domains of international human rights law and environmental law. It inheres in all individuals and all peoples, with special attention to the requirements of survival. It has as extensions or corollaries the right to a healthy environment and the right to peace (and disarmament). It is closely related, in its wide dimension, to the right to development as a human right (right to live with fulfilment of basic human needs). And it lies at the basis of the ultimate *ratio legis* of the domains of international human rights law and environmental law, turned to the protection and survival of the human person and mankind.

Inextricably interwoven with the right to life itself, the right to health entails negative obligations (not to practice any act which can endanger one's health, thus linking this basic right to the right to physical and mental integrity and to the prohibition of torture and of cruel, inhuman or degrading treatment[13] as well as positive obligations (to take all appropriate measures to protect and preserve human health,[14] including measures of prevention and treatment of diseases). It thus partakes the nature of an individual and a social right: it is, like the right to life, an individual right in that it requires the protection of the physical and mental integrity of the individual, and it is also a social right in that it imposes on the State and on society the collective responsibility for the protection of public health. The right to health, thus properly understood, affords, like the right to life, a vivid illustration of the indivisibility and interrelatedness of all human rights. It can hardly be doubted that

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12 It should not pass unnoticed that the 1989 Hague Declaration on the Atmosphere, for example, expressly refers to the right *to live* (§§ 1 and 5), seemingly well in keeping with the proper understanding that the right to life entails negative as well as positive obligations as to preservation of human life.

13 As recognized and provided for in the UN Covenant on Civil and Political Rights, Article 7; the European Convention on Human Rights, Article 3; the American Convention on Human Rights, Articles 4–5.

14 Cf. UN Covenant on Economic, Social and Cultural Rights, Article 12; European Social Charter, Article 11; besides WHO and ILO resolutions on specific aspects.

15 The collection *Case Law on the European Social Charter*, for example, contains illustrative views of the Committee of Independent Experts pertaining to the content and extent of the right to protection of health as enshrined in Article 11 of the 1961 European Social Charter. Reference could also be made to the 1973 Draft Protocol to the European Convention on Human Rights, prepared by H. STEIGER, which provided for the protection of life and health as encompassing well-being (Article 1 (1)) and the protection of individuals against acts of other private persons (Article 2), which remains the sole existing proposal on the matter to date (in so far as the European Convention system is concerned). Cf. A.A. CANÇADO TRINDADE, loc. cit. n. 1 at pp. 61–62.

environmental degradation constitutes a collective threat to human health;[15] in fact, the protection of the whole of the biosphere as such entails the protection of human beings, and the right to a healthy environment comes to enhance the protection of other recognized human rights.[16]

If the right to a healthy environment is taken not as the (virtually impossible) right to an ideal environment but rather as the right to the conservation—i.e. protection and improvement—of the environment, it can then be implemented like any other individual right. A healthy environment is then taken as a "procedural" right, the right to a due process before a competent organ, and thus assimilated to any other right guaranteed to individuals and groups of individuals. This right entails, as corollaries, the right of the individual concerned *to be informed* of projects and decisions which could threaten the environment[17] (the protection of which counts on preventive measures), and the right of the individual concerned *to participate* in the taking of decisions which may affect the environment (active sharing of responsibilities in the management of the interests of the whole collectivity).[18] To the rights to information and of participation one can add the right *to available and effective domestic remedies*. The 1982 World Charter for Nature, it may be recalled in this respect, does in fact provide (§ 23) that all persons are to have the opportunity to participate—individually or with others—in the formulation of decisions of direct concern to their environment and, furthermore, are to have access to means of redress when their environment has suffered damage or degradation.

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16 At the global level, the *E.H.P.* v *Canada* case (1982), decided by the Human Rights Committee under the UN Covenant on Civil and Political rights and [first] Optional Protocol bore witness of the interrelatedness between environmental protection and human rights protection, in particular when fundamental rights, such as the rights to life and to health, are at stake. Cf. *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Vol. 2 (UN 1990, Doc. CCPR/C/OP/2) pp. 20–22.

17 On the possibility of interpreting the European Convention on Human Rights as containing (as from the provisions of, e.g., Articles 10, 8 and 2) the right to environmental information, and for the suggestion that this right be embodied in a possible new Additional Protocol to the European Convention, cf. S. WEBER, "Environmental Information and the European Convention on Human Rights", 12 *Human Rights Law Journal* (1991) pp. 177–185.

18 A. Ch. KISS, "Le droit à la qualité de l'environnement: un droit de l'homme?", *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (ed. N. DUPLÉ), Vieux-Montréal/Québec, Éd. Québec/Amérique, 1988, pp. 69–87; and cf. A. Ch. KISS, "Peut-on parler d'un droit à l'environnement?", *Le droit et l'environnement—Actes des Journées de l'Environnement du C.N.R.S.* (1988) pp. 309–317.

3. "SUSTAINABLE DEVELOPMENT" AS A LINK BETWEEN THE RIGHT TO A HEALTHY ENVIRONMENT AND THE RIGHT TO DEVELOPMENT

The right to a healthy environment can hardly be approached in isolation; it has found expression in the conceptual universe of human rights. It cannot be considered without reference to another right of the kind, namely, the right to development as a human right. It may well be that the principle of *sustainable development*—which, in the view of the Brundtland Commission, calls for meeting the needs and aspirations of the present without compromising the ability of future generations to meet their own needs—provides a possible link between the right to development and the right to a healthy environment. It emphasizes that environment and development go together, applying to developed as well as developing regions of the world and creating obligations for all, while bearing in mind the international community as a whole and the present as well as future generations: in this sense *sustainable development* has come to be regarded not only as a concept, but as a principle of contemporary international law.[19] The UN General Assembly, in deciding to convene the 1992 UN Conference on Environment and Development asserted and insisted on the promotion of sustainable and environmentally sound development in all countries.[20] In fact, assertions of the interrelationship between environment and development have come from all corners.

At regional level, for example, the 1988 *Berlin Round-Table on Environment, Natural Resources and North-South Interdependence* stated that sustainable development was "needed both in the North and in the South', and it required that those who were more affluent adopt "lifestyles compatible with the planet's finite ecological means"; it drew attention to the "environmental dimension in development projects" and added that "development activities must be socially, culturally and environmentally compatible".[21]

The *Beijing Ministerial Declaration on Environment and Development*, of June 1991, expressing the views of 41 participating developing countries, began by attributing the acceleration of environmental degradation to "unsustainable development models and lifestyles" (§ 1) and by stressing the need to integrate environmental protection with the imperatives of sustainable development as a matter of common concern of mankind (§§ 2–3); it then warned that the

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19 NAGENDRA SINGH, "Sustainable Development as a Principle of International Law", in *International Law and Development* (ed. P. De WAART, P. PETERS and E. DENTERS), Dordrecht, Nijhoff, 1988, pp. 2–5.

20 Cf. G.A. Resolution 44//228, of 22 December 1989, paras 3, 6, 12 and 15(c) and (i).

21 Council of Europe, *Results of Round-Tables and Other European Events in the Context of the North-South Campaign* (Doc. CEO/NS/TR (88) 10, Strasbourg, C.E. Secretariat, 1988) pp. 34–35 and 38.

environmental problems of the developing countries arose from the conditions of poverty, and that sustainable development and steady economic growth constituted "a way to break this cycle of poverty and environmental degradation and to strengthen the capabilities of the developing countries for environmental protection" (§ 4). In emphasizing the interrelationship between environment and development issues (§§ 25–26), the Beijing Declaration further stated that as poverty was "at the root of the environmental problems of the developing world" (§ 27), it was necessary to keep pursuing endeavours to attain "better quality of life and environmental well-being" and "to protect the environment without hindering the development process" (§§ 30 and 32).

The *Beijing Symposium on Developing Countries and International Environmental Law*, of August 1991, co-sponsored by UNEP, the Chinese Ministry of Foreign Affairs in cooperation with the United Nations and the Chinese Society of International Law in the framework of the UN Decade of International Law, acknowledged in its final report[22] that environment and development were indivisible and could not be considered in isolation from each other, the concept of common concern of mankind relating both to environment and to development (p.4). The Beijing Symposium report reckoned that the environmental problems of developing countries were "often a reflection of the inadequacy of development", and drew attention to the "vicious circle linking poverty, underdevelopment and environmental degradation"; it added that sustainable development included the fostering of economic growth, the meeting of basic domestic human needs (e.g., those pertaining to health, nutrition, education, housing) and "the eradication of poverty so as to provide to all a life of dignity in a clean, safe and healthy environment". In this respect, the report asserted that "there were linkages" between the domains of environmental protection and of human rights protection "provided mainly by the focus on certain fundamental rights (*inter alia*, the right to life and the right to health)" and that "the emergence of the right to a healthy environment and the right to development was meant to enhance, rather than to restrict, other rights, given their indivisibility and interrelatedness" (p.5).

Reference could also be made to the *Ministerial Declaration on Environmentally Sound and Sustainable Development*, adopted by the Bangkok Meeting of October 1990, reflecting the views of countries in Asia and the Pacific region. As a follow-up of that Ministerial Meeting, a Meeting of Senior Officials, convened in Bangkok in February 1991, adopted a report to the Economic and Social Commission for Asia and the Pacific (ESCAP) in which it pointed out the "environment-development interaction" (§ 21 (d)), and addressed, *inter alia*, the issues of human health and quality of life (§ 52); as "poverty and underdevelopment are the major causative factors of environmental problems

22 *Rapporteurs* A.A. CANÇADO TRINDADE (Brazil) and A. MALHOTRA (India).

for the developing countries in the region", the major objective of the strategy of these latter was "to ensure sustainable development for meeting basic human needs for survival and for improvement in the quality of life" (§ 21 (a)).

In its turn, the *Brasilia Declaration on the Environment*, adopted at the Latin American and Caribbean Summit (VIth Ministerial Meeting) of March 1989, affirmed that the improvement of economic and social conditions of life was "the key to preventing the defacement of the environment" in the countries of the region (§ 3). Likewise, the *Action Plan for the Environment in Latin America and the Caribbean*, adopted by the VIIth Ministerial Meeting on the Environment in Latin America and the Caribbean (held in Port-of-Spain, Trinidad and Tobago) in October 1990, recalled the Brasilia Declaration and insisted on the "inseparable linkage" between environmental concerns and the development model (§§ 3–4 of "Call to Action").[23] The *Tlatelolco Platform on Environment and Development*, adopted at the Latin American and Caribbean Regional Ministerial Preparatory Meeting of March 1991 for the 1992 UN Conference on Environment and Development, went further than the 1989 Brasilia Declaration in identifying priority concerns of the countries of the region and calling for their joint action for the 1992 Conference (§§ 24–25). The 1991 Tlatelolco Platform acknowledged the link between poverty and environmental degradation (§§ 18 and 24 (g)) and the link between such degradation and unsustainable development models (§§ 2, 4, 6 and 9): it called for the incorporation of the "environmental dimension" as a basic component of the process of sustainable and equitable development (§§ 23 and 13) and then drew attention to the related relevance of observance of human rights. In that respect, the Tlatelolco Platform emphasized the region's "significant achievements in strengthening democratic processes, preserving peace and promoting respect for human rights" (§ 3), as well as the need to secure "access to decent living conditions, adequate levels of social organization and political representation and the genuine participation of the population in the definition of its own development" (§ 18). The Tlatelolco Platform insisted on "the essential need for the active commitment of all sustainable development" (§ 21). There was thus clear recognition of the interrelationship between environmental protection, sustainable development and human rights promotion and protection.

Last but not least, the report *Our Own Agenda* (1990), prepared by the Latin American and Caribbean Commission on Development and Environment to develop a regional outlook on the issue of the environment prior to the 1992

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23 The participating countries in the VIIth Ministerial Meeting further stated, *inter alia*, that there was "an unbreakable bond between environmental deterioration and poverty", and that "environmental protection must become an integral part of the economic, social and cultural development of the nations of the region". Doc. UNEP/LAC-IG-VII/4, of 23 October 1990, Annex II, pp. 3–4.

UN Conference on Environment and Development, likewise drew attention to the relevance to that central issue of securing respect for human rights. The report stated categorically that

> "to speak of human rights (including the right to eat, to housing, to education, to health, and to income), of the environment, or of support for democracy and cultural diversity is infinitely more logical from the human perspective" (p.11).

The report next warned in this connection that "our region has experienced a democratization process that should be sustained. The broad participation of civilian society is essential if we are to achieve development with equity" (p.IX). Sustainable development will thus not be possible without real democracy: it will be "impossible to break down the barriers that stand in the way of economic, social and ecologically viable development" without a "democracy that permits greater participation by society" (p.45). Achievement of sustainable development should be "the joint responsibility of State and society", that presupposes the existence of a well-informed society, a social mobilization on behalf of sustainable development, and "the citizens' ability to control the State"; a participating democracy is characterized by "a proliferation of organizations which serve as intermediaries between the State and society" (pp. 72–75).

The regional Latin American and Caribbean report goes on to identify distinct ways to strengthen the constitutional State, namely: first, the development of adequate environmental legislation[24] (with corrective as well as, mainly, preventive measures, also requiring environmental impact studies); second, the introduction of reforms that make "the judicial power truly autonomous"; and third, the establishment of the basis for "a legal system that protects the citizens against abusive exercises of power" (pp.78–79). Significantly, the report *Our Own Agenda* emphasizes that the central objective of the new strategy to stimulate sustainable development pursuant to such regional outlook

> "can be none other than the improvement of the quality of life of the population. If we are to improve the quality of life, we must, first and foremost, face up to the abject poverty which currently affects the bulk of the population. We cannot talk of improving the environment as long as such a sizeable segment of our people lives in conditions of extreme poverty" (p.45).

Therefore, the fundamental aim of the economic and social strategy is "to

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24 For a recent study of environmental legislation in Latin American and Caribbean countries, see *Institutional and Legal Aspects of the Environment in Latin America, Including the Participation of Non-governmental Organizations in Environmental Management, Washington* (Inter-American Development Bank, 1991) pp. 11–47 and 104–105.

enhance the well-being of most of the population to the fullest", in conformity with the "objectives of sustainable development", leading necessarily to a "more egalitarian society" (p.68). The regional report thus clearly stresses the link between pursuance of ecologically sustainable development and enhancement of human rights, in particular economic and social rights.

Moving from the regional to the global level, it may be recalled that the concept (or principle) of "sustainable development" occupied a central place in the already-mentioned 1987 report of the *World Commission on Environment and Development*. The relevant passages of the Brundtland Commission report, besides linking environmental and developmental considerations, addressed the issues of elimination of poverty and satisfaction of essential human needs.[25] The Report is permeated with considerations of [inter-and intra-generational] equity,[26] social justice,[27] regulated access to resources and human resource development,[28] effective community and citizen participation,[29] wide and effective international cooperation "to manage ecological and economic interdependence".[30] It sets policy directions to attain sustainable development in six areas, namely: population and human resources; food security; the loss of species and genetic resources; energy; industry; and human settlements (the urban challenge).[31] The Commission also refers to international humanitarian law,[32] and attempts to formulate the fundamental human right to an adequate and healthy environment.[33]

The Brundtland Commission report is particularly emphatic in insisting that the very concept of sustainable development requires the eradication of widespread or extreme poverty and the adoption by the more affluent of lifestyles considerably less consumist and more consonant with the world's [limited] ecological means:[34] in the endeavours towards sustainable development, "overriding priority" should be given to the "essential *needs* of the world's poor",[35] as "poverty, injustice, environmental degradation, and conflict interact in complex and potent ways".[36] After all, development and environmental protection go together, in an indivisible and integrated way; they cannot be considered in isolation from each other, and they are both

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25 Cf. World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987) pp. 8–9, 40, 43–66, 75–90.
26 Ibid, p. 52.
27 Ibid, pp. 40 and 49.
28 Ibid, p. 11.
29 Ibid, pp. 63 and 65.
30 Ibid, p. 9, and cf. pp. 65 and 301.
31 Cf. ibid, pp. 11 and 95–258.
32 Cf. ibid, pp. 290 and 294–300.
33 Cf. § 1, in ibid, Annex 1, p. 348.
34 Ibid, pp. 8–9, and cf. pp. 29–31, 40 and 49.
35 Ibid, p. 43 (emphasis added), and cf. p. 54.
36 Ibid, p. 291

regarded today as being together of common concern for mankind.

The 1991 *Human Development Report* of the United Nations Development Programme (UNDP), referring to sustainable development, likewise warns as to the interrelationship between poverty and environmental degradation.[37] In its turn, the 1987 UNEP report on "Environmental Perspective to the Year 2000 and Beyond", in addressing sustainable development also asserts that "environmental issues are closely intertwined with development policies and practices",[38] and further warns:

> "[S]ince mass poverty is often at the root of environmental degradation, its elimination and ensuring equitable access of people to environmental resources are essential for sustained environmental improvements".[39]

The UNEP report acknowledges the need for "more concern for human progress and social justice as factors influencing human resources development and environmental improvement",[40] and calls for the provision by governments of basic health and housing development as an integral part of environmental management of resources so as to ensure better quality of life for their people.[41] In the view of the UNEP report, "poverty-focused projects which improve the environment should receive greater attention in development cooperation".[42]

Sustainable development discloses a pronounced temporal dimension; in fact, an essential element of sustainability is the basic general obligation to look into the future.[43] In the acknowledgement and assertion of the requirements of survival and of superior common principles and values and common responsibility, one can witness the notion evolving in contemporary international law that "obligations and entitlements are no longer the sole attributes of States but first and foremost pertain to human beings and to peoples".[44] Bearing this in mind, we can turn our attention to the significant formulation, at global (United Nations) level, of the right to development as a human right, as the latter is directly related to the right to a healthy environment.

The 1986 UN Declaration on the Right to Development[45] states quite clearly

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37 PNUD, *Desarrollo Humano: Informe 1991*, Bogotá, PNUD/Tercer Mundo ed., 1991, pp. 184–185.

38 UNEP/Governing Council, *Environmental Perspective to the Year 2000 and Beyond*, Doc. UNEP/GC. 14–26, 1987, Annex II, p.4.

39 Ibid, p. 3, and cf. p. 6.

40 Ibid, p. 5.

41 Ibid, p. 24, and cf. pp. 21–22, 34 and 37.

42 Ibid, p. 27.

43 NAGENDRA SINGH, op. cit. *supra* n. 19, p. 6.

44 Th. VAN BOVEN, "Fundamental Rights and Nuclear Arms", 19 *Denver Journal of International Law and Policy* (1990) pp. 58–59; and cf. R. MÜLLERSON, "Right to Survival as Right to Life of Humanity", 19 *Denver Journal of International Law and Policy* (1990) pp. 48–50.

that "the human person is the central subject of development and should be the active participant and beneficiary of the right to development" (Article 2 (1), and Preamble). It qualifies the right to development as "an inalienable human right" of "every human person and all peoples" (Article 1), by virtue of which they are "entitled to participate in, and contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" (Article 1 (1)).

The Declaration addresses itself repeatedly to States, urging them to take all necessary measures for the realization of the right to development (Articles 3 (3), 4, 5, 6, 7 and 8). Responsibility for the realization of the right to development is placed primarily on States (Article 3 (1)), "individually and collectively" (Article 4 (1)), but also on all human beings, "individually and collectively" (Article 2 (2)), i.e., individuals and communities. The Declaration envisages measures and activities at both *national* and *international* levels (Articles 3 (1), 4, 8 and 10) for the realization of the right to development. The Declaration thus encompasses a wide and complex range of relationships meant to contribute to the realization of the right to development.

4. SUBJECTS, LEGAL BASIS AND CONTENTS OF THE RIGHT TO DEVELOPMENT AS A HUMAN RIGHT

The 1986 Declaration clarified to some extent the key questions of the *subjects*, *legal basis* and *contents* of the right to development, much discussed in the preparatory work of the Declaration and in expert writing in the years

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45 Adopted by General Assembly Resolution 41/128, of 4 December 1986, with 146 votes in favour, one against, and eight abstentions, and containing a Preamble with 17 paragraphs and 10 Articles in its operative part. For an account of the drafting of the Declaration, see *inter alia*, M. BULAJIC, *Principles of International Development Law*, Dordrecht, M. Nijhoff, 1986, pp. 332–345; J. ALVAREZ VITA, *Derecho al Desarrollo*, Lima, Cult. Cuzco Ed., 1988, pp. 8–108; M.M. KENIG-WITKOWSKA, "The UN Declaration on the Right to Development in the Light of its *Travaux Préparatoires*", in *International Law and Development* (eds. P. De WAART, P. PETERS and E. DENTERS), Dordrecht, M. Nijhoff, 1988, pp. 381–388. For recent reassessments of the Declaration, see generally: Ph. ALSTON, "Making Space for New Human Rights: The Case of the Right to Development", 1 *Harvard Human Rights Yearbook* (1988) pp. 3–40; G. ABI-SAAB. "Le droit au développement", 44 *Annuaire suisse de droit international* (1988) pp. 9–24; B.G. RAMCHARAN, "The Role of the Development Concept in the UN Declaration on the Right to Development and in the UN Covenant", in *International Law and Development* (eds. P. De WAART, P. PETERS and E. DENTERS), Dordrecht, M. Nijhoff, 1988, pp. 295–303; J. CRAWFORD, "The Rights of Peoples: Some Conclusions", in *The Rights of Peoples* (ed. J. CRAWFORD), Oxford, Clarendon Press, 1988, pp. 172–174; IAN BROWNLIE, *The Human Right to Development*, London, Commonwealth Secretariat (Occasional Papers), 1989, pp. 1–25; A.A. CANÇADO TRINDADE, "Legal Dimensions of the Right to Development as a Human Right: Some Conceptual Aspects", 12 *Revista del Instituto Interamericano de Derechos Humanos* (1990) pp. 81–95.

which preceded it.[46] As to the subjects, it is noteworthy that the Declaration proclaims the right to development as an inalienable human right, by virtue of which every human person and all peoples are entitled to enjoy economic, social, cultural and political development. The *active* subjects or beneficiaries of the right to development are thus the human beings and peoples. In addition, as what happens in contemporary formulation of other rights pertaining to human collectivities (or to the human person in society, or "*l'homme ou peuple situé*"), distinct sets of obligations [47] may be distinguished: the responsibilities ascribed by the Declaration to States, individually and collectively, and, as counterpart of the human right to development, the responsibilities incumbent upon human beings, individually and collectively (communities, associations, groups). The *passive* subjects of the right to development are thus those who bear such responsibilities, with emphasis on the obligations attributed by the Charter to States, individually and collectively (the collectivity of States).

Possibly the major significance of the Declaration on the Right to Development lies in its recognition or assertion of the right to development as an "inalienable human right". The acknowledgement of this right of the human person and of peoples was intuitively forecasted or anticipated by a few authors some years ago.[48] But even nowadays, in the first years following the Declaration, some precision is required as to the *legal basis* and *contents* of the right to development. The Declaration contains elements which are already embodied, *mutatis mutandis*, both in human rights instruments proper (such as the 1948 Universal Declaration, the two UN Covenants on Human Rights, and UN resolutions of various kinds on the subject) and in sources of the international law of development (such as the 1974 Charter of Economic Rights and Duties of States, the 1974 Declaration—and Programme of Action—on the Establishment of a New International Economic Order, and relevant UN General Assembly resolution).[49]

It is important to keep in mind the distinction between the "international law

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46 Cf. the papers by R. AGO, R. ZACKLIN, G. ABI-SAAB and A. EIDE, in *Le droit international au développement au plan international—Colloque (1979)*, Hague Academy of International Law (hereinafter quoted *Hague Colloquy*), The Hague, Sijthoff/Nijhoff, 1980, pp. 7–8 (AGO), 117–118 (ZACKLIN), 162–164 and 168–170 (ABI-SAAB), and 402-403 and 415 (EIDE).

47 I.J. KOPPEN and K.-H. LAUDEUR, *Environmental Rights*, Florence, European University Institute, 1989, p. 33 (2nd draft, internal circulation).

48 KÉBA M'BAYE, "Le droit au développement comme un droit de l'homme", 5 *Revue des droits de l'homme/Human Rights Journal* (1972) pp. 505–534; J.A. CARRILLO SALCEDO, "El Derecho al Desarrollo como Derecho de la Persona Humana", 25 *Revista Española de Derecho Internacional* (1972) pp. 119–125.

49 Cf., e.g., JORGE CASTAÑEDA, "La Charte des droits et des devoirs économiques des États", 20 *Annuaire français de droit international* (1974) pp. 31–77; P.M. MARTIN, "Le nouvel ordre économique international", 80 *Revue générale de droit international public* (1976) pp. 502–535; P. de WAART, "Permanent sovereignty over natural resources as a cornerstone for international

of development" ("*droit international du développement* "), and the "'right *to* development" ("*droit au développement* ") as a human right as proclaimed in the 1986 Declaration. The former, with its various components (right to economic self-determination, permanent sovereignty over natural wealth and resources, principles of non-reciprocal and preferential treatment for developing countries and of participatory equality of developing countries in international economic relations and in the benefits from science and technology), emerges as an objective international normative system regulating the relations among juridically equal but economically unequal States. It aims at the transformation of those relations on the basis of international cooperation (UN Charter, Articles 55–56) and considerations of equity, so as to redress the economic imbalances among States and to give all States—particularly the developing countries—equal opportunities to attain development.[50] The latter, as propounded by the 1986 Declaration (and inspired in such human rights provisions as Article 28 of the 1948 Universal Declaration and Article 1 of both UN Covenants on Human Rights) appears as a subjective human right, embodying demands of the human person and of peoples which ought to be respected.

Three years after the adoption of the UN Declaration on the Right to Development, its significance has been acknowledged by some countries in their comments and views on the implementation and further enhancement of the Declaration forwarded to the UN Secretary-General and considered by the UN Commission on Human Rights in its 1989 session. According to these comments and views, the primary significance of the Declaration is reflected in the status of an "inalienable human right" given to the right to development (Jamaica), in the emphasis on the "all-embracing global" nature of the problem of development and its linkage to the observance of human rights (USSR), the awareness of the need of a "comprehensive realization" of *all* human rights (Yugoslavia), and in the recognition of the interdependence of all

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economic rights and duties", 24 *Netherlands International Law Review* (1977) pp. 304–322; A.A. CANÇADO TRINDADE, "As Nações Unidas e a Nova Ordem Econômica Internacional", 81 *Revista de Informação Legislativa*, Brasília (1984) pp. 213–232; H. HOHMANN, "Justice sociale et développement pour le nouvel ordre économique international", 58–59 *Revue de droit international de sciences diplomatiques et politiques* (1980–1981) pp. 217–231 and 82–88.

50 M. VIRALLY, "Vers un droit international du développement", 11 *Annuaire français de droit international* (1965) pp. 3–12; H. GROS ESPIELL, *Derecho Internacional del Desarrollo*, Valladolid, Univ. de Valladolid, 1975, pp. 11–47; P. BUIRETTE-MAURAU, *La participation du tiers-monde à l'élaboration du droit international*, Paris, LGDJ, 1983, pp. 131–137, 160–167 and 185–202; ALAIN PELLET, *Le droit international du développement*, 2nd ed., Paris, PUF, 1987, pp. 3–124.

human rights (Brazil and India).[51] Furthermore, the right to development focuses on the interaction between human rights and development,[52] at last brought together.

5. IMPLEMENTATION (MISE-EN-OEUVRE) OF THE RIGHT TO DEVELOPMENT AS A HUMAN RIGHT

The formulation and assertion of the right to development leads to the next question, that of its implementation or vindication. It should preliminarily be observed that the UN Declaration on the Right to Development itself was attentive to the obstacles to be overcome in order to provide equality of opportunity for development. The Declaration refers to the elimination of those obstacles in Articles 5 and 6(3), and two *consideranda* of the Preamble, and identifies them as being: massive and flagrant violations of rights of human beings and peoples (ensuing from situations such as those resulting from *apartheid*, all forms of racism and racial discrimination; foreign domination and occupation, aggression, foreign interference and threats against national unity and sovereignty and territorial integrity), threats of war and refusal to recognize the fundamental right of peoples to self-determination.

In addition, the [UN] open-ended Working Group of Governmental Experts on the Right to Development, originally established in 1981 by the UN Commission on Human Rights, recently considered (1989) as further obstacles to be surmounted for the realization of the right to development: the arms race and the threat of nuclear holocaust, poverty and destitution, illiteracy, economic imbalances in international relations, the deterioration of the environment and the ecological balance, ideological and religious intolerance, different forms of violence, and natural disasters. On the other hand, the Working Group also considered as factors which may foster the harmonious development of mankind, the progress in science and technology and the dissemination of knowledge and cultural values through information and

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51 *Analytical Compilation of Comments and Views on the Implementation and Further Enhancement of the Declaration on the Right to Development Prepared by the Secretary-General* (UN Doc. E/CN.4/AC.39/1989/1, of 21 December 1988) pp. 4–9.

52 PH. ALSTON, "The right to development at the international level", *Hague Colloquy, supra* n. 46, p. 111. Cf. also J.-B. MARIE and N. QUESTIAUX, "Article 55 alinéa c", in *La Charte des Nations Unies—Commentaire article par particle* (ed. J.-P. COT and A. PELLET), Paris-Bruxelles, Economica/Bruylant, 1985, pp. 863–883; TH. VAN BOVEN, "Human Rights and Development—Rhetorics and Realities", in *Progress in the Spirit of Human Rights—Festschrift für Felix Ermacora* (ed. M. NOWAK, D. STEURER and H. TRETTER), Kehl/Strasbourg, N.P. Engel Verlag, 1988, pp. 575–587.

communications media (so as to facilitate exchanges among men and cultures).[53]

Although the 1966 UN Covenant on Economic, Social and Cultural Rights falls short of expressly recognizing (especially in its Articles 11–12) the right to development, it appears that its draftsmen did have in mind development issues the implementation of which was related to the development process of each country.[54] Thus, the insufficient level of socio-economic development is one of the sources of difficulties in the realization of the rights recognized in the Covenant[55] and the significance of the right to development may thus be assessed in terms of its impact on the fostering and operationalization of economic, social and cultural rights.[56]

All development models ought to conform to international human rights standards; the disparities of socio-economic development among countries and peoples—further exacerbated, in the case of developing countries, by the external debt problem—constitutes a threat to mankind.[57] All aspects of the right to development (set forth in the 1986 UN Declaration) are indivisible and interdependent, encompassing economic, social, cultural, as well as civil and political rights; conditions of life include such basic needs as food, health, housing, education, a healthy environment as well as personal freedom and security.[58] Poverty and underdevelopment amount to a denial of the totality of human rights—civil, political, economic, social and cultural. Without housing or resources, one can hardly consider the right to health or the freedom of movement, without the means to raise one's own children the right to family life becomes dead letter, without education, one can hardly speak of freedom of expression or opinion and of association.[59]

An aspect which was particularly emphasized in the UN Global Consultation on the Right to Development as a Human Right (Geneva, 1990) was the importance of *participation* of all individuals and of the much-

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53 *Problems Related to the Right to Enjoy an Adequate Standard of Living—The Right to Development* (UN Doc. E/CN.4/1989/10, of 13 February 1989) pp. 3–13. On the "individual" and "collective" dimensions of the right to development and the related theme of the external debt (of Latin American countries), cf. L. DIAZ MÜLLER, "El Derecho al Desarrollo y los Derechos Humanos", 4 *Revista del Instituto Interamericano de Derechos Humanos* (1986) pp. 5–13.

54 B.G. RAMCHARAN, loc. cit. n. 45 at 298–299 and 301.

55 Ibid, pp. 299 and 301.

56 PH. ALSTON, "Some Notes on the Concept of the Right to Development", in: *Essais sur le concept de "droit de vivre" en mémoire de Y. Khushalani* (ed. D. PRÉONT), Bruxelles, Bruylant, 1988, p. 84. On the "collective and communal characteristics" of African culture with an impact on its conception of the enjoyment of human rights, cf. T. HUARAKA, "The African Charter on Human and Peoples' Rights: A Significant Contribution to the Development of International Human Rights Law", in ibid, pp. 197, 201 and 204.

57 UN Centre for Human Rights, op. cit. n. 60 at pp. 27 and 46.

58 Cf. ibid, pp. 9–10, 44–45 and 49, and cf. pp. 15 and 42.

59 Ibid, p. 34.

needed equality in the distribution or sharing of the benefits of development.[60] Participation was viewed "as a means to an end and as an end in itself"; special measures were required "to protect the rights and ensure the full participation of particularly vulnerable sectors of society, such as children, rural people, and the extremely poor, as well as those which have traditionally experienced exclusion or discrimination, such as women, minorities and indigenous peoples".[61] References were made in this connection to the need of an "appropriate environmental and cultural framework" in each country.[62]

The 1990 Global Consultation on the Right to Development, far from limiting itself to the States' domestic scene, also drew attention to the need, in the present domain, for "greater transparency in negotiations and agreements between States and international financial and aid institutions" and for democratization of intergovernmental financial agencies. Among the relevant factors for the assessment of the participatory process were mentioned "the representativity and accountability of decision-making bodies, the decentralization of decision-making, public access to information, and responsiveness of decision-makers to public opinion".[63] It is significant that a Global Consultation convened by the UN Commission on Human Rights saw it fit to warn that "prevailing models of development have been dominated by financial rather than human considerations". These models

> "largely ignore the social, cultural and political aspects of human rights and human development, limiting the human dimension to questions of productivity. They foster greater inequalities of power and control of resources among groups and lead to social tensions and conflicts. (...) The growing burden of indebtedness and structural adjustment falls heaviest on the poorest and weakest sectors of society and has clear human rights implications. (...) The prevailing terms of trade, monetary policy, and certain conditions tied to bilateral and multilateral aid, which are all perpetuated by the non-democratic decision-making processes of international economic, financial and trade institutions, also frustrate the full realization of the right to development as a human right".[64]

The same point was made in two recent regional Seminars of the Inter-American Institute of Human Rights, held in Buenos Aires (1989) and in Brasília (1991). The warning was expressed on those occasions that UN financial agencies (such as the IMF) seemed not to take into account provisions of UN human rights treaties and ILO conventions, and that this created a paradox within the UN system: it was important that international

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60 UN Centre for Human Rights, *The Realization of the Right to Development*, New York, UN 1991, pp. 25, 35–38 and 44.
61 Ibid, pp. 45–46, and cf. 33, 47 and 53.
62 Ibid, p. 53, and cf. pp. 47 and 45.
63 Ibid, pp. 50–51 (emphasis added).
64 Ibid, p. 48.

financial agencies did not adopt measures—for instance, leading to persistent increases in the levels of unemployment and cost of living—which ran counter to the object and purpose of human rights treaties (adopted under the auspices of the UN itself and its specialized agencies).[65] The effects of recessionist policies and the grave concentration of income, leading to the impoverishment of the population, constituted a threat, if not a violation, of economic and social rights, and ultimately of the right to development as a human right.[66]

In fact, even before the 1986 UN Declaration, the right to development as a human right was already recognized by a regional human rights convention: the African Charter on Human and Peoples' Rights states in its Article 22:

> "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind".

It adds that "States shall have the duty, individually or collectively, to ensure the exercise of the right to development". Such express recognition of the right to development as a human right in both the African Charter and the 1986 UN Declaration is most significant, as the question of its implementation can be addressed once the right to development is properly inserted in the framework of human rights.[67] Difficulties in that regard arise not only from its wide scope, covering a variety of entities and situations and placing unequal burdens (heavier on industrialized States), but also from the fact that it finds its roots partly in the tradition of human rights thinking (including the doctrine of collective rights) and partly in developments concerned with the establishment of a new international economic order.[68]

The implementation of the right to development and its practical implications within the framework of human rights has significantly

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65 Cf. *Derechos Económicos y Desarrollo en America Latina* (eds. J. ORDÓÑEZ and E. VASQUEZ), San José/Buenos Aires, IIDH, 1991, pp. 71 and 81–82.

66 A.A. CANÇADO TRINDADE, "The 1991 Brasília Seminar on the Protection of Human Rights", 12 *Human Rights Law Journal* [1991] p. 346; A.A. CANÇADO TRINDADE (ed.), *A Proteção dos Direitos Humanos nos Planos Nacional e Internacional: Perspectivas Brasileiras*, San José/Brasilia, IIDH, 1992, p. 341. According to the sombre figures of the UNDP *Human Development Report* for 1991, the global distribution of income remains appalling: 77 per cent of the world population earns 15 per cent of its income, and the levels of unemployment remain high, well above those of the post-war period: unemployment has in fact become a chronic and long-term problem. PNUD, *Desarrollo Humano: Informe 1991*, Bogotá, PNUD, 1991, pp. 66 and 79.

67 R.N. KIWANUKA, "Developing Rights: The UN Declaration on the Right to Development", 35 *Netherlands International Law Review* (1988) pp. 265–269 and 272; P. MACALISTER-SMITH, "The Notion of Development as a Right: Reflections from an International Perspective", in M.P. SINGH, *Comparative Constitutional Law*, Lucknow (India), Eastern Book Co., 1989, pp. 317–319, 323 and 325.

68 IAN BROWNLIE, *The Human Right to Development*, London, Commonwealth Secretariat (Occasional Paper Series), 1989, pp. 16–17.

contributed to draw closer attention to the minimum or basic necessities of life as a basis for entitlements.[69] Moreover, the formulation of the right to development, by revealing its individual and collective dimensions and being sometimes regarded as a "synthesis" of a great many human rights, contributes to focus on the totality of means required for a comprehensive and integrated implementation of all interrelated human rights standards, with apparently more emphasis on economic, social and cultural rights.[70] In fact, the right to development has lately had judicial recognition, in the *Guinea/Guinea Bissau Maritime Delimitation* case, as pertinently recalled by Ian Brownlie—in its award of 18 February 1983, the Court of Arbitration which decided the case referred to "the legitimate claims" of the parties as developing States, and to "the right of the peoples involved to a level of economic and social development which fully preserves their dignity".[71]

The issue of the implementation or vindication of the right to development can be properly considered within the universe of international human rights law. By and large, human rights which have found expression in multiple instruments at global and regional levels also form the object of groups of provisions whose functions may appear different but are in fact complementary, such as: to protect the life and physical integrity of human beings and to secure the exercise of other fundamental rights and freedoms; to prevent and eliminate all forms of discrimination; and to secure minimum conditions of living.[72]

Human rights range substantively from those which impose limits to State intervention (e.g., right to life, right not to be ill-treated, liberty and security of person, freedoms of thought, conscience, religion and opinion, freedom of movement) to those which require State action (e.g., right to work and to an adequate standard of living, including food, housing and clothing; right to health and to social security; right to organize trade unions; right to education).[73] Human rights range procedurally from those which can be vindicated by the victims themselves (or their representatives) to those which involve a complex web of actors, namely, the victims themselves, interest groups, judges, legislators and the administration. The normative-judicial model, suitable to the implementation of individual rights, appears inadequate to the implementation of, for example, rights pertaining to human collectivities, the protection of which may require the mobilization of public

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69 P. MACALISTER-SMITH, loc. cit. n. 67 at pp. 317 and 325–326; I. BROWNLIE, loc. cit. n. 68 at pp. 23–24.

70 I. BROWNLIE, loc. cit. n. 68 at pp. 12 and 22; P. MACALISTER-SMITH, loc. cit. n. 67 at p. 317.

71 I. BROWNLIE, loc. cit. n. 68 at pp. 1–2, and cf. p. 13 n. 1.

72 A. KISS, "Définition et nature juridique d'un droit de l'homme à l'environnement", in: *Environnement et Droits de l'Homme* (ed. P. KROMARECK), Paris, UNESCO, 1987, p. 14.

73 A. EIDE, "Maldevelopment and 'the Right to Development': a Critical Note with a Constructive Intent", *Hague Colloquy*, loc. cit. n. 46 at p. 400.

funds and resources. The basic shortcoming of the judicial control model is that it treats *all* rights in a rather undifferentiated way starting from the assumption that they are all susceptible of being vindicated by the same method.[74]

In practice rights pertaining to human collectivities seem to call for a distinct approach to the means and the institutional arrangements for their implementation or vindication. Violations of those rights may affect so many individuals that individual litigation may prove unsuitable or unjustified, and it may happen that national rules of *locus standi* end up by denying standing.[75] It is clear that the "justiciability" of a right cannot be taken as a *conditio sine qua non* of the latter's existence and recognition: there are rights which today cannot properly be vindicated before a tribunal by their active subjects ("*titulaires*").[76] This point needs further reflection and considerable rethinking of international human rights law.

On the other hand, it can be argued that, having been brought into the realm of international human rights law, the right to development may in concrete cases well rely on the operation of the means of implementation proper to the international protection of human rights (basically, petitioning, reporting and fact-finding). To this effect a range of possible courses of action may be contemplated in the future which might be pursued, first, at the initiative of the human beings concerned, individually and collectively (communities, associations, groups), as the active subjects of the right to development. Secondly, the possibility of initiatives by States acting on behalf of peoples for their protection should not be discarded. Clear indications to this effect can be found in the applications instituting proceedings before the International Court of Justice by New Zealand (against France) in the *Nuclear Tests* case (1973–1974), and by Nauru (against Australia) in the *Phosphate Lands* case (1989, since withdrawn).

It seems that it is particularly the methods of human rights protection that the right to development is more likely to rely on for its implementation. The 1986 Declaration in its Preamble in fact refers to the relevant instruments of the United Nations and its special agencies. Finally, the implementation of the right to development as a human right, given the "individual" and "collective" dimensions of the right at issue and its comprehensive nature, may prove to be a complex and multi-faceted one.

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74 A. CASSESE, A. CLAPHAM and J. WEILER, *1992—What are Our Rights?*, Florence, European University Institute, 1989, pp. 25 and 53–54.

75 Ibid, p. 68.

76 A. KISS, loc. cit. n. 72 at p. 24.

6. THE RIGHT TO DEVELOPMENT IN ITS RELATION TO OTHER HUMAN RIGHTS

We should be guarded against the pitfalls of an inadequate compartmentalization of human rights, first, because it hardly reflects the reality of their implementation and secondly, because it may pave the way to the invocation of undue restrictions to the exercise of certain rights. The proposed classification of individual, social and peoples' rights should be properly approached on the understanding that one category of rights should not prescind from the existence of others. By the same token, the rights of certain categories of protected persons, regarded as belonging to particularly vulnerable groups and standing in need of special protection—such as rights of workers, of women, of the child, of the elderly, of disabled persons—should be approached on the understanding that they are complementary to those enshrined in general human rights treaties. Irrespective of whether the protection of rights *vis-à-vis* the State (fundamental freedoms) or the guarantee of rights by the State is concerned, the implementation of instruments relating to rights of distinct categories of protected persons, or to a distinct kind of protection sought, is to be taken as complementary to that of general treaties on human rights protection, the two UN Covenants on Human Rights and the three regional—European, American and African—Conventions.[77]

In line with the more lucid thinking in international human rights law, it is a merit of the 1986 UN Declaration on the Right to Development that it provides guidelines for approaching the relation between the right to development and other human rights. In three significant passages (Articles 6(2), 9(1) and Preamble), the declaration stresses that all human rights are indivisible and interdependent and that, in order to promote development, equal and urgent attention should be given to the implementation of civil, political, economic, social and cultural rights, and thus the observance of certain human rights cannot justify the denial of others. Likewise, all aspects of the right to development are indivisible and interdependent and each of them is to be considered in the context of that right as a whole. The Declaration therefore echoes the endorsement, by the celebrated UN General Assembly Resolution 32/130 of 1977, of the thesis of the indivisibility and interdependence of all human rights advanced by the 1968 Proclamation of Tehran, the

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77 A.A. CANÇADO TRINDADE, *A Questão da Implementação Internacional dos Direitos Econômicos, Sociais e Culturais: Evolução e Tendências Atuais*, San José/Costa Rica, Instituto Interamericano de Derechos Humanos (VII Curso Interdisciplinario), 1989, pp. 7–8; A.A. CANÇADO TRINDADE, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de L'Académie de Droit International* (1987) p. 57.

roots of which may be traced back to the 1948 Universal Declaration and its preparatory work undertaken by the UN Commission on Human Rights.[78]

The globalist perspective pursued by the United Nations was prompted by the fundamental changes undergone by contemporary international society, *inter alia*, decolonization, capacity of massive destruction, population growth, environmental conditions, energy consumption. The globalist conception, as externalized by UN GA Resolutions 32/130, 39/145, 43/113, 43/114, 43/125 and by the Declaration on the Right to Development, has contributed to focus on the promotion and protection of the rights pertaining to human collectivities and on the search for solutions of gross and flagrant violations of human rights.

The globalist approach was soon to have repercussions and thus paved the way for distinct solutions at regional level. On the African continent, the draftsmen of the 1981 African Charter on Human and Peoples' Rights opted for the inclusion of a catalogue of civil and political rights (Articles 3–14), economic, social and cultural rights (Articles 15–18), and peoples' rights (Articles 19–24), with a common mechanism of implementation (Articles 46–59 and 62). On the European continent, the Council of Europe adopted the First Protocol to the European Social Charter in 1987, expanding the list of rights protected under the latter. Finally on the American continent, the OAS adopted the Additional Protocol to the American Convention on Human Rights Relating to Economic, Social and Cultural Rights in 1988, incorporating certain economic, social and cultural rights to the Inter-American system of human rights protection.[79] There could hardly be a pretense of an antagonism of solutions at global (United Nations) and regional levels: the instruments of protection were complementary to each other and had an overriding identity of purpose.

The right to development, as propounded by the 1986 Declaration reinforces existing rights and their interdependence and indivisibility while the globalist approach discloses the complementarity between so-called "individual" and "collective" rights and preserves the indivisibility of rights with predominantly individualist and collectivist orientations or inclinations.[80] Following this line of thought the requirements of material development cannot be invoked to justify restrictions to the exercise of guaranteed human rights[81] (cf. UN GA Resolution 37/199).

In view of its comprehensive nature the right to development is commonly said to have an "individual" and a "collective" (social) dimension, but simply distinguishing between individual and collective rights would amount to

78 Ibid, pp. 8 and 59.

79 A.A. CANÇADO TRINDADE, *A Questão da Implementação* ..., op. cit. n. 77 at pp. 9–10, 12 and 29.

80 PH. ALSTON, loc. cit. n. 52 at pp. 107–109.

81 A. EIDE, loc. cit. n. 74 at pp. 402 and 410.

reducing the substratum of these rights to the means of their exercise.[82] All these rights in a way have a social dimension in that they are related to the community in varying degrees, while solidarity is not the exclusive attribute of any category of rights.[83] An atomized or fragmented view of human rights can easily be misleading: for example, the assertion that the right to a clean environment brings about limitations of the exercise of some economic and social rights is neglectful of the fact that the right in question essentially purports to expand and reinforce existing rights.[84] So has the right to development, and this may well bring about adjustments to render new rights effective.

Reversely, a denial of the right to development is bound to entail adverse consequences for the exercise of civil and political as well as economic, social and cultural rights. The recent search for more effective means of implementing economic, social and cultural rights was surely undertaken under the influence of the conception of fundamental unity and indivisibility of human rights. The formulation of the right to development could only have been undertaken in light of that conception and indivisibility. The phenomenon we witness in our days is not that of a succession, but rather one of expansion and strengthening of recognized human rights.

The atomized outlook of human rights with its distortions is in accordance with the theory of "generations" of rights. But human rights, whichever way they are classified, disclose an essentially complementary nature and interact with each other; they do not "replace" each other. Moreover, the analogy of the "generational succession" of rights does not appear historically sound and developments on the matter in municipal and international law do not seem to have taken place *pari passu*. While in the internal law of many countries the recognition of social rights took place subsequently to that of civil and political rights, this did not occur at the international level, as exemplified by the various international labour conventions, some of them preceding the adoption of conventions devoted to civil and political rights. It is important, even in our days, to reduce or bridge the gap which seems to persist between the constitutionalist and internationalist outlooks on the matter.[85]

Some concluding remarks remain to be made. First, the right to development—like the right to a healthy environment—discloses an inter-

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82 J.-B. MARIE, "Relations between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions", 7 *Human Rights Law Journal* (1986) pp. 197–200.

83 Ibid, pp. 199–200.

84 M. ALI MEKOUAR, "Le droit à l'environnement dans ses rapports avec les autres droits de l'homme", *Environnement et Droits* ..., op. cit. n. 72, at pp. 91–105.

85 A.A. CANÇADO TRINDADE, *A Questão da Implementação* ..., op. cit. n. 77, pp. 9–10; PH. ALSTON, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?", 29 *Netherlands International Law Review* (1982) pp. 316–317, and cf. pp. 307–322.

temporal dimension[86] in the international protection of human rights which has not yet been sufficiently explored to date. This dimension encompasses both the "dynamic" interpretation of human rights treaties and instruments and their actual application in the *cas d'espèce* (e.g., the gradual crystallization of the notion of "potential" victims).[87] Secondly, the recent progress in the search for a more effective implementation of economic, social, and cultural rights and in the formulation of the right to development bears witness of the considerable advances achieved at the doctrinal level by the conception of the indivisibility of rights. The acknowledgement of these advances, however, cannot make abstraction of the endeavours, at the normative level, towards the identification of a nucleus of non-derogable rights of universal acceptance (e.g., the right of life, the right not to be subjected to torture or slavery, the right not to be condemned by retroactive application of penal provisions).

This reassuring consolidation of a hard core of fundamental non-derogable rights, as a definitive achievement of civilization, has not taken place *pari passu* to developments at the procedural level, where the absence of a "hierarchy" between the distinct mechanisms of protection seems to continue to prevail. These mechanisms have reinforced each other, being essentially of a complementary nature, as evidenced, for example, by the test of the primacy of the most favourable provision to the alleged victims.

In view of the diversity of the means of protection, there seems to be no logical or juridical bar against advancing, concomitantly, in the search at the substantive level for an expansion of a universal nucleus of non-derogable rights, and, at the procedural level, for an increasingly more effective implementation of social rights. While such expansion of the hard core of fundamental rights cannot be achieved for the time being, the current attitude consists of focusing on devising and improving guarantees with regard to all human rights (both non-derogable and derogable).

The efforts towards a possible expansion of the nucleus of non-derogable rights surely constitute a commendable step for the near future, particularly in view of the distortions and abuses perpetrated during the chronic and pathologically prolonged states of exception and suspensions of rights in the recent history of various countries, with their consequent reiterated, systematic and large-scale violations of human rights. Moreover, taking the proposed categories of rights as an indissoluble whole and considering that the observance of certain social rights and of the right to development has a direct bearing upon the exercise of even certain classical rights of freedom (civil and political), nothing would impede, epistemologically, that in the future

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86 For a comprehensive study, from the perspective of international environmental law, cf. E. BROWN WEISS, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, Tokyo/Dobbs Ferry, N.Y., U.N.U./Transnational Publs., 1989.

87 A.A. CANÇADO TRINDADE, "Co-existence and Coordination ...", loc. cit. n. 77 at pp. 243–299.

some of the former rights (e.g., right to work, right to education) and the rights to development and to a healthy environment would or could also come to integrate with that "expanded" hard core of non-derogable rights.

The recognition of the right to a healthy environment[88] enriches and reinforces existing human rights and brings to the fore other rights, e.g., the much-needed right of citizen participation which, in turn, requires the effectiveness of the rights to information and to education (in environmental matters). In the same way, environmental protection can be pursued through the vindication of existing rights.[89] This bears witness of the indivisibility of human rights.

The same could be said of the recognition of the right to development as a human right. The interrelatedness of, for example, the right to life in its wider sense (encompassing the adequate conditions for a dignified standard of living) and the right to development is self-evident as the latter requires all possible endeavours to be made to overcome the obstacles (of destitution and underdevelopment) preventing the fulfilment of basic human needs.[90]

7. CONCLUDING REMARKS: THE INSTRUMENTALIZATION OF THE RIGHT TO DEVELOPMENT AS A HUMAN RIGHT (POSSIBLE MECHANISMS)

It is to be expected that the experience accumulated in the implementation of human rights protection will be of use to the implementation of environmental protection and of the right to development. Some inspiration may be derived from the experience of the methods of reporting[91] and fact-finding.

Since the 1986 UN Declaration, which brought the right to development into the realm of international human rights law, refers in its Preamble to relevant instruments of the United Nations and its specialized agencies relating to

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88 As in the African Charter on Human and Peoples' Rights, Art. 24, and in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Art. 11.

89 The right to privacy, the right to the peaceful enjoyment of one's possessions—as recent case law indicates, particularly under the European Convention on Human Rights.

90 Not surprisingly, the UN Working Group of Government Experts on the Right to Development recommended in 1984, *inter alia*, that particular attention should be paid to the basic needs and aspirations of vulnerable or disadvantaged and discriminated groups. Cf. P.J.I.M. De WAART, "The Inter-Relationship between the Right to Life and the Right to Development", in *The Right to Life in International Law* (ed. B.G. RAMCHARAN, Dordrecht, Nijhoff/Kluwer, 1985, pp. 89 and 91–92; and cf. A.A. CANÇADO TRINDADE, "Legal Dimensions of the Right to Development as a Human Right: Some Conceptual Aspects", 12 *Revista del Instituto Interamericano de Derechos Humanos* (1990) pp. 81–95.

91 Cf. United Nations, *Manual on Human Rights Reporting*, New York, UN Centre for Human Rights/UNITAR, 1991, pp. 3–201.

human rights, it is proper to consider the suitability of existing mechanisms of human rights protection for the instrumentalization of the right to development. Accordingly, in the debates of the 1990 UN Global Consultation on the Right to Development as a Human Right, we raised four possibilities for consideration in this connection. First, a communications system along the lines of the procedure provided in ECOSOC Resolution 1503 in case of an alleged denial or violation of the right to development (e.g., growth of unemployment, refusal of access to education, housing and health services, etc.) amounting to gross or massive and flagrant violation of human and peoples' rights; secondly, the adoption of a system of periodic State reports to be forwarded to an organ like the UN Commission on Human Rights on the basis of experience accumulated in this area (e.g., under the ILO and the UN); thirdly, the establishment of a monitoring system by a group of experts or a special rapporteur in situations manifestly resulting from a condition of underdevelopment or with a direct bearing on the realization of the right to development as a human right, in coordination with other supervisory organs (particularly those with a concrete mandate under general treaties of human rights protection); fourthly, the undertaking of in depth studies by an organ such as the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities aiming at, for example, identifying specific key issues pertaining to the right to development as a human right (e.g., health, housing, access to education and information, etc.).[92] During the debates of the UN Global Consultation we further pondered about a combination of two or more of the above-suggested methods, which might prove suitable given the comprehensive nature of the right to development as a human right, encompassing the protection of the human person and of peoples in the civil, political, economic, social and cultural domains; besides the above-suggested were not exclusive of other and possibly new methods of implementation that could be devised.[93]

The recognition and formulation of the right to development as a human right has introduced ethical considerations in the conduct and assessment of contemporary international relations. In humanizing the process of development, it is now high time to turn our attention to devising some form of institutionalized implementation of the right to development as a human right in the years to come.

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92 A.A. CANÇADO TRINDADE, *Direito das Organizações Internacionais*, Brasília, Escopo Ed., 1990, pp. 327–328 and 343–345; A.A. CANÇADO TRINDADE, "As Consultas Mundiais das Nações Unidas sobre a Realização do Direito ao Desenvolvimento como um Direito Humano", 72/74 *Boletim da Sociedade Brasileira de Direito Internacional* (1990–1991) pp. 91–100.

93 A.A. CANÇADO TRINDADE, *Direito das Organizações* ..., op. cit. supra n. 92, p. 345.

ANNEX

DECLARATION ON THE RIGHT TO DEVELOPMENT (ADOPTED BY THE UN GENERAL ASSEMBLY RESOLUTION 41/128 OF 4 DECEMBER 1986)

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international cooperation in solving international problems of an economic, social, cultural and humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and cooperation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, *apartheid*, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, *inter alia*, by the denial

of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the Right to Development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should

therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.
2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations.
3. States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from *apartheid*, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

1. All States should cooperate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.
2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.
3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects to the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.
2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

TRANSNATIONAL TRADE TRANSACTIONS OF A FOREIGN STATE AND SOVEREIGN IMMUNITY IN INDIA: AN APPRAISAL

K.I. Vibhute*

1. INTRODUCTION

Commercial activities of States have extensively increased in contemporary international trade and commerce. Questioning and doubting the propriety of the notion of sovereign immunity, which originated from the maxim *par in parem non habet imperium* and is premised on the principles of independence and of sovereign equality and dignity, States have been distinguishing "governmental" or "public" acts (*acta jure imperii*) from those of a "non-governmental" or "private" or "commercial" (*acta jure gestionis*) character in order to restrict absolute sovereign immunity. They accord immunity to a State only for its acts *jure imperii* and not for acts *jure gestionis*. This (restrictive) theory is ostensibly based on the premise that when a State, through its government-department or any other instrumentality, undertakes commercial transactions (with transnational effects) with a foreign firm or corporation, it is not entitled to immunity from the jurisdiction of other States for such transactions as that jurisdiction does not involve either a challenge or a threat to the dignity of the State concerned nor interferes with its sovereign functions.

A careful glance at the national immunity laws, the practice of States and international instruments on sovereign immunity[1] unmistakably reveals that almost all States, except socialist ones, recognise the restrictive theory of

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1 For national laws, *see* United Nations, *Materials on Jurisdictional Immunities of States and their Property* (ST/Leg./Ser.B/20[1982], hereinafter referred to as *UN Materials on Immunities*), and for state practice, see the State reports compiled in 10 NYIL (1979).

Asian Yearbook of International Law, Volume 3 (Ko Swan Sik *et al.*, eds.; 0-7923-2708-X; © 1994 Kluwer Academic Publishers; printed in Great Britain), pp. 47–69

immunity. However, perusal of the Indian laws governing immunity of a foreign State involved in commercial activities does not unequivocally exhibit a similar trend. Compared to national and international instruments on sovereign immunity it demonstrates a fragmentary approach to State immunity and discloses a few pertinent drawbacks.

This article attempts to evaluate the Indian law on State immunity for commercial transactions of a foreign State. A few suggestions are thereby offered to bring it on a par with the international instruments and other immunity laws in vogue.

2. JURISDICTIONAL IMMUNITY OF A FOREIGN STATE IN INDIA: LEGAL FRAMEWORK

Unlike the USA, the UK and other common law countries, India does not have a comprehensive legislation on jurisdictional immunity of a foreign State. However, the Code of Civil Procedure of 1908 (hereinafter referred to as "CPC") incorporates a chapter entitled "Suits by Aliens by or against Foreign Rulers, Ambassadors and Envoys". It deals, *inter alia*, with suits against a foreign State in India.

Section 86(1) of the CPC stipulates that no foreign State,[2] Ruler of a foreign State,[3] Ambassador or Envoy of a foreign State, High Commissioner of a Commonwealth country or any member of the staff or retinue of the Ruler, Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country as specified by the Central Government, be sued in a competent court *except* with the consent of the Central Government in writing by a Secretary to the Government. Clause (2) of section 86 further directs the Central Government not to accord its consent unless it appears to it that the foreign State:

(a) has instituted a suit in the court against the person desiring to sue it, *or*
(b) by itself or another trades within the jurisdiction of the court, *or*
(c) is in possession of immoveable property situated within such jurisdiction

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2 "Foreign State" has been defined to mean "any State outside India which has been recognized by the Central Government" (section 87A(1)(a) of the CPC). By virtue of s 87A(2)(a) a Court in India has to take judicial notice of the fact whether a State has or has not been recognized by the Central Government. *De facto* or *de jure* recognition has the same effect and the court before which a suit is filed has to obtain necessary information pertaining to recognition of the foreign State from the Government of India and information supplied by the government is conclusive on the matter. (See *German Democratic Republic* v *Dynamic Industrial Undertaking Ltd*, A.I.R. 1972 Bom. 27).

3 "Ruler", in relation to a foreign State, has been defined to mean "the person who is for the time being recognized by the Central Government to be the head of that State (section 87A(1)(b) of the CPC). And a court has to take judicial notice of the fact that whether a person has or has not been recognized by the central government to be the head of a State (section 87A(2)(b) of the CPC).

and it is to be sued with reference to such property or for money charged thereon, *or*

(d) has expressly or implicitly waived the privilege accorded to it by section 86(1) of the CPC.

Section 86 of the CPC, being *lex fori*, binds the courts in India in matters pertaining to the jurisdictional immunity of foreign States. A foreign State, therefore, cannot rely on the doctrine of sovereign immunity under international law and rules relating thereto when the Central Government has given its consent to the filing of a suit in India against such foreign State. In *Mirza Ali Akbar v. United Arab Republic*[4] the Calcutta High Court was called upon to decide, *inter alia*, whether a foreign State engaged in commercial activities is entitled to absolute jurisdictional immunity in India. The foreign State argued that, according to the accepted general rules of (private) international law and in view of the difficulty of distinguishing acts *jure gestionis* from acts *jure imperii*, it was entitled to absolute immunity even in matters of a commercial nature. Justice A.N. RAY, favouring the sovereign and non-sovereign categorization of State activities for jurisdictional immunity purposes and relying heavily upon LAUTERPACHT,[5] negatived the plea of absolute immunity and held that a State engaged in commercial transactions is not entitled to jurisdictional immunity in India.[6] However, this rejection of the theory of absolute immunity received a setback when Chief Justice LAHIRI, speaking for the Division Bench of the High Court, relied upon the maxim *par in parem non habet imperium*, reversed the judgment,[7] and concluded:

> "...
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> ... [N]o analogy can be drawn between the immunity of the domestic state and the immunity of an independent foreign state, because the essence of independence is freedom from the laws of every other country except one's own. The doctrine of restricted immunity based on the distinction between *jure imperii* and *jure gestionis* which rests on such insecure foundation cannot be accepted as the positive international law of our country."[8]

The Supreme Court of India, before which the matter finally went in appeal,[9] reversed the judgment of the Division Bench by holding, *inter alia*, that section 86 CPC excludes the application of international law by the courts in India

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4 A.I.R. 1960 Cal. 768.

5 H. LAUTERPACHT, "The problem of jurisdictional immunities of foreign States", 28 BYIL (1951) 220.

6 *Supra* n. 4 at p. 775.

7 *United Arab Republic* v. *Mirza Ali* [*Akbar*], A.I.R. 1962 Cal. 387.

8 Ibid, at 394.

9 [*Mirza*] *Ali Akbar* v. *United Arab Republic*, A.I.R. 1966 S.C. 230.

and exclusively and conclusively determines the competency of suits against foreign States. The court, expressing the view that section 86, to a certain extent, "modifies" the doctrine of immunity recognized by international law, observed:

> "...
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> ... [F]oreign States can be sued within the municipal courts of India with the consent of the Central Government and when such consent of the Central Government is granted as required by section 86(1), it would not be open to a foreign State to rely on the doctrine of immunity under international law, because the municipal courts in India would be bound by the statutory provisions, such as those contained in the Code of C.P. ... It is common ground that if there is a specific statutory provision, such as is contained in section 86(1) which allows a suit to be filed against a foreign State subject to certain conditions, it is the said statutory provisions that will govern the decision of the question as to whether the suit has been properly filed or not. In dealing with such a question, it is unnecessary to travel beyond the provisions of the statute because the statute determines the competence of the suit."[10]

The *Ali Akbar* case, in ultimate analysis, thus perceives that the provisions of section 86 CPC supplant international rules governing sovereign immunity, and mandates that a foreign State is precluded from invoking these rules in India once the Government of India consents to a suit against it.

However, the view has been expressed by the Bombay High Court that the word "modified" appearing in the *Ali Akbar* case signifies that the doctrine of immunity (along with the relevant principles relating thereto) in international law, is applicable in India though subject to the modification made in section 86. According to the Court, the modification effected by section 86 is the requisite consent of the Central Government and, to this extent, it operates as an additional exception to the doctrine of sovereign immunity in India. The Bombay Court accordingly refused to read that *Ali Akbar* implies that section 86 CPC "wholly supplants" the relevant doctrine of sovereign immunity under international law.[11] Referring to the view taken in *Royal Nepal Airlines Corporation* v *Manorama*[12] that sections 86 and 87 of the CPC have no relation to the principles of private international law and that these provisions of the Code afford additional protection or privilege to a foreign Sovereign by providing immunity from being sued in India without previous permission of the Central Government, the court further opined that section 86, requiring

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10 Ibid, at pp. 236–237.

11 *German Democratic Republic* v. *Dynamic Industrial Undertaking Ltd*, A.I.R. 1972 Bom. 27(42–43).

12 A.I.R. 1966 Cal. 319 (329).

consent of the Central Government, constitutes an exception to the principles of international law.[13]

Recently, a Division Bench of the Calcutta High Court has expressed its agreement with the viewpoint of the Bombay High Court that section 86 allows application of the principles of international law in India but expressed its inability to accept that the provision constitutes an exception to the principles of sovereign immunity operating in international law.[14]

In the light of the *Ali Akbar* decision of the Supreme Court it is submitted that the interpretation of the case as offered by the Bombay High Court, with which the Calcutta High Court concurs, seems unconvincing and in direct conflict with *Ali Akbar*. Section 86 of the CPC, as interpreted and perceived by the Supreme Court codifies the law relating to jurisdictional immunity of foreign States in India and thereby ousts the application of international law rules governing immunity of a foreign State in the Indian courts. It lists the circumstances in which a foreign State may be sued in India and thereby defines the bounds of jurisdictional immunity of a foreign State in India. In this sense, according to the Supreme Court, it "modifies" the doctrine of immunity as recognized in international law. Such an approach becomes clear when the Supreme Court states that section 86(1) "imposes liability", circumscribed and safeguarded by the limitations prescribed by it, "on foreign States to be sued" in India. Similarly, the viewpoint of the Bombay High Court, according to which the provisions of section 86 constitute an exception to the principles of international law governing sovereign immunity in India, seems to be at odds with the true legal effect of the section as dilated by the Supreme Court and reflects a highly artificial approach to statutory construction.

Interestingly, neither the Bombay High Court, in carving out the exception, nor the Calcutta High Court, in expressing its partial disagreement with the Bombay High Court, have given reasons for their respective views. A commentator rightly felt that the Bombay High Court judgment had proceeded on a misapprehension of the true legal effects of section 86 as interpreted by the Supreme Court and that the High Court had erred by equating the right of a foreign State to waive its privilege with the jurisdictional authority of the Government of India to give or refuse its consent for a suit against the foreign state. The learned commentator rightly opined that these two powers operate on different bases and have two different effects.[15]

The *Ali Akbar* ruling of the Supreme Court thus reflects the present law dealing with the doctrine of sovereign immunity in India. Section 86 of the

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13 *Supra* n. 11, at p. 42.

14 *New Central Jute Mills Co Ltd* v. *VEB Deutfracht Seereederei Rostock*, A.I.R. 1983 Cal. 225 (234).

15 C.G. RAGHAVAN, "Sovereign Immunity in the Conflict of Laws—Some Recent Trends", IYIA (1980) 160.

CPC, as it stands today, not only "supplants" the relevant principles of international law governing sovereign immunity and "controls" the doctrine of immunity in India, but also determines the competence of a suit against a foreign State in India. It, therefore, allows courts in India only to decide on the competency of a suit against a foreign State and not to deal with, and adjudicate upon, the contested claims of sovereign immunity on the basis of evidence adduced before them. A court in India can only dwell upon the question as to whether the requisite consent of the Government of India, prior to the suit, was obtained or not. Even the words "unless it appears to the Central Government", appearing in sub-section (2) of section 86 have been interpreted to the effect that the decision granting the consent is final on the question whether any of the clauses (a) to (d) thereof is satisfied and it is not open to a court to question the propriety of an order granting or refusing the consent.[16]

It is worth noting that neither the CPC nor any other legal instrument provides for procedures to be followed by the Central Government in exercising its decisional powers under section 86 and in case of an appeal from its order granting or refusing the requisite sanction. A set of interesting questions emerge out of these propositions, such as: is the Central Government vested with unbridled discretion to grant or refuse sanction for instituting a suit against a foreign State? If not, what are the requirements that may be legally asserted and/or ought to be considered by the Central Government in granting or refusing sanction? Is the Central Government empowered to adjudicate upon the merits of the claim(s) intended to be made by a petitioner(s) against a foreign State and thereby thwart legitimate claim(s) of the petitioner(s) by executive fiat? Is an order refusing or granting sanction beyond judicial scrutiny and, therefore, not justiciable? If so, does it even exclude judicial review of an erroneous, or malafide decision of the Central Government? Does section 86(2), expressly or by necessary implication, preclude a court to entertain the plea that the consent has been refused in violation of the provisions embodied in its clauses (a) to (d) and not in good faith? Answers to these allied questions will have to be attempted in light of the provisions of

(a) section 86(1) conferring an exclusive competence on the Central Government to allow a suit against a foreign State and
(b) section 86(2) enumerating a few guidelines for the Central Government, as well as
(c) section 86(6) on providing a reasonable opportunity for the person making the request to be heard before refusing to accede to his request.

The phraseology of section 86(2) as mentioned earlier unequivocally indicates that the Central Government, before it accords its consent, has to

16 See *Govindram* v. *State of Gondal*, A.I.R. 1950 P.C. 99; *Mohamad Raza* v. *Kapurthala Estate*, A.I.R. 1935 Ori. 164. For recent developments see *infra*.

convince itself that the foreign State has instituted a suit against the plaintiff, *or* that it "trades" within the jurisdiction of the court, *or* that it possesses immoveable property within the jurisdiction of the court and that the intended suit deals with that property, *or* that it has, expressly or impliedly, waived the privilege accorded to it by section 86(1). The possibility of a decision in violation of these statutory guidelines or a decision motivated by some irrelevant, improper considerations or wrong assessment of the above requirements cannot be ruled out. The underlying idea of section 86 is to save a foreign State from harassment which may be caused by a suit based on mischievous, false and frivolous claims. The provision not only enables the Government of India to avoid such harassment to a foreign State but also to verify the contended claim(s) of a petitioner on the touchstone of its political relations.

Again sub-section (6) of s 86 imposes a mandatory obligation on the Central Government to give a reasonable opportunity of being heard to the person making the request before it refuses to accede to the request. It reads:

> "...
>
> (6) Where a request is made to the Central Government for the grant of any consent referred to in sub-section (1), the Central Government *shall*, before refusing to accede to the request in whole or in part *give to the person making the request a reasonable opportunity of being heard.*" (emphasis supplied)

Though the sub-section embodies the principle of natural justice and attempts to do justice to the claim(s) of a petitioner, it does not encompass one of the well-accepted, important facets of the principles of natural justice, namely, a speaking order requiring the government to assign reasons for withholding its consent to the intended lawsuit against the foreign State. In fact, during the debate in the Lok Sabha on the insertion of section 86(2), a proviso requiring the Central Government to assign reasons, in writing, for disallowing a suit against a foreign State was unsuccessfully moved. Dr. V.A. SEYID MUHOMMAD, the then Minister of State in the Ministry of Law, Justice and Company Affairs who moved the Bill in the Lok Sabha, rejected the suggested amendment. His contention was that:

> "... the very necessity for such a provision is that in certain cases where foreign States are involved, it may not be possible for the Central Government to give reasons why the consent is given or not given. To make it compulsory that in every case that reasons should be given defeats the very purpose of the provision."[17]

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17 *Lok Sabha Debates* (Fifth series), Seventeenth Session, vol. LXIII No.1. cols. 161–162 (12 August, 1976).

It is submitted that from the point of view of a person seeking the requisite consent of the Central Government to sue a foreign State the above quoted justification for rejecting the suggested proviso does not hold water in the contemporary administrative age and appears unconvincing. It is important to recall that section 86 enables the Central Government to disallow frivolous claims against foreign States and thereby avoid their harassment in India. Contrary to the claim of the Minister, it is difficult to concede that a speaking order defeats the "very purpose" of section 86. On the contrary, it is submitted, it would convince both the petitioner and the foreign State that their respective claims are objectively assessed and considered. The need and importance of the suggested "speaking order" or "reasoned decision" can be felt when one visualises the absence of any stipulated procedure in the CPC and envisages an indubitable wide jurisdiction and authority of the Central Government to give its sanction to sue a foreign State in India.

Endorsing such indubitable discretion, jurisdiction and authority of the Central Government in granting or refusing sanction under section 86, the Supreme Court recently observed in *Harbhajan Singh* v. *Union of India*[18]:

> "...
>
> [T]he power given to the Central Government must not be exercised arbitrarily, or on whimsical grounds but upon proper reasons and grounds. ... [T]he Central Government is not to adjudicate upon the correctness of the claim. ... [T]he power conferred on the Central Government ... shall be carefully exercised. ... The power given to the Central Government must be exercised in accordance with the principles of natural justice and in consonance with the principle that reasons must appear from the order."[19]

The Court further rightly insisted that:

> "...
>
> it is necessary that there should be an objective evaluation and examination by the appropriate authority of relevant and material factors in exercising its jurisdiction under section 86 by the Central Government. There is an implicit requirement of observance of the principles of natural justice and also the implicit requirement that decision must be expressed in such a manner that reasons can be spelled out from such decision. ... If the administrative authorities are enjoined to decide the rights of the parties, it is essential that such administrative authority should accord fair and proper hearing to the person to be affected by the order and given sufficiently clear and explicit reasons. Such reasons must be on relevant material

18 A.I.R. 1987 S.C. 9.
19 Ibid, p. 14.

> factors objectively considered. There is no claim of any privilege that disclosure of reasons would undermine the political or national interest of the country."[20]

The Supreme Court, in its quest to ensure "just" and "speaking order" from the Central Government in exercise of its powers under section 86 of the CPC, also tendered a bit of advice to the Central Government to accord its consent normally unless there are cogent political and other reasons.[21]

The apex Court of the land has also given sufficient indication that it is not the function of the Central Government to adjudicate administratively upon the merits of the claim(s) intended to be made by the litigants in their proposed suits against the foreign State and to determine the propriety of a claim before granting consent to the institution of a suit. According to the Supreme Court, it is the function of a competent civil Court to do so and the Central Government, therefore, cannot under section 86, assume that jurisdiction.[22]

There are strong indications in the *Harbhajan* and other Supreme Court rulings[23] that not only is the decisional power of the Central Government subjected to the two above-mentioned limitations but its order is also subject to judicial scrutiny. The Central Government, through proper writ, can be directed to reconsider its "order" in the light of contemporary trends and developments of international law. The courts can go into the propriety of such orders by probing into the observance or non-observance of the principles of natural justice, absence of speaking order and adequacy of the stated reasons, administrative adjudication of the proposed suit by the Central Government before giving/refusing sanction, etc. It is worth noting that recently the Delhi High Court[24] has gone one step further by directing the Central Government to accord its sanction within two months from the date of order in the light of the law laid down by the Supreme Court and international law.

It is interesting to note, however, that while the Supreme Court endorsed the decisional authority of the Central Government—obviously subject to the above mentioned limitations—and admitted that it (the Supreme Court) was "not concerned with the correctness or genuineness or otherwise" of such claim, its real concern lay in whether the grievances of the persons intending to sue a foreign State would be properly and legally dealt with.[25] Accordingly the Supreme Court insisted on a fair, just, careful and objective exercise of the

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20 Ibid, p. 15.

21 Ibid, p. 14. See also *Narottam Kishore* v. *Union of India*, A.I.R. 1964 S.C. 1590; *Tokendra Bir Singh* v *Secretary to the Government of India*, A.I.R. 1964 S.C. 1663.

22 *Supra* n. 19. See also *Tokendra Bir Singh* v. *Secretary to the Government of India*, ibid; *Century Twenty One (P) Ltd* v. *Union of India*, A.I.R. 1987 Del. 124.

23 *Tokendra Bir Singh* v. *Secretary to the Government of India*, *supra* n. 21; *Norottam Kishore* v *Union of India*, *supra* n. 21.

24 *Century Twenty One (P) Ltd* v. *Union of India*, *supra* n. 22.

25 *Harbhajan Singh* v. *Union of India*, *supra*, n. 18 at p. 12.

discretion on some cogent political and other relevant grounds, rather than on whimsical, vague and fanciful grounds and opined that the provisions of the CPC must be interpreted in consonance with the basic principles of the Indian Constitution.[26] The Supreme Court also cautioned the Central Government not to deny sanction on "political grounds" and generally to desist from administrative adjudication of merits of claims of petitioners and thereby usurp the jurisdiction of the competent civil courts. According to the Supreme Court such a refusal in ultimate analysis puts a restriction on the rights of citizens to institute a suit against a foreign State in respect of injuries suffered by them and to seek redress for it. It, therefore, tendered a bit of judicial advice to the Central Government normally to accord consent, keeping in view recent trends and developments in international law, international trade and commerce, and international interdependence, except in cases where the claim appears to be patent, frivolous or vexatious, intending to harass the foreign State.

The Code of Civil Procedure also mandates that no decree against a foreign State be executed against property of any foreign State without consent of the Central Government in writing. Sub-section (3) of section 86 reads:

> "(3) Except with the consent of the Central Government certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State."

This provision makes it clear that the consent of the Central Government is also necessary in execution proceedings against a foreign State. Further, sub-section (3) indicates eloquently that the requisite consent of the Government of India allowing execution of a decree against any property of a foreign State is unqualified. This interpretation gets support from section 86(6), which mandates the Central Government to ensure a reasonable opportunity of being heard only to a person requesting the requisite consent to sue a foreign State, not to a person seeking consent to execute a decree duly obtained by the latter against a foreign State. The cumulative effect of sub-sections (1) and (3) is that the requisite consent of the Central Government for executing a decree against property of a foreign State in India is distinct from, and independent of, the consent of the Central Government for filing a suit against a foreign State. Therefore, reasonable opportunity of being heard afforded by section 86(6) of the CPC cannot be extended to persons seeking permission to execute a decree against the foreign State's property in India.

However, it may be noted that the Law Commission of India, in its 54th Report on the Code of Civil Procedure of 1908 which was used as a model by the Parliament when overhauling the CPC in 1976, had suggested that

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26 Ibid, p. 14, 15.

reasonable opportunity of being heard be extended to persons requesting consent of the Central Government for execution of a decree against a foreign State. The recommended clause was worded as follows:

> "(b) Where a request is made to the Central Government for the *grant of any consent under this section*, the Central Government shall, before refusing to accept the request in whole or in part, give the person making the request a reasonable opportunity of being heard."[27] (italics supplied)

The Parliament of India, for the reasons best known to itself, when approving clause (b), replaced the words "grant of any consent under this section" by "grant of any consent referred to in sub-section (1)", making the clause applicable only to the requisite consent to sue a foreign State and not to execution of a decree against a foreign State.

The provision has a direct bearing on transnational arbitration. Section 14 of the Indian Arbitration Act, 1940, being the *lex fori*, makes it obligatory to file an award in a competent court for further proceedings in order to get a decree in terms of the award. And by virtue of section 86(3) of the CPC consent of the Central Government to execute the decree (obtained in terms of the award resulting from the agreed arbitral tribunal) against property of a foreign State even when used for commercial purposes is required. Compared to the corresponding provisions in the American Foreign Sovereign Immunity Act, the British State Immunity Act and the contemporary rules of international law in the area of sovereign immunity *vis-à-vis* international commercial arbitration, the provisions of the CPC not only depict a fragmentary approach to the rules of sovereign immunity *vis-à-vis* transnational arbitration in India but are also unfavourable to the development of transnational arbitration in India.

From the foregoing analysis it is amply clear that section 86, as interpreted by the Supreme Court in the *Ali Akbar* case, vests the Government of India—unlike its American and British counterparts—with the sole decisional authority in the determination of claims of sovereign immunity and courts in India, subject to the above-mentioned judicial inroads, play only a secondary role in the matters pertaining to sovereign immunity.

It is worth noting that in the USA, before the *Tate Letter*, the State Department dominated in determining sovereign immunity claims, and the courts, as in contemporary India, only played a secondary and supportive role. In 1976, realizing that the political organs of the State should not be allowed to adjudicate upon legal claims of sovereign immunity, the responsibility was transferred from the State Department to the courts through the FSIA. Section 1602 of the FSIA, declaring its purposes reads:

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27 Law Commission of India, *Fifty-Fourth Report: Code of Civil Procedure, 1908* (1973) 64

> "The Congress finds that the determination by United States Courts of the claims of foreign States to immunity would serve the interests of justice and would protect the rights of both foreign States and litigants in United States courts. ... Claims of foreign States to immunity should henceforth be decided by courts of the United States in conformity with the principles set forth in this chapter."

Similarly, section 1(2) of the British SIA which, *inter alia*, sets provisions with respect to proceedings in the United Kingdom by or against other States and with respect to the immunities and privileges of heads of State, empowers a court to give effect to the jurisdictional immunity of a foreign State.

It needs no emphasis that determination of claims of sovereign immunity by courts, as aptly proclaimed in the FSIA, not only serves the interests of justice for which a civilised State strives, but also protects legitimate rights and claims of both foreign States and private individuals, one of the dominant and accepted claims of the Rule of Law doctrine. There are no convincing reasons for not shifting the decisional responsibility from Central Government to the courts in determination of sovereign immunity claims in India. The considerations, namely the interests of justice and the protection of rights and claims of a foreign State and a private individual, which have led the US Congress to entrust the US courts to decide matters relating to sovereign immunity, are equally relevant to, and applicable in, India. They warrant due consideration by the Indian legislature. In fact, as mentioned earlier, recent judicial pronouncements contain sufficient indication in this direction.

3. WAIVER OF IMMUNITY *VIS-À-VIS* TRANSNATIONAL COMMERCIAL ACTIVITY OF A FOREIGN STATE

It is a well-settled principle of sovereign immunity that the courts of a country cannot by their process make a foreign State a party to legal proceedings without its consent. Such a consent may be express or implied (the terms "express" and "implied" waiver of immunity are self-explanatory). Express waiver of immunity may be through an international agreement or a term contained in the contract or by express consent given before or after a dispute, while tacit consent to waive its immunity may be read in the acts of the foreign State indicating its willingness to submit either to the courts or arbitral tribunals.

Section 86(1) of the CPC, as discussed above, requires prior consent of the Central Government to sue a foreign State in India and section 86(2) makes it unequivocally clear that the Central Government, before according its sanction, has to satisfy itself whether the foreign State, according to its perception

(a) has already instituted a suit against the plaintiff; or

(b) trades, itself or through its agency; or

(c) possesses an immoveable property which is subject-matter of the suit; or
(d) has expressly or impliedly waived its privilege.

The institution of a suit by a foreign State, matters arising out of possession of immoveable property in the possession of a foreign State and express waiver of immunity are questions of fact and can, therefore, be taken note of without much difficulty. The trading by a foreign State and the waiver of immunity, particularly implied waiver of immunity, on the other hand, are comparatively not so simple.

3.1 Implied waiver of immunity

Clauses (b) and (d) of section 86(2) warrant consent of the Central Government if a foreign State "trades", by itself or through another, or has "waived", expressly or impliedly, its privilege. But the Code neither defines nor explains these key phrases, nor does it provide any guidance for their determination. There is no indication either whether clauses (a) to (c) actually contain the modes of implied waiver of sovereign immunity recognized by the Code. If they do, it is submitted that clause (d), separately referring to "express or implied waiver" of the privilege accorded by section 86(1), is in fact redundant.

However, such interpretation seems odd and unwarranted in the light of the *Mirza Ali Akbar* case, wherein the Supreme Court has held that section 86 is a complete Code on sovereign immunity in India. Nor is it clear whether a suit against a foreign State which is involved in trade or which has expressly or impliedly waived its privilege, still requires the consent of the Central Government. It may be argued that a foreign State, even if it is involved in trading activities or has waived its privilege, can not be sued in India without prior permission of the Central Government by virtue of section 86 CPC. On the other hand, in the light of contemporary State practice and the principles of international law governing sovereign immunity one may advance a counter-argument according to which a foreign State, by trading or waiving its privilege, is directly amenable to the courts and, therefore, can be sued without consent of the Central Government. In the absence of legislative policy both arguments seem equally sound and convincing in the context of their respective perceptions of the ambit of section 86.

Against the background, and in the context of, accepted principles of international law pertaining to waiver of sovereign immunity, it is submitted that it would be wrong to equate the right of a foreign State to waive its privilege with the jurisdictional authority of the Central Government to accord or refuse consent in case of a request to file a suit against the foreign State. Waiver is governed by the will of the foreign State while granting or withholding consent refers to the decisional power of the Central Government. Section 86(2)(d) merely provides a situation in which as a result of waiver of sovereign immunity consent may be given and, therefore, does not deal with

criteria for the determination of waiver of immunity nor with the circumstances amounting to such waiver.

In most other countries "trading" by a foreign State has been accepted as an exception to the doctrine of sovereign immunity by relying upon the restrictive theory of immunity based on the distinction between *acta jure gestionis* and *acta jure imperii.* Against this background it seems odd to insist on the consent of the Central Government for suing a foreign State which has undertaken commercial activities within the jurisdictional limits of a court. Unfortunately, the CPC is silent on these and similar issues.

After these preliminary observations pertaining to the nature and scope of section 86(2) with respect to implied waiver, let us now consider the guidelines enumerated in section 86(2).

3.1.1 Implied waiver by submission to a court's jurisdiction

Unlike in the UK, where a foreign State may enter a conditional appearance in a court of law to have the writ set aside, the law in India does not provide for such conditional appearance. Therefore, one of the crucial questions is when a foreign State can be said to have submitted to a Court's jurisdiction in India and thereby waived its immunity? In *Mirza Akbar* v. *United Arab Republic (UAR)*[28] it was argued before the Calcutta High Court, as a preliminary issue, that the UAR, by making appearance to a writ and asking for relief, had submitted to the jurisdiction of the court and thereby had waived its privilege. Justice A.N. RAY, the trial judge, accepting the argument, held that the UAR had submitted to the jurisdiction of the court and thereby waived its privilege. However, in appeal a Division Bench consisting of LAHIRI C.J. and BACHAWAT J., placing reliance on *Mighell* v. *Sultan of Johore*[29] and *In Re Bolivia Republic Exploration Syndicate Ltd,*[30] expressed its inability to accept the view of RAY J. as a correct proposition of the law and ruled that merely making an application challenging jurisdiction of a court does not amount either to submission to jurisdiction or waiver of jurisdictional immunity.[31] The Court further stated that the appearance must be unconditional and unequivocal in order to qualify as submission to the jurisdiction of a court. Relying heavily upon the views of CHESHIRE, DICEY and some statements of law deduced by them, the Division Bench inferred that such appearance, in order to constitute waiver of sovereign immunity, must be an unmistakable election to submit to the court's jurisdiction and not mere unconditional

28 *Supra* n. 4.
29 (1894) 1 Q.B. 149.
30 (1914) 1 Ch. 139.
31 *Supra* n. 7.

appearance of a foreign State.[32] Again in *Royal Nepal Airlines Corporation* v. *Manorama*[33] it was pressed before a Division Bench of the Calcutta High Court comprising of BOSE C.J. and MITTER J. that the Royal Nepal Airlines Corporation, a corporate body of the Royal Nepal Government, had submitted to the jurisdiction of the court and thereby had waived its immunity by appearing in the court and by filing a written statement. The Division Bench, after analyzing the relevant English authorities and its earlier judicial pronouncements, concluded that there must be an unmistakable election to submit to the court's jurisdiction or a deliberate abandonment of the right to claim sovereign immunity from which an unequivocal intention to submit to jurisdiction could be inferred. The Court further held that such unequivocal intention and unmistakable election to submit to the court's jurisdiction must be by a person having the right to waive with the consent of the foreign sovereign.[34] In *Indian National Steamship Co Ltd* v. *Maux Faulbaum*[35] the Calcutta High Court held that Indonesia, by its conduct, had waived its privilege to claim jurisdictional immunity when it applied for leave to be examined *pro inter se sua* and asked the court to investigate the question of its title of goods on board and applied for issue of Letters of Request to examine witnesses in Holland to prove its title.

3.1.2 Implied waiver by trading in a foreign State

Two questions deserve consideration: whether the word "trading" in section 86(2)(b) includes *acta jure gestionis* and thereby incorporates within its ambit the commercial activity exception to the sovereign immunity, and whether an agreement to submit a dispute to arbitration amounts to a submission to the jurisdiction of the court in India.

Clause (b) of section 86(2) allows the Central Government to accord its

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32 Ibid, p. 390.

33 *Supra* n. 12.

34 Ibid, p. 331.

35 A.I.R. 1955 Cal. 491. For details and comments, see S.K. AGRAWALA, "The plea of sovereign immunity and Indian State practice", *Revue Hellénique de droit international* (1975) p. 20 *et seq.* In this case the Indonesian Purchasing Commission which is a department of the Defence Ministry of the Government of Indonesia purchased 51 reels of cable in Hamburg and shipped the said goods for carriage from Hamburg to Jakarta under a bill of lading. The vessel altered its course and at the direction of the owner company (the Indian National Steamship Co.) proceeded to Calcutta and there unloaded the entire cargo which was on board the vessel. The owner company filed a suit thereafter against Maux Faulbaum (the charterer of the said vessel) claiming certain sums alleged to be due to it on account of arrears of hire of the said vessel and claiming a lien on all goods on board the said vessel including the 51 reels of cable. The Calcutta High Court appointed a receiver for the entire cargo. The Indonesian Purchasing Commission, through the Republic of Indonesia, claiming a superior title to that of the receiver made an application to the court for possession of the goods.

consent to a request to sue a foreign State if the latter, by itself or another, trades within the local limits of the court. To the knowledge of the writer no judicial pronouncement of an Indian court interpreting the term "trading" is reported as yet. However, the *Memorandum on State Immunity* in respect of commercial transactions, submitted by the Government of India to the Asian-African Legal Consultative Committee (AALCC) in 1960,[36] reveals the viewpoint of the Government of India on commercial activities of a foreign State *vis-à-vis* its immunity. The Government of India in its Memorandum showed its preference to the restrictive immunity theory, premised on the distinction between *acta jure gestionis* and *acta jure imperii.* Addressing itself to the question as to whether a foreign State be immune from jurisdiction of the courts of a country with respect to "commercial" and other non-governmental activities and by reviewing pertinent State practice as existed at that time and referring to the opinions of international jurists, the Government of India asserted:

> "If it is decided to adopt a practice restricting the grant of immunity to foreign States in respect of their trading activities, no objection could legitimately be taken. Even on principle it appears that the time has now come when a distinction between the various forms of State activities for the purposes of immunity is desirable and indeed essential. The activities that are undertaken by modern States can not be regarded as State activities in the sense it was understood and it would indeed be stretching the point too far if the principle of sovereign immunity was applied to all such activities undertaken by a State today. If a sovereign State chooses to trade, it should be in no better position than an individual or company engaged in foreign trade. To allow immunity in such cases will result in unduly putting a sovereign State in a better position than a trading individual or a company for which preferential treatment there is no warranty in international law or usage. ... [I]t may well be asserted that a State by taking upon itself the role of a trader must be deemed to have waived its claim of immunity in respect of such transactions."[37]

The Indian delegate participating in the first session of the AALCC[38] expressed his views on the matter. He also favoured the distinction between public and private activities of a State and opined that immunity should not be extended to commercial activities of States as in such ventures no question of dignity of sovereign States arises. According to him, if a State enters the area of trade activities it should be prepared, if the occasion so arises, to suffer the same processes of law as a citizen would be subjected to. He further opined that with States participating more and more in commercial activities it is desirable

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36 For the text of the Memorandum *see, Asian-African Legal Consultative Committee, Third Session, Colombo,* 1960, issued by the Secretariat of the AALCC, New Delhi, India, pp. 58–62.
37 Ibid, p. 62.
38 New Delhi, 1957.

that the immunity should not operate on non-governmental activities.[39] The Indian delegate, responding to one of the questions posed by the AALCC, also expressed his willingness to adopt the doctrine of qualified immunity.[40] The Government of India also agreed that the doctrine of sovereign immunity should not be applicable to commercial transactions undertaken by State trading organizations, and that no distinction could be drawn in principle between such activities undertaken directly by a government and those which are done through trading organizations, whether they constitute a separate juristic entity or not. Accordingly even trade representatives of a government should not be entitled to immunity.[41]

It is, thus, evident that the Indian assertion that immunity should be confined to "governmental" in contradistinction to "non-governmental" or "commercial" transactions of a foreign State and that a foreign State resorting to commercial activity should be deemed to have waived its claim of immunity revealed its faith in the widely accepted and practised theory of restrictive immunity. However, it is interesting and significant to note that the Government of India has not been influenced in its actual conduct by the restrictive view of immunity pursued and advocated in its Memorandum. In 1971 in *Isbrandtsen Tankers Inc* v. *President of India*,[42] even in the face of an arbitration clause clearly amounting to a waiver of immunity, India successfully invoked immunity before foreign courts for its commercial activity.

The success and precision of the theory of limited immunity, as discussed above, ultimately depend upon certain specific criteria or tests selected for such a distinction. Unfortunately, the Memorandum, favouring and stressing the distinction and indicating its faith in the restrictive immunity theory, has not addressed itself to the crucial question as to the criteria for the determination of such "commercial activity" of a State. The Indian delegate missed a unique opportunity to formulate and develop certain criteria for distinguishing *acta jure gestionis* from *acta jure imperii* when he abstained from making suggestions in respect to a specific question on the point posed by the AALCC. The omission on the part of the Indian delegation to do so is regrettable and unfortunate for it was the Government of India that brought forward the subject of State immunities for discussion and recommendation by the AALCC.

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39 Loc. cit. n. 36 pp. 63–64. The AALCC, accordingly, recommended that a State which enters into transactions of a commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign State in respect of such transactions and if the plea of immunity is raised it should not be admissible to deprive the jurisdiction of the domestic courts. *Final Report of the Committee on Immunity of States in respect of Commercial and other Transactions of a Private Character, as revised in the third session of the AALCC,* ibid p. 68.

40 Ibid, p. 72.

41 Ibid, pp. 67–68.

42 See 66 AJIL (1972) 396.

The Government of India has not made any public declaration in pursuance of its policy of favourably inclining to the restrictive immunity theory and thereby disallowing immunity to a foreign State in respect to its commercial activities, but its preferences have, of course, to be appreciated against the background of the provisions of section 86(1) and (2) of the CPC.

3.1.3 Implied waiver by agreement to arbitrate

The Memorandum of the Government of India presented to the AALCC, which makes fleeting reference to the frequent insistence by traders entering into contracts with foreign States on the insertion of an arbitration clause and the voluntary submission of States to arbitration or jurisdiction of domestic courts, does not reveal any considered opinion of the Government of India on the question as to whether an arbitration agreement to submit disputes to arbitration amounts to submission to the jurisdiction of the courts in India. Neither the guidelines incorporated under section 86(2) CPC nor judicial pronouncements provide any indication, and in the absence of executive, legislative as well as judicial policy it is difficult to comprehend when and to what extent an arbitration clause is to be considered an "implicit" waiver of immunity in Indian law. As mentioned earlier, section 86(2)(d) provides a ground for the Central Government to consent to a foreign State being sued in India if that State has expressly or impliedly waived its privilege.

It is worth mentioning that section 1605(a)(1) of the US Foreign Sovereign Immunity Act, 1976, which is similar to section 86(2)(d) CPC, provides that a foreign State is not immune from the jurisdiction of US courts in any case

> "in which the foreign State has waived its immunity either explicitly or by implication ..."

Like the Indian CPC, the American FSIA does not specifically prescribe that the presence of an arbitration clause in a contract amounts to implicit waiver of sovereign immunity. However, the legislative history of the FSIA sheds some light on the intent of the US Congress. The Congressional report gives a strong indication that a foreign State waives its immunity when it agrees to arbitrate in another country and presence of an arbitration clause in a contract *ipso facto* amounts to waiver of immunity. The report accompanying section 1605(a)(1) of the FSIA states:

> "...
>
> [W]ith respect to implicit waivers, the courts have found such waivers in cases where a foreign State has agreed to arbitration in another country or where a

foreign State has agreed that the law of a particular country should govern a contract."[43]

The congressional statement seeks support from cases decided prior to,[44] and immediately after[45] the introduction of the FSIA. However, it should be noted that only an agreement to arbitrate in the United States, and not in any foreign country, constitutes an implicit waiver of immunity from jurisdiction of the US courts.[46]

The State Immunity Act (SIA) 1978, of the United Kingdom, which regulates immunity of a foreign State in the UK and codifies the restrictive theory of sovereign immunity, also provides that an arbitration clause in a contract disentitles the foreign State for jurisdictional immunity. Section 9 of the SIA, dealing with the impact of an arbitration agreement on jurisdictional immunity, states, *inter alia*:

"...

(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

Even in the pre-SIA period Lord DENNING M.R. had opined that:

"...

Usually the contract contains an arbitration clause, in which case there is a

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43 House Report No. 94–1487, 94th Cong. 2d Sess. 18 (1976). Reprinted in *UN Materials on Immunities*, *supra* n.1, p. 98 (109).

44 *Wilmotte & Co* v. *Rosenman Bros*, 258 N.W. 2d 317 (Iowa, 1977); *Victory Transport Inc.* v. *Comisoria General de Abastecimientosy Transportes*, 232 F. Supp. 294 (S.D.N.Y. 1963); *Victory Transport Inc.* v. *Comisoria de Abastecimientosy Transportes*, 336 F. 2d 354 (2d Cir. 1964); *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F. 2d 103, (2d Cir. 1966).

45 *Ipitrade International SA* v. *Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C., 1978); *LIAMCO* v. *Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175 (D.D.C. 1980); *MINE* v. *Republic of Guinea*, 20 I.L.M. (1981) 669.

46 *Verlinden BV* v. *Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980); *Chicago Bridge & Iron Co* v. *Islamic Republic of Iran*, 506 E. Supp. 981 (N.D.I.11, 1980); *Ohntrup* v. *Firearms Centric Inc* 516 F. Supp. 1281 (D.D.C. 1981); *Zernicek* v. *Petroleos Mexicanos*, 614 F. Supp. 407 (S.D. Tex. 1985). See also, GARY B. SULLIVEN "Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits", 18 Tex. I.L.J. (1983) 329; KAHALE, "Arbitration and Choice-of-Law Clauses as Waivers of Jurisdictional Immunity', 14 N.Y.U.J.I.L. Pol. (1981) 29; KAHALE and VEGA, "Immunity and Jurisdiction: Towards a Uniform Body of Law in Actions against Foreign States", 18 Col.J.Tr.L. (1979) 211.

voluntary submission to the jurisdiction of the arbitrators and the supervision of them by the courts."[47]

Beside these provisions of the FSIA and the SIA international agreements, such as the European Convention on State Immunity (1972),[48] the Draft Convention on State Immunity prepared by the International Law Association (1983),[49] the Draft Articles on Jurisdictional Immunities of States and Their Property of the International Law Commission (1986)[50] and recently enacted national legislation[51] do concur that a foreign State, which is a party to an arbitration agreement, is precluded from asserting its immunity from the jurisdiction of the courts of the forum.

A comparison of these provisions with the circumstances listed in clauses (a) to (d) of section 86(2) CPC reveals the inadequacy of the provisions embodied in the Indian Code of Civil Procedure.

Meanwhile, it is significant to note that in *Union of India* v. *Owners of Vessel Huegh Orchid & their Agents*,[52] a case pertaining to stay of proceedings in respect of matters referred to arbitration under the Foreign Awards (Recognition and Enforcement) Act 1961, the Gujarat High Court, after a cursory analysis of the provisions of Article 14 of the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958, refused to accede to the argument advanced by the Central Government that an arbitral clause in the charter party contract obliging it to make a reference to foreign arbitration amounts to a denial of its sovereign status and that such an agreement is valid and binding between citizens of different States only.[53]

4. CONCLUSION

Section 86 of the CPC as interpreted by the Supreme Court of India in *Ali Akbar*, constitutes a complete Code on sovereign immunity of a foreign State in India and it is applicable to the exclusion of the principles of international law relating to sovereign immunity. However, subsequent to the *Ali Akbar* ruling the Bombay and Calcutta High Courts, by offering their own interpretation to the *ratio* of *Ali Akbar* and its implications, have expressed the view that the

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47 *Thai-Europe Tapioca Service Ltd* v. *Government of Pakistan*, (1975) 1 W.L.R. 1485. See also, *President of India* v *Metcalfe Shipping Co Ltd*, (1970) 1 Q.B. 289.

48 Article 12.

49 Article III (A).

50 Article 11.

51 See generally, *UN Materials on Immunities*, *supra* n. 1, Part I, pp. 3–72, and the State reports compiled in 10 NYIL (1979).

52 A.I.R. 1983 Guj. 34.

53 Ibid, pp. 42–43., V

provisions of section 86 do not supplant the relevant principles of international law and that they are still applicable in India subject to the modifications made in section 86.

Constitutionally, the *ratio* of *Ali Akbar* is not only binding on all courts within the territory of India but also stands as good law in the field until overruled by a larger Bench of the Supreme Court. Yet the judicial deliberations and contrary views of the high judicial forums regarding the true ambit and interpretation of section 86 CPC and the application of contemporary international law rules and principles on the subject depict a fundamentally different perception of the immunity in the Indian courts of foreign States engaged in commercial activities. Examined against the background of the prevailing statutory enactments and State practice in the UK, USA and other common law countries and the principles of contemporary international law it is in fact not clear whether the provisions of section 86 really embrace the theory of restrictive sovereign immunity based on a distinction between *acta jure gestionis* and *acta jure imperii.*

The provisions of section 86 vest the Central Government with the decisional authority to determine matters which involve claims of sovereign immunity. The courts in India are concerned with the competency of a suit against a foreign State and not with the question of sovereign immunity. They are not permitted to adjudicate upon a claim against a foreign State on the basis of evidence adduced before them, unless the Central Government has given its consent to the filing of the suit.

In view of the historical antecedents that led the US to transfer the decisional authority on claims of sovereign immunity from the State Department to the courts and in view of the underlying legislative policy according to which the political wing of the State should not be entrusted with the decisional responsibility in legal questions which can properly be resolved through ordinary judicial process, it is difficult to appreciate the sole decision-making authority vested in the Central Government of India. It is important to note that the Government of India, responding to one of the questions posed by the AALCC, has opined that the plea of immunity be left to the courts. In view of the extended function of a State, including commercial activities and its wide legal capacity to intervene, it is imperative for a system of law not only to accommodate legitimate interests of individuals doing business with foreign governments but also to empower them to assert the determination of their legitimate claims arising out of such transactions by courts on the basis of judicial reasoning rather than by a political agency of a State on political or other considerations. The Rule of Law and the need of justice for individuals in their transactions with a foreign State which has entered the market-place and which has acquired the character of a trader, warrant adjudication of such claims by courts. A foreign State should not be allowed to take shelter under the protective umbrella of sovereign immunity to deprive the private party of his legitimate claims arising out of the commercial activities simply on the

ground that he has had privilege to trade with a foreign State and to suffer damage.

While section 8b para. 2 enumerates a few situations, subject to which consent is to be given to a lawsuit against a foreign State, it is not clear whether the sub-section embodies the *acta jure gestionis* and other exceptions to jurisdictional immunity provided in the American FSIA and the British SIA. None of the conditions are explained or defined in the CPC, and compared to the similar exceptions to immunity provided in the FSIA, the SIA and the European Convention of 1972 the Indian provisions are vague and imprecise.

In the interest of justice for private individuals involved in commercial activities with a foreign State and in order to bring the Indian law on a par and in harmony with other contemporary systems of law and State practice, the present discretion of the Central Government is to be done away with at the earliest opportunity. It is high time to transfer the decisional responsibility from the Central Government to the courts and to reconsider the situations amounting to implied waiver of sovereign immunity in the light of prevailing State practice, overseas statutory instruments and international conventions. It is, therefore, suggested that a comprehensive legislation on sovereign immunity, like the FSIA, the British SIA and identical statutes operating in a number of common law countries, be enacted in India. The Supreme Court in the *Ali Akbar* case has endorsed the legislative competence of a State to enact such a law to govern rights and liabilities of a foreign State in India.

Undoubtedly, legislative moves in this direction need a careful analysis and an in-depth study of the legal instruments operative in different States and at the international level. It is submitted that pending the enactment of a comprehensive law the present section 86 of the CPC, be substituted by the following suggested clause:

86. No foreign State shall be immune from jurisdiction of a court in India when the foreign State:
(a) has submitted to the jurisdiction of the court, or
(b) has engaged in a commercial activity in India, or
(c) has expressly or impliedly waived its immunity.

Explanation: For the purpose of this section:
(1) "Foreign State" means any State outside India which has been recognized by the Central Government and includes a political sub-division of a foreign State or any agency or instrumentality of a foreign State.
An agency or instrumentality of a foreign State means any entity:
(*i*) which has a separate and distinct legal personality, corporate or otherwise, and
(*ii*) which is an organ of a foreign State or political sub-division thereof, or a majority of whose shares or other ownership interest is owned by a foreign State or political sub-division thereof.

(2)(A) A foreign State is said to have submitted to the jurisdiction of the courts in India and thereby waived its immunity, either:
(*i*) by international agreement; or
(*ii*) by an express term contained in a contract in writing; or
(*iii*) by express consent given after a dispute between the parties has arisen; or
(*iv*) by a declaration before the court in a specific case.
(B) A foreign State be deemed to have submitted to the jurisdiction of the courts in India if:
(i) it has instituted a suit in the court against the person desiring to sue it; or
(*ii*) it has intervened or taken any step in the proceedings in India except to claim immunity or to protect its interests in the property in which it would have been entitled to immunity if the proceedings have been brought against it; or
(*iii*) it is in possession of immoveable property situated within local limits of the jurisdiction of the court and it is to be sued with reference to such property or for money charged thereof; or
(*iv*) it has made any counter-claim in proceedings before the court; or
(*v*) it has agreed in writing to submit a dispute, present or future, to arbitration (such submission be applicable only to proceedings relating to the arbitrations).

(3) "Commercial activity" means:
(*i*) any contract for the supply of goods or services;
(*ii*) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of such transaction or any other financial obligation; and
(*iii*) any other transaction or activity (whether of a commercial, industrial, financial or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.
Such acts may be either a regular course of commercial conduct or a particular commercial transaction or act."

TREATMENT OF THE RULES OF THE INTERNATIONAL LAW OF MONEY BY THE IRAN-US CLAIMS TRIBUNAL*

Allahyar Mouri**

1. INTRODUCTION

In an award issued in *The Stanwick Corporation, Stanwick International, Inc. and The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Mellat, Bank Tejarat* (hereinafter *Stanwick)*[1] a majority of two arbitrators in Chamber One of the Iran US Claims Tribunal ("the Tribunal")[2] awarded payment of a total of rials 61,240,510 to the claimant.

In its award, the majority held that the depositary agreements between Stanwick and the Iranian banks (Bank Mellat and Bank Tejarat) involved a contractual or statutory obligation on the banks' part to refer to the Central Bank of Iran (Bank Markazi) for the authorization required under the

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*This article was basically completed in January 1991.

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1 Award No. 467-66-1 (rendered 31 January 1990), 24 *Iran-US Claims Tribunal Reports* (Iran-US CTR) 102.

2 The Tribunal has been established pursuant to two Accords arrived at through the mediation of the Government of the Democratic and Popular Republic of Algeria, to which the Governments of the Islamic Republic of Iran and the United States of America adhered on 19 January 1981. These Accords together with a couple of others are known as the "Algiers Declarations"; the more general of these agreements is the "Declaration of the Government of the Democratic and Popular Republic of Algeria", often referred to as the "General Declaration", and the other, specifically dealing with the establishment of an international Tribunal (the Iran-US Claims Tribunal), is the "Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the Islamic Republic of Iran," known as the "Claims Settlement Declaration". For the complete texts of the Accords, see, e.g. 1 Iran-USCTR (1983) 3, 9; 20 ILM (1981) 224, 230; 75 AJIL (1981) 418, 422; and A. LOWENFELD, *Trade Controls for Political Ends* (2nd ed.) (1983) vol. III DS-823 and DS-829. See also, in general, A. MOURI, "Aspects of the Iran-US Claims Tribunal", 2 *AsYIL* (1992)

Asian Yearbook of International Law, Volume 3 (Ko Swan Sik *et al.*, eds.; 0-7923-2708-X; © 1994 Kluwer Academic Publishers; printed in Great Britain), pp. 71–110

prevailing exchange regulations.[3] Finding the depository banks in breach of such an obligation, the majority ordered that the rials in the accounts be converted into US dollars, at the official rates in effect at the time when, as they saw it, the alleged payment obligation became due, and further that the amounts arrived at—a total of US$ 870,388.13 plus the accrued interest as from the date of such breach up to the date of the actual payment[4]—be paid out of the "Security Account" established "for the sole purpose of securing the payment of, and paying, claims against Iran".[5]

To assist the reader in better understanding the issue to be discussed in this article, a brief account of the facts will be given, followed by a discussion of the pertinent rules of law, in particular those which govern the international aspect of "money", in so far as they are related to the decision in *Stanwick*. In doing so, the author expects to demonstrate the extent to which the Tribunal, in its award, failed to take those facts and rules of law into account.

2. REVIEW OF FACTS

Pursuant to contracts entered into with the Iranian Navy in 1974 and 1977, Stanwick undertook to provide the latter with engineering management, consultative and technical support and training services by means of recruiting and employing the experts needed by the Navy. On 22 June 1978, Stanwick also concluded a contract with the Ministry of Defence (formerly the Ministry of War) of Iran, aimed at upgrading an Air Force communications system. A specific part of the consideration of the two contracts was to be paid in dollars, and another part (a specific amount of the contract with the Air Force, and 25 per cent of the amount of the contract with the Navy) was to be paid in rials.[6]

The foreign currency portion of the contracts was to be paid as follows: first, Bank Markazi was to open certain letters of credit in an amount equivalent to the foreign currency (dollar) contractual amount, with a foreign bank or

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3 Op.cit. n. 1, paras. 38–40.

4 Ibid, paras. 41–46.

5 Paragraph 7 of the General Declaration provides, in part: "As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing Security Account in the Central Bank, until the balance in the Security Account has reached the level of US$ 1 billion. After the US$1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All 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 Claims Settlement Agreement."

6 Provisions of the contracts with Stanwick, *inter alia*, Article 6 of the 1977 contract with the Navy and Article 17 of the 1978 contract with the Ministry of Defence. See also para. 8 and n. 4 to the award in *Stanwick*.

banks; Bank Markazi was then to make periodic or monthly payments, as requested by the Navy or Ministry of Defence, out of those letters of credit and to a pre-arranged foreign bank account in Stanwick's name.[7] There was no dispute between the parties—and Stanwick itself confirmed—that the Armed Forces which were party to the contracts were initially to pay the rial equivalent of the amount of foreign currency provided for under the contract "to the Bank Markazi Iran, which then used the official exchange rate to change those rials into dollars, which it then sent to the United States."[8] The rial portion of the contract, which was to be used to defray expenses in Iran, was to be deposited in Stanwick's name, into Iranian bank accounts which had been pre-arranged or specified from time to time by Stanwick.[9]

The funds in the rial accounts, which were claimed to be the accumulated rial revenues derived from the contracts (and which reached the present levels by at least mid-1978), were never transferred abroad from Iran. On the other hand, documents (including a letter of 28 January 1979 to the Iranian Navy) clearly show that even under the revolutionary circumstances toward the end of 1978 and in early 1979, which Stanwick claimed had "resulted in the rapid depletion of [its] financial assets in the United States", Stanwick knew that it could look only to "the dollar credits from the current contracts" for transfer abroad, and that the transfer of any quantity of foreign currency had to be arranged by the Armed Forces through Bank Markazi. The last payment, even in that "critical financial" and revolutionary situation, was credited by Bank Markazi to Stanwick's account in the United States on 20 March 1979, pursuant to Stanwick's request dated 28 January 1979 and on instructions from the Navy.

Either toward the end of the first half of 1979 or early in the second half thereof, Stanwick conceived the idea of transferring out of Iran the balance in its rial accounts, apparently due to delayed receipt of dollar payments under its contracts with the Air Force and Navy, and pending disposition of those payments. To this end, Stanwick referred initially to the Iranian banks with which its accounts were held; they, in turn, advised it to refer to Bank Markazi to obtain permission for such transfer.[10] Stanwick then acted accordingly by requesting, in its letter of 6 July 1979 (sent with a covering letter dated 7 July 1979), that Bank markazi agree to transfer most of the funds in Stanwick's rial accounts. To justify its request, and aware of the terms of its contracts with the Navy and Air Force, Stanwick gave a brief explanation of its accounts, and

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7 See the articles of the contracts cited in n. 6 *supra*; also note 4 to the Award in *Stanwick*.

8 Para. 39, Statement of Claim, filed on 17 November 1981.

9 See n. 6 *supra*.

10 For some time following the Revolution—i.e. until sometime in December 1979—Stanwick had one or two representatives, Messrs. BILLS and STAUNCH, in Iran. Such actions, consisting of, *inter alia*, contacting the two Armed Forces, the Ministry of Defence, and Bank Markazi, Bank Mellat and Bank Tejarat, were carried out through those individuals. (In this regard, see Doc. No. 51 p. 11, filed with the Iran-US Claims Tribunal on 14 January 1983).

then argued that since, in the course of the revolution and with the establishment of the Government of the Islamic Republic of Iran, it had not received in excess of "3 million dollars (211,800,000 rials)" of the foreign exchange monies owed it under the contracts, it found itself facing such a critical financial situation in the United States that it had to "request the transfer of $825,000 (58,245,000 rials) from its ... Bank Accounts to ... the USA."[11]

On 11 July 1979, Bank Markazi's Foreign Exchange Commission replied (in a note on the cover letter attached to the aforementioned letter) that if the funds in question were in a foreign exchange current account, they should be transferred through the bank concerned; other-wise, the Navy and Air Force "should give their confirmation".[12] Bank Markazi chose this course of action in view of its role as the institution responsible for allocating contractually-specified foreign currency within the framework of the budgets of Government organizations; and given the relevant contractual provisions and the Parties' previous conduct under the contracts—in whose implementation Bank Markazi had played a part; and, most important, in light of the contents of Stanwick's letter which specifically made clear that the applicant sought to export the balance of its rial accounts or, according to its own assertion, to export the rial revenues from its contracts in lieu of its unrecovered foreign exchange revenues.

With no objection or protest whatsoever, Stanwick proceeded to act in accordance with the directive of the Foreign Exchange Commission, by sending the letter dated 25 July 1979 wherein it requested the Navy to notify Bank Markazi that it agreed to the transfer. Documents also confirm the fact that Stanwick subsequently provided the Navy with further information, in response to a request by the latter. However, the case file and the available evidence neither explain Stanwick's failure to refer to the Air Force in order to obtain its consent, nor reveal the Navy's final position *vis-à-vis* this request. For the main part, this ambiguity arises from the fact that Stanwick's claims against the Navy and Air Force and the Ministry of Defence were settled at an early stage in the proceedings. It is in any event certain, and relevant to the subject at issue that Stanwick never referred to Bank Markazi thereafter, either to protest the Commission's directive, or to report the results of its actions, or to make a renewed request for transfer of funds, based on whatever reason it might have had.

Subsequently, on 8 January 1980, Stanwick sent telexes to Bank Mellat and Bank Tejarat, wherein it informed them that so far Bank Markazi had not responded affirmatively to its request of 7 July 1979 for a permit.[13] However, a

11 Para. 9, Award in *Stanwick*.
12 Ibid para. 11.
13 Ibid para. 13.

short time later (on 18 March and 15 April 1980), ignoring such events as the fact that it had been the banks themselves that had advised Stanwick to refer to Bank Markazi, that Bank Markazi had not yet issued its permission to export the funds in its accounts, and the fact that the banks were well aware of the course of events, Stanwick sent virtually identical telexes to Bank Mellat and Bank Tejarat, respectively, requesting information on the balances in its accounts and asking them to transfer the balances in its "accounts *in dollars at the current official exchange rate* to ... Riggs National Bank of Washington."[14] The banks were unable then or subsequently, to comply with Stanwick's request for transfer of funds, other than to provide the information requested. In its response dated 5 April 1980, Bank Mellat informed Stanwick that in view of current exchange regulations, the bank was unable to make any transfer abroad of the funds in its accounts.[15]

On 17 November 1981, Stanwick filed a statement of claim against the Government of the Islamic Republic of Iran, the Ministry of Defence, the Air Force and Navy of the Islamic Republic of Iran, Bank Markazi, Bank Tejarat, and Bank Mellat. Aside from other relief sought, such as the cost of relocation of Stanwick's personnel to the United States and recovery of deductions withheld to secure payment of Social Security contributions, the demand for approximately $3,070,000 for outstanding debts denominated in dollars under the 1977 contract constituted the principal claim against the Navy. As for the principal claim against the Air Force (aside from the claim for deductions withheld to secure payment of Social Security contributions), it consisted of a claim for approximately $531,000 for outstanding dollar-denominated debts under the 1978 contract. In actuality, these two amounts made up the very monies that were owed in foreign currency under the contracts and whose payment had been delayed, causing Stanwick by its letter of 6 July 1979 (see at pp.73–74 *supra*), to request Bank Markazi approve the transfer of the funds in its rial accounts out of Iran in lieu thereof, in order to prevent its financial position in the United States from deteriorating further.

The claims against the Ministry of Defence, the Navy and the Air Force were settled pursuant to the settlement agreements which underlie the partial Awards on Agreed Terms,[16] by payment of a total of $3.7 million. These respondents were thus stricken from the case.[17] In this way the Armed Forces, parties to the contracts, performed in full their obligations under the contracts

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14 Ibid para. 14 (emphasis added).

15 Bank Tejarat denied having received the telex requesting transfer of the monies, but in any event it adopted a position similar to that of Bank Mellat from the beginning of the proceedings; namely, that the governing exchange regulations did not permit the transfer of foreign exchange abroad, without permission from Bank Markazi, just as it had informed Stanwick when the latter contacted it in 1979.

16 Awards No. 83-66-1 and 101-66-1, Iran-USCTR Vol. 4, 20; and ibid. Vol. 5, 76, respectively.

17 See para. 3, Award in *Stanwick*.

with Stanwick for the purchase and sale of services and goods, by paying every cent of their contractual debts.

3. WHERE DOES RESPONSIBILITY FOR SEEKING APPROVAL FOR TRANSFER RESIDE?

In para. 38 of the Award in *Stanwick*, the Tribunal held that there was no useful distinction to be made between the separate banking transactions "with respect to the depositary banks" obligation to seek necessary approval of Bank Markazi ..." It would have been reasonable, in order to determine the nature of the banks' statutory or contractual responsibility, first, to inquire whether an obligation had in fact arisen; and second, if such obligation was founded upon a contract, to determine the nature of that contract and how the obligation arose therefrom. From the contents of para. 38, as well as para. 40 of the Award, it is clear that the Tribunal did not follow that approach. The Tribunal's statement referred to apparently served the purpose of avoiding an issue which, had it been addressed, would have led it to a radically different conclusion.

3.1 The banks had no contractual responsibility to seek approval for the transfer

The Tribunal appears to have been confused by needless abstractions that were the creation of its own trend of reasoning. Having recognized in para. 38 of the award that in order to determine liability, the question "whether Bank Mellat and Bank Tejarat met their obligations under the deposit agreements with Stanwick" must first be answered. The Tribunal then proceeded immediately in the same paragraph and also in para. 40 of the Award, without adducing reasons therefor, to reach the conclusion that Stanwick's request for the transfer of the balance in its accounts abroad

> "triggered the banks' obligation under their deposit agreements with Stanwick to take all appropriate steps to effect the exchange and transfer of funds".

Such a finding should surely have been reached only after proof of the existence of an agreement placing such an obligation upon the banks.

The depositary agreements contained no provision that would give rise to such an obligation on the part of the banks, or indeed any obligations beyond those that arise from its fiduciary relationship. Even if such an obligation had existed, it could scarcely have been made the basis for holding, as the Award appeared to do, that the banks should have carried out a transaction that

violated the exchange regulations of a member of the International Monetary Fund (the "IMF").[18]

Whatever the nature of the relationship between Stanwick and the banks, whether called deposit,[19] loan,[20] or more generally, "agency and trusteeship",[21] the banks were obliged only "to restore [to the owner of the account] the equivalent (in quantity, kind and description) of that which it had received."[22]

Stanwick's contemporaneous actions, for instance, its conduct in 1979 and its direct recourse to Bank Markazi and the Navy and Air Force, confirm that the banks had no contractual obligation to convert the funds in its accounts and to transfer them abroad, and that the claimant itself did not believe that any wider obligation existed.

3.2 The banks had no statutory obligation to seek approval for transfer

The ambiguity of para. 38 of the Award in *Stanwick* tend to confuse two types of obligation: the contractual and the statutory. Whereas the first part of the paragraph can be construed to mean that the banks had a contractual obligation to convert the funds in the rial accounts into dollars, the latter part of the paragraph (where the majority moves on to discuss Bank Markazi's Circular No. 11600) implies that the banks had a statutory obligation, pursuant to that circular, to convert rials to foreign currency and to transfer the latter abroad. Yet, even a brief consideration of the circular's import and content does not lead us to such a conclusion.

The award seems to imply—but falls short of stating—that the provisions of Circular No. 11600 of 4 November 1978 are exchange control regulations, and not restrictive regulations prohibiting current transactions.[23] Pursuant to this

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18 See J. GOLD, *The Fund Agreement in the Courts* (hereinafter GOLD) Vol. 1 p. 86; Vol. 3 pp. 92, 233; and Vol. 4 pp. 203, 205, 226–227. See *infra*, part 4.5 and sources cited in n. 120.

19 SEYYED HASSAN EMAMI, *Hoquq-e Madani* [Civil Law], Vol. 2 (5th ed.) p. 178; F. NASSER KATOOZIAN, *Hoquq-e Madani—Review of Specific Contracts* (3) (1st ed.) (1364/1985) pp. 72–73.

20 SEYYED HASSAN EMAMI, loc cit; NASSER KATOOZIAN, op. cit. pp. 73–74.

21 NASSER KATOOZIAN, op. cit., p. 75.

22 SEYYED HASSAN EMAMI, loc. cit; NASSER KATOOZIAN, op. cit. pp. 72–75. Aside from the special character of the fiduciary relationship between the bank and the holder of the account, in Part 5 of the present article the author will elaborate on the money of account and the money of payment, and on the rule that a contract is considered performed once the money of payment is that of the account. In this connection, it does not matter whether the contract constitutes a contract for which a name has been assigned to them by law (e.g. sale, hire etc) or a contract not so named.

23 In as much as Iran is an Article XIV member of the IMF Agreement, it will be immaterial, as we shall see, whether we qualify the exchange regulations imposed by Bank Markazi as measures controlling or restricting exchange transactions. This is because, as an Article XIV member, Iran was and is entitled to maintain exchange restrictions, even with respect to current transactions, and

circular, the banks could, provided that they observed the provisions of the circular of Bank Markazi—whose control and supervision under the critical situation prevailing from the time of the Revolution was of vital importance in preventing the drain of money from the country—still engage in the "sale of commercial foreign exchange for importation of goods." The list attached to Circular No. 11600 permitted the sale of foreign exchange for the uses set forth in the annex, and as the award noted, item 4 thereof covered the "sale of foreign exchange for services *based on contracts* concluded between domestic and foreign enterprises ... with (prior) *authorization by Bank Markazi.*"[24] And finally, item 14 of the list stated that the "sale of commercial foreign exchange for purposes other than specified above shall in all cases be subject to prior authorization by Bank Markazi, Iran."

There is nothing in this circular or the attached list that could be invoked to place on the banks the burden of seeking Bank Markazi's approval, upon being approached by any applicant for foreign exchange, just as the provisions of the circular cannot be construed as preventing an applicant for a foreign exchange permit from seeking it on his own initiative.[25]

The language of para. 38 of the Award in *Stanwick* might be interpreted as meaning that since Circular No. 11600 addressed itself to the banks, the banks had a contractual or statutory obligation in this connection. However, any interpretation of the circular as somehow impliedly incorporating additional obligations into the customers' contracts with the banks can hardly be sustained. Contractual obligations cannot arise except in accordance with the

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cont.

to adapt them to changing circumstances. In the circular in question, and also in a subsequent circular of Bank Markazi, No. 2090/5 dated 5 May 1979, permission was given, upon observance of the provisions of the circular, for the sale of foreign exchange for numerous kinds of transactions and needs, *inter alia*, authorized services by foreigners on the basis of contracts for engineering, expert, technical, consulting, and other services; for the purchase of authorized goods; for repaying the principal, interest and costs on loans obtained from abroad with the permission of Bank Markazi; and for profits from transport operations, reinsurance premiums, dividends on shares held by foreign shareholders in insurance and banking companies, rental fees on machinery and equipment, and payment of medical and educational expenses. This confirms, upon a comparison with Article XXX of the IMF Agreement, that payments for current transactions have not been restricted, but instead only placed under Bank Markazi's control and supervision. Indeed, the circular goes further yet, and even permits the transfer of capital (and the profits thereon) brought into Iran on the basis of the Law for the Attraction and Protection of Foreign Capital.

24 Emphasis added.

25 See award of 14 March 1990 in *Ali Asghar* (United States of America on behalf of its national) *and The Islamic Republic of Iran* (hereinafter, *Ali Asghar*), Award No. 475-11491-1, para. 18, 24 Iran-USCTR 238 at 244. In this case the same Chamber One of the Tribunal (but chaired by Judge BROMS) ruled that in the absence of a contractual or statutory obligation, when the depositary bank instructed the claimant "to contact Bank Markazi Iran, then [he] had an obligation to do so in order to obtain permission for the transfer. Bank Melli was not the bank to be contacted with a request for an exchange transaction."

mutual intent of the parties concerned. While it is true that the law might provide rules of interpretation for cases where the text of a contract is silent, such an eventuality is irrelevant here, particularly because the circular contained no language whatever which could be thought to replace the parties' intent or to interpret their silence. Rather, the circular explicitly required the applicant and the banks to observe the terms of the contracts on the basis of which the transfer is requested.

There is no basis in law for implying a statutory obligation from a circular which lacks any such express or implied directive, in particular where the legislator has refrained from stating any such directive even when in a position to do so. On the other hand, there are numerous indications that support a contrary interpretation, including the banks' advice to Stanwick to direct its request to Bank Markazi, the fact that Stanwick did actually do so in order to obtain authorization and that Stanwick followed up the matter by addressing the two Armed Forces and the manner in which Bank Markazi reacted in regard to Stanwick's independent application. Bank Markazi treated Stanwick's application not as infringing the regulations, but as being in conformity with them, seeking further information and making a distinction between cases where the funds were in a foreign exchange current account and where the current account was denominated in rials and, finally, referring Stanwick to the depositary bank only where the account was denominated in foreign exchange.[26]

From the foregoing it would appear that none of the banks were obligated to refer the application to Bank Markazi for authorization. Indeed, it is difficult to see how Chamber One of the Tribunal could base its award in *Stanwick* on such an interpretation while the same Chamber in the same composition, was already aware in *Grune and Stratton, Inc.* that a private firm, wanting to transfer foreign exchange, had a duty to apply to Bank Markazi in order to obtain a "currency transfer licence"; and when it had obtained the foreign exchange transfer licence, present it at the Iranian bank with which it held the account and, by paying the rial equivalent of the foreign currency sought, proceed with the transfer of the funds.[27]

3.3 The banks were under no obligation to refer Stanwick's request to Bank Markazi

Where, as in the present case, the claimant initially requested the banks to seek approval for the transfer of funds in its rial accounts, justifying the request

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26 Para. 11, Award in *Stanwick* and *supra*, text at n. 10.

27 *Grune and Stratton, Inc* (the United States of America on behalf of its national) *and The Islamic Republic of Iran*, Award No. 359-10059-1, 18 Iran-USCTR 224, at 228–229.

on the ground that it was in dire financial straits; where the banks advised the applicant to obtain authorization from Bank Markazi; and where the banks were informed at every stage, through Stanwick's representatives in Tehran and by correspondence, of the progress of—or rather the impediments facing—the transfer of the funds in the accounts, it would seem futile to expect the banks to approach Bank Markazi directly.

The Award itself seems to recognize the unreasonableness of such an expectation. It states in para. 40 that the banks could have relieved themselves of responsibility by demonstrating either that they had sought approval, or else that "their application would have been, anyhow, denied under the [exchange] regulations if they had made such application," observing in the same paragraph that "Bank Mellat and Tejarat have not made such a showing here." In this way, several paragraphs later, the Award in effect forgets the facts which it already found in paras. 9–13, (i.e., that the banks were fully informed as to what the claimant was doing) and fails to note that the claimant itself informed the banks by its telexes of 8 January 1980 that "to date," it had not received authorization "from Bank Markazi in response to its request of 7 July 1979". There is therefore, given the continuous validity of the relevant circular,

> "no sufficient evidence that [the claimant] suffered damages as a result of any possible negligence, as there is no showing that the required permission which was denied in [July 1979], would have been granted by Bank Markazi at any [other] point of time"[28]

If, for the sake of argument, we were to construe the ambiguous sentence in the *Stanwick* award as meaning that the Tribunal wished to place on the respondent banks the burden of demonstrating that Iran's exchange regulations conformed to the provisions of the IMF Agreement, then the Award could be open to further criticism. The first ground for questioning such a position would be the failure of the award to take into account of the fact that the majority [in the Chamber] based its finding against the banks on the premise that they failed, in violation of their statutory/contractual obligation, to refer to Bank Markazi to obtain a permit. Second, in such an event, the majority would have totally failed to take note of the well-established rule in international law that the courts cannot leave it to the parties to invoke exchange regulations but are, rather, required to make an *ex-officio* determination as to their existance.[29] Third, the Award should have taken

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28 *Hood Corporation and The Islamic Republic of Iran et al*, (hereinafter, *"Hood"*, Award No. 1452-100-3), 7 Iran-USCTR 36, at 43.

29 See, e.g., *Mark Dallal and The Islamic Republic of Iran, Bank Mellat*, Award No. 53-149-1 (hereinafter, *"Dallal"*), 3 Iran-USCTR 10 at 14, 16; and the following awards cited in GOLD: the British award in *Batra* v. *Ebrahim* (Vol. 3 p. 60; Vol. 2 pp. 258–259; Vol. 4 p. 180); the award dated

into account that the conformity of the exchange regulations with the provisions of the IMF Agreement is legally presumed,[30] and that to make such a presumption it suffices that the State that has laid down those regulations is a member of the IMF, and that the Fund has made no representation or recommendation to that member concerning the maintenance of or amendments to the said regulations. The corollary to such a presumption is that the burden of proving nonconformity lies with the party seeking to enforce an exchange contract. In other words, that party bears the burden of proof that the exchange contract is enforceable,[31] a rule which is entirely in conformity with the recognized scope of the exercise of sovereign rights, and the Act of State doctrine.[32] Fourth, the most that could be expected of the respondent was that it proved the existence of exchange regulations making the transfer of bank account funds conditional upon authorization from Bank Markazi, a point that was not in dispute between the Parties in the *Stanwick* case.

The Award also appears to have failed to take into account the highly crucial and fundamental fact of two categories of agreements involved in this case. One category consisted of the contracts with the Navy and the Air Force, which could not be invoked against the banks. Even if they could, their terms and conditions (such as the currency in which the obligation was denominated and the limitation of the foreign exchange portion of the contracts) would have to be taken into account (as directed by item 4 of the list annexed to Circular

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8 July 1974 by the Berlin court (*Kammergericht*) (Vol. 4 pp. 263–268); the Argentinian award in *Citibank NA* v. *Narbaitz Hnos. Y. Cia. S.C.A.* (Vol. 4 pp. 189–203); and the award in *White* v. *Roberts* (Vol. 1 pp. 87–90). See also OTTO SANDROCK, "Are disputes over the application of Article VIII, section 2(b) of the IMF Treaty arbitrable?", 23 *The International Lawyer* p. 933 at 938–939; and *United City Merchants (Investments) Ltd et al* v. *Royal Bank of Canada et al* (1982) 2 W.L.R. 1050; (1982) 2 All E.R. 729. By and large, the courts have invoked the language "shall be unenforceable" of Article VIII, s 2(b) of the IMF Agreement, in arriving at this conclusion.

30 BERNARD S. MEYER, "Recognition of Exchange Control after the International Monetary Agreement", 62 *Yale Law Journal* (1953) 867–910; *Wilson, Smithett & Cope Ltd* v. *Terruzzi* (1976) 1 G.B. 683 at 696; *Callejo* v. *Bancomer SA*, (1985) 764 F. 2d 1101 at 1119. In this connection, in 1948 the IMF Legal Department interpreted Article VIII, s 2(b) as meaning that:

> "Since the exchange control regulations of a member will normally be maintained or imposed consistently with the Articles of Agreement, courts should presume, ... that this is the position unless the Fund has declared otherwise." *International Monetary Fund 1945–1965*, Vol. 1 ed. by J.K. HORSEFIELD pp. 209–210.

31 See *Dallal*, loc. cit. n. 29, 13; Berlin *Kammergericht* cited *supra* n. 29 Hamburg *Oberlandesgericht* 5 July 1978 cited in GOLD, Vol. 3 p. 275; Hamburg *Landesgericht* 24 February 1978, cited in GOLD, ibid. p. 271, and BERNARD S. MEYER, loc. cit. n. 30.

32 *French* v. *Banco Nacional de Cuba*, 295 N.Y.S., 2d 433, 442; 23 N.Y. 2d (1968) 46, 55–56; *Weston Banking Corporation* v. *Turkiye Garanti Bankasi A.S.* 456 N.Y.S. 2d 684; *Braka et al* v. *Bancomer S.A.*, (1984) 589 F. Supp. 1465, 1473; *Allied Bank Case* (1984) 733 F. 2d 23; see also GOLD, Vol. 3 pp. 161–167, 403–407; and the sources cited *infra* nn. 46–52.

No. 11600[33]). So too would the fact that the foreign exchange obligations under this category of contracts had been fully paid pursuant to the awards issued on the basis of settlement agreements.[34] The other category of agreements consisted of the accounts with the banks, whose special terms had to be observed. Their balances were in the nature of capital, regardless of the original sources of the funds, and any transfer of those monies would have constituted a transfer of capital.[35] Article 5 of the terms and conditions of the current account (produced in evidence) demonstrates that the Parties were agreed that the funds in the bank accounts were, even if maintained in foreign currency, subject to the prevailing Iranian regulations—which certainly included Iran's exchange regulations.[36] It is worth noting that the last agreement between the banks and Stanwick (which was at issue in the present case) was concluded on 5 March 1979, (i.e., subsequent to the issuance of Circular No. 11600); moreover, Circular No. 2090/5 was issued before steps were taken to transfer the funds abroad.

Another important aspect that appears to have been overlooked, is that according to the statements of account (filed as Exhibit 1 to the Claimants' "Index of Documentary Evidence and Attached Exhibits upon Which Claimants Seek to Rely, and a List of All Documentary Evidence Submitted in this Case" (on 10 October 1986)), at various points of time during the relevant period there were only insignificant amounts of money in the current accounts to which the transfer request related. Until late 1979 and early 1980, most of the funds were being kept in fixed deposits and had not yet been transferred to the current accounts.[37]

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33 Para. 38 of the Award in *Stanwick*, and *supra*, text at n. 24.

34 Para. 3 of the Award, and *supra*, text at nn. 16 and 17.

35 See *infra*, Part 4.3 (especially text at n. 90 and nn. 90–91.

36 Since the law of both the contract and the currency involved, and that of the rights and obligations of the owners of accounts are part of the same legal system which also governs the money of account, Iranian law governed the relations between the banks and the owners of the accounts therein (*see infra*, text at nn. 112–115). Being cognisant of the terms of the IMF Agreement, particularly Article VIII, 2(b) and the definitions given of "exchange transactions", and, finally, in recognition that the regulation of the State to which the currency belongs governs the currency involved in the transaction (no matter which law applies to the contractual relationship), Article 5 of the terms and conditions of Stanwick's current account agreement recognized that the funds in Stanwick's foreign currency accounts (if any such account existed) were subject to the laws of Iran and of the State to which the foreign currency belonged.

37 The claimant did not meet its burden of proof that it could have withdrawn and transferred abroad the funds in the fixed deposit certificates before they matured (para. 20 of the award in *Ali Asghar*, cited *supra* n. 25, and para. 8 of the Separate Opinion to the award in *Ali Asghar* by Judge HOLTZMANN). This point is further evidence corroborating the fact that the claimant's transfer application was in reality a request to transfer capital funds. The banks' answer to the transfer requests, to the effect that they were unable to honour the requests in view of the prevailing exchange regulations should not be construed as meaning that it would be possible to make the withdrawal from the time deposits before their date of maturity, because in such circumstances,

3.4 The precedents invoked in the Award

In the absence of contractual or statutory provisions requiring the depositary banks to perform any other function than to maintain Stanwick's rial accounts and to pay the funds kept therein,[38] the Award in *Stanwick* relies on certain Tribunal precedents as the basis for determining that such an obligation existed. A brief examination of these precedents follows.

The main precedent on which the Award relies, is that of *Benjamin R. Isaiah* (hereinafter "*Isaiah*").[39] In that case, Bank Mellat had agreed to issue, and did in fact issue, after receiving the rial equivalent thereof, a dollar-denominated cheque drawn on the Chase Manhattan Bank, to be paid in the United States. According to the Bank's initial pleading, the cheque was dishonoured for the sole reason that the American bank

> "suddenly withdrew the credit facilities which it previously had made available to Bank Mellat, and that the latter made unsuccessful efforts to restore its credit facilities with Chase Manhattan bank so that the cheque could be paid."

The Tribunal found that explanation inconsistent with the respondent's subsequent plea of an "impediment to payment which would allegedly have resulted from Bank Markazi Iran's position as to the operation of exchange control in this case."[40] It is clear that the Tribunal, in reaching that conclusion, took into account the particular facts of the case, which were not in any sense comparable with those in the *Stanwick* case. Moreover, the fact that the bank issued the dollar cheque without any objection apparently convinced the Tribunal that when it issued the cheque, the bank was either operating according to authorization or else had obtained it, or at least the bank did not deem it necessary to obtain such authorization.[41] In the *Stanwick* case,

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"[t]he International Division [of the banks would] not find it necessary to forward the [requests] to the branch concerned", and in answering queries, they did not take additional problems and impediments into account." (*American Housing International Inc. and Housing Co-operative Society of Officers of the General Gendarmerie et al*, Award No. 117–199–3, 5 Iran-USCTR 235, 240).

38 See *supra*, text at n. 25.

39 *Benjamin R. Isaiah and Bank Mellat* (Award No. 35-219-2), 2 Iran-USCTR 232.

40 *Ibid*, p. 239.

41 In any event, this award presents numerous problems. First, it is not clear whether the arbitrators in Chamber Two shared a common understanding of the results of the deliberations and of the purport of the award, since on page 11 of the Persian version of the award, it is stated [retranslated by author into English] that "the Tribunal notes that Bank Mellat neither alleged nor proved any refusal by Bank Markazi, pursuant to the circular, to approve the payable foreign exchange which the bank had sought." The Persian text of the award does not expressly state that the bank had an obligation to refer to Bank Markazi, whereas it is stated in the English version of the Award that:

however, from the outset the banks had advised the claimant to apply to Bank Markazi, in order to obtain permission to transfer the funds in its rial accounts.

As for the other two precedents relied on in the award,[42] both of which were handed down by the same Chamber and issued on the same date, it must be noted that

(a) the findings set forth in *Isaiah* served as the supporting pillar for constructing the subsequent ruling in the two cases; and
(b) they did not, apart from referring to the finding in *Isaiah*, invoke any recognised rule or principle of law, or any specific statutory or contractual provision, in order to support their findings.

Instead, the basic technique in the two cases was merely to list, in each award, the numbers of prior awards, and then to invoke them as precedents that ought to be followed by the Tribunal.

In *Computer Sciences* the Tribunal examined two kinds of accounts: rial and foreign currency (dollar) accounts. The issues relating to the funds in the dollar accounts were totally different from the issues in *Stanwick*, while the claims relating to the rial accounts, which could have raised issues analogues to those in *Stanwick*, were dismissed by the Tribunal as having been not outstanding of a date that would confer jurisdiction on the Tribunal.[43]

The award in *Kohler*, which was issued simultaneously with that in *Computer Sciences*, related to funds in current and fixed deposit accounts with Bank Tejarat, and to accrued interest on another account (No. 5264), the principal of which had been transferred abroad. The Tribunal dismissed the claim relating to the transfer of funds in the fixed-deposit and current accounts, as having

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"the Tribunal notes that Bank Mellat neither alleged nor proved any refusal by Bank Markazi of the foreign exchange approval which it was incumbent on Bank Mellat to seek pursuant to the circular." (2 Iran-USCTR at 239)

It must be pointed out that both Persian and English have been designated as the official languages of the Tribunal and of its awards and decisions, with equal weight (Article 17, para. 2 of the Tribunal Rules), and that every matter which is made the subject of an award must be formulated in precise terms in both English and Persian (Article 31, Note 2 to the Tribunal Rules).

Secondly, even if the decision was based on the stated hypotheses, yet it is contrary to the rules of international law and the IMF regulations (*inter alia*, Article VIII, 2(b) thereof), as we shall suggest later.

Moreover, the decision was rendered without differentiating between current transactions and capital transfers, and was thus inconsistent with other awards by the Tribunal, such as the awards in *Dallal* (*supra*, n. 29) and in *Hood* (*supra*, n. 28). Finally, the Award appears to have been based on the theory of unjust enrichment, a theory not applicable in these circumstances. See *infra*, text at nn. 121–122 .

42 *Computer Sciences Corporation* and *The Government of the Islamic Republic of Iran et al* (hereinafter, *Computer Sciences*), Award No. 221-65-1 (16 April 1986), 10 Iran-USCTR 269 and *Ronald Stuart Kohler* (United States of America on behalf of its national) and *Islamic Republic of Iran*, (hereinafter, *Kohler*), Award No. 223-11713-1 (16 April 1986), 10 Iran USCTR 333.

43 10 Iran-USCTR at 302.

been not outstanding on a date which would have conferred jurisdiction on the Tribunal and for lack of jurisdiction.[44] It would appear that the claim against Bank Tejarat for payment of rials 20,000.00 in interest on the funds in account No. 5265 (principal amounting to rials 200,000.00) was granted on the presumption that Bank Markazi's approval had been obtained at the time the principal amount was transferred (para. 30 of the award in *Kohler*).[45]

It has been observed earlier that the Tribunal should have taken into account the special circumstances which clearly distinguished *Stanwick* from the other cases cited. In none of the cases invoked as precedent did the claimant seek to transfer out of Iran contractually-stipulated revenues denominated in rials that were to be received and spent in Iran, in lieu of dollar-denominated monies under such contracts. Moreover, in none of those cases did the Claimants apply independently, as Stanwick did, for authorization from Bank Markazi.

4. THE AWARD IN STANWICK AND THE RULES OF INTERNATIONAL MONETARY LAW

In holding against the banks in *Stanwick* the Tribunal did not give due weight to foreign exchange regulations and may thus be inconsistent with the rules of international law and the provisions of the IMF Agreement, *inter alia*, Articles XIII, XIV and XXIX thereof.[46]

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44 Award in *Kohler*, *supra* n. 42, para. 31.

45 Bank Tejarat did comply with the request to transfer the principal of the funds in account No. 5265. However, if Iran's exchange regulations make the transfer of rials abroad dependent upon authorization from Bank Markazi, or even prohibit such transfer in general, this does not bar the depositary bank or, *a fortiori*, Bank Markazi and the Islamic Republic of Iran, from invoking those regulations, because otherwise "lawful exchange restrictions [would be] made ineffective in individual cases and might thus constitute an infringement on the power of sovereign States." (The award in *Hood*, *supra* n. 28 at 47.) In other words, such payment "cannot render the plaintiff's claim receivable [in foreign currency]." See Maastricht District Court in *Frantzmann* v. *Ponijen*, *Nederlandse Jurisprudentie* (1960) No. 290, GOLD, op. cit. n. 18, Vol. 1 pp. 117–118; Supreme Court of the Federal Republic of Germany, 21 December 1976, cited in GOLD, ibid. Vol. 2 pp. 272–273. Similarly, the Tribunal could not avoid enforcing Article VIII, s 2(b), IMF and the international policy of protecting the currency of an IMF member State, merely by finding that the respondent had not advanced any objection. J. GOLD, "The Iran-United States Claims Tribunal and the Articles of Agreement of the International Monetary Fund", 18 George Washington *JILEc.* 537 at 549, and the sources cited, *supra* n. 29 and *infra* n. 65.

46 For the IMF Articles of Agreement with the latest amendments, see the August 1985 reprint of collected IMF documents.

4.1 The right of a State to determine its financial and monetary policy, and to formulate its own exchange regulations

Under universally accepted rules of international law states may, as a manifestation of their economic sovereignty, determine and regulate their own monetary policy.[47] In this respect states enjoy broad authority to lay down exchange restriction and control regulations, without thereby incurring international responsibility.[48] There is no need to address the argument, advanced by certain well-known and learned jurists in the field of monetary law such as F.A. MANN, ARTHUR NUSSBAUM and J.E.S. FAWCETT, that exchange regulations must neither be discriminatory nor be imposed through misuse of discretion and authority, because the same authors endorse the position that States enjoy broad powers and prerogatives in this area.[49] It is thereby necessary to note, even if only in passing, the following points: first, the right to impose exchange regulations being recognized in principle, the burden of proving their invalidity rests on the party making the claim; and second, the mere existence of similar exchange regulations elsewhere and their recognition by the international community, will suffice to render those regulations, at least *prima facie*, valid and binding.[50]

A special proviso to the aforementioned rule was made by the Permanent Court of International Justice in the *Serbian and Brazilian Loans* case:[51] regulations should not affect the substance of the debt.[52] In the instant case Iran's exchange regulations did not contain provisions by which the underlying obligation (Stanwick's ownership over the funds in the rial accounts) had been

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47 Reference may be had, in this connection, to all of the works and articles written on the subject of "money", *inter alia*, the following sources: F.A. MANN, *The Legal Aspect of Money* (4th ed., hereinafter, MANN) pp. 295, 301–303, 404–405, 465 et seq; M.R. SHUSTER, *The Public International Law of Money* (1973, hereinafter: SHUSTER) pp. 73–75; J.E.S. FAWCETT, "The International Monetary Fund and International Law", BYIL (1964) p. 32 at 48–49; M.M. WHITEMAN, *Damages in International Law* (1964) p. 981; C.C. HYDE, *International Law* (1947) p. 690; PCIJ in *Serbian and Brazilian Loans* (1929): "[I]t is indeed a generally accepted principle that a State is entitled to regulate its own currency", PCIJ Rep. Ser. A, Nos. 20-1 at 44; US Int. Claims Commission in the *Tabar Claim*, I.L.R., pp. 242–243; US For. Claims Settlement Commission in the *Mitzi Schoo* Claim, F.C.S.C. 70th Semiannual Report; the Award in *Hood, loc. cit.* n. 28 p. 47; the position taken by the United States with respect to Chile's foreign exchange regulations, in HACKWORTH, *Damages in International Law* Vol. 2 (1944) p. 68; and the sources referred to *supra* n. 32.

48 See J.E.S. FAWCETT, "Trade and Finance in International Law", ... RdC (1968-I) at 246–247; SHUSTER and other sources cited in nn. 30 and 47; decision in the *Tabar* Claim *supra* n. 47 and *infra* n. 101.

49 SHUSTER, p. 75.

50 SHUSTER, pp. 75–78; GOLD (examining the decision by the Hamburg court cited in n. 31), Vol. 1 pp. 82–86; and other sources cited in nn. 30–31.

51 *Supra*, no. 47.

52 FAWCETT, loc.cit. n. 47.

affected in any way. The respondents had at all stages regarded the claimant as the owner of the funds in the accounts, and had provided Stanwick with information on those accounts, even in the years since the claim was filed. Based on the data directly provided by the Iranian banks in connection with the balance of the accounts the claimant subsequently even increased the amount of the remedy initially sought by its claim. As to the requirement that such regulations not be discriminatory, Iran's exchange regulations are and have always been general, and uniformly applied and enforced with respect to all persons, although some scholars in the field hold that exchange regulations are inevitably discriminatory in nature.[53]

It is generally recognized today that controlling and regulating domestic needs and demands through economic and monetary policies is the most important and effective instrument of States to achieve equilibrium in their exchange reserves and their international payments[54] and to prevent negative effects from export of those reserves.[55] Moreover, even though the principal policy and objective of the IMF agreement is said to be the promotion of cooperation between members, the coordination of their exchange regulations and the steering of their policies towards freedom of exchange transactions, the provisions of the Articles of Agreement nonetheless clearly show that a State's economic sovereignty and its authority to establish its own monetary policies take precedence over those objectives. The IMF's purpose is by no means to do away with every kind of control over exchange transactions, or to prevent imposition of exchange regulations under any circumstance.[56] For this same reason, not only has Article XIV lost its original transitional nature[57] but, as we shall see later[58] the IMF Agreement requires its members and their judicial bodies not to give effect to agreements that violate the exchange regulations of a member State, even if the law of the State whose currency is involved is not, according to the rules of conflict of laws, deemed to be the proper law of the exchange contract in question.[59]

Not only did Iran's monetary and exchange policies govern Stanwick's

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53 MANN, pp. 424–5, and SHUSTER, pp. 85–91; also A. NUSSBAUM, *Money in the Law: National and International* (1950, hereinafter: NUSSBAUM), pp.475–6.

54 See SHUSTER, p. 41, and FAWCETT, loc.cit. n. 47 at 59.

55 The (IMF) Articles of Agreement, the GATT and the 1948 Havana Charter, all permit States to take any necessary measures to prevent problems which might disrupt their economic equilibrium and monetary stability.

56 See SHUSTER p. 41; MANN p. 518; see also the decisions in *Braka* v. *Bancomer* and in *Batra* v. *Ebrahim* and the ruling by the Dusseldorf court in GOLD, Vol. 3 pp. 165, 180, 278.

57 See SHUSTER, p. 139 *et seq.*

58 Section 4.5 *infra.*

59 See the IMF's Interpretative Decision No. 446-4, dated 10 June 1949, cited in the *IMF Annual Report (1949)*, pp. 82–83; also in *Selected Decisions of the International Monetary Fund and Selected Documents* (11th issue, 30 April 1985). See also the award in *Dallal*, loc.cit., *Supra* n. 29 at 14.

relations (agreements, money of account and payment) with the banks and the Air Force and Navy through exchange and currency regulations, but Stanwick had notice of these facts from the time its contract for the purchase of goods and services were executed. Accordingly the claimant must be taken to have accepted those policies and restrictions when concluding the contracts with the Air Force and Navy which permitted payment of only 75 per cent, or else a specified amount, of the contractual price in the form of foreign currency (dollars). If Stanwick had insisted from the outset upon receiving a larger percentage or all of the contractual price in the form of foreign currency, it was likely that it would not have been awarded the contracts; or, if the contracts were awarded, the Plan and Budget Organization and Bank Markazi, as the organs responsible for making budgetary allocations and earmarking the amounts of foreign currency needed for Government projects as well as for regulating monetary and banking policies, would have barred the contracts from being implemented.

The purpose of subjecting contracts to the above restrictions was to balance income and expenditures and also to stimulate the domestic market, matters of critical importance for all States, especially developing countries. The provisions of the IMF Agreement, and, similarly, those of GATT (*inter alia*, Article XII) allow member States (even States with developed economies) to restrict the importation of goods and services based on their own interest, in support of and to safeguard their external financial position and to protect their purchasing power.[60] Article XVIII of GATT, essentially gives preference to the domestic and local policies of developing countries over the policy of international cooperation. It is remarkable that this recognition of the prerogative of developing countries is not contingent upon a decline of a country's reserves, nor upon proof that a threat of such decline is imminent.[61]

4.2 Bank Markazi is the authority that establishes Iran's monetary policies

The authority and competence to determine financial monetary policy and to regulate exchange transactions is usually vested in a State's central or reserve bank, or in its Ministry of Finance or Treasury.[62] Initially, pursuant to the Law

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60 See SHUSTER, pp. 156–162.

61 Ibid, pp. 162–163. In interpreting the term "involve" in the provisions of Article VIII, s 2(b) relating to the unenforceability of exchange contracts, courts would enquire only whether the exchange contract "involve[s] the currency of [a] member", and not whether there was an impact on the exchange reserves of that State (New York Court of Appeals in *Banco do Brasil S.A.* v. *A.C. Israel Commodity Co. Inc. et al*, in: GOLD, Vol. 2, pp. 22–23 and Vol. 3 pp. 67–68). Inadequacy or shortage of the currency involved is not a requirement for imposing exchange regulations (see also MANN, p. 392).

62 SHUSTER, p. 30.

Entrusting Foreign Exchange Transactions to Bank Melli Iran (enacted 15 March 1958), the responsibility for "maintaining the equilibrium of the country's foreign exchange and for supervising the enforcement of" this policy, was entrusted to Bank Melli Iran; and "to this end, the authorized banks [were] required to observe and enforce the exchange directives issued by Bank Melli Iran" (Article 2 of the Law). Similarly, Article 12 of the Bylaw for the Implementation of the Law Entrusting Supervision over Exchange Transactions [to Bank Melli Iran] provided that

> "to maintain the foreign exchange balance and to ensure the necessary foreign exchange, no natural or juridical person has the right to accept any undertaking whatsoever to pay foreign exchange, to guarantee payment of foreign exchange, or to carry out futures transactions, without obtaining the approval of the Bureau for the Supervision of Foreign Exchange ..."

In 1960, Bank Melli Iran's authority was transferred in full to Bank Markazi under Article 2(c) of the National Monetary and Banking Law. Subsequently, with the passage of the Monetary and Banking Act of Iran (ratified 18 July 1972), the responsibility for "regulating and implementing monetary and credit policy, with due regard to the country's general economic policy," remained with Bank Markazi Iran (Article 10 Law of 1972). According to Article 11(c) of the Law, Bank Markazi was also given the specific responsibility for "formulating regulations relating to foreign exchange transactions ... and for the control of foreign exchange transactions.[63]

Pursuant to Article 37 of the National Monetary and Banking Law, Iranian banks are obligated to,

> "respect the provisions of the law and the pertinent bylaws issued on the strength of the law, and also the directives issued by Bank Markazi Iran pursuant to this law or its bylaws ..."

and are forbidden to carry out

> "any banking operations resulting in the transfer of foreign exchange or giving rise to foreign exchange obligations ... without observing the regulations laid down by Bank Markazi Iran pursuant to Article 11 ... ".

Violators would be held liable for payment of pecuniary penalties (Article 42(a) of the National Monetary and Banking Law).

From the foregoing it would appear that the Tribunal's finding against the banks is inconsistent with a substantial body of peremptory regulations that

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63 The Tribunal has, in a number of awards, taken note of this authority of Bank Markazi Iran. See, *inter alia*, the award in *Dallal* (*supra* n. 29 at 14), and *Hood* (*supra* n. 28 at 44).

requires banks to respect and enforce Bank Markazi's directives and circulars. No foreign exchange laws and regulations contain provisions that would permit banks to question regulations duly formulated by a competent supervisory organ such as Bank Markazi; and so far no court has regarded banks as competent to do so, or as being required to provide their customers with explanations when implementing such regulations.[64] Nor are the courts of an IMF member State entitled to disregard the international protection of the Member's currency provided for under Article VIII, section 2(b), even where the respondent has failed to prove the existence of valid exchange regulations, or has fallen short by not raising any defence.[65]

4.3 Iran is an IMF Member under Article XIV of the Articles of Agreement

Article XIV, section 1 provides that every member can, upon accepting membership in the IMF, specify those terms and conditions under which it is adhering to the Fund. In the event that it declares its accession to Article XIV, a member may:

> "[n]otwithstanding the provisions of any other articles of this Agreement, maintain and adapt to changing circumstances the restrictions on payments and transfers for current international transactions that were in effect on the date on which it became a member." (Article XIV, section 2)[66]

From among the 155 members of the IMF in 1991, 85 countries had continued to remain members under Article XIV, while 70 had accepted Article VIII of the Agreement.[67]

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64 Even in a case where a [Mexican] bank undertook to pay in dollars pursuant to a deposit agreement, the New York Court of Appeals ruled that:

> "were we [the court] to issue the order they [plaintiffs] seek [in compliance with the contract obligation], we would find ourselves directing a State-owned entity to violate its own national law with respect to an obligation wholly controlled by Mexican law. This would clearly be an impermissible "inquiry into the legality, validity, and propriety of the acts and motivation of foreign sovereigns acting in their government roles within their own boundaries." (GOLD, Vol. 3 p. 166).

65 GOLD, Vol. 1, pp. 82, 117–118; see also sources referred to *supra*, in n. 29.

66 Article VI, s 3 of the IMF Agreement permits all members, whether covered by Article VIII or Article XIV, to "exercise such controls as are necessary to regulate international capital movements."

67 See the *IMF Annual Report* (1991) pp. 101, 150–152.

The right to remain a member under Article XIV has existed since the IMF came into being.[68] An examination of the IMF's practice shows that it is not easy to shift from membership under Article XIV to membership under Article VIII. Such a shift involves passing through certain stages, completing particular procedures, and meeting certain qualifications.

In particular, it should be noted that it is the member Government's sole prerogative to relinquish membership under Article XIV and to accept responsibilities under Article VIII.[69] Accordingly, a member cannot be deemed to fall under Article VIII contrary to its express intent and merely on the basis of an interpretation of certain asserted conduct. States have also been advised to exercise caution and prudence by consulting with the Fund prior to deciding to accept the obligations of Article VIII. In taking this conscious decision, Article XIV members must first eliminate all those measures and regulations that they have maintained or applied under Article XIV, and "satisfy themselves that they were not likely to need to have recourse to such measures in the foreseeable future."[70] Finally, after completing these arrangements, members must formally notify the IMF of their acceptance of responsibilities under Article VIII, and in doing so "notify the Fund that they accept the obligations under Article VIII, sections 2, 3 and 4, and no longer avail themselves of the transitional provisions of Article XIV."[71] It was precisely in the light of the implementation of this policy that the declaration of adhesion under Article VIII by a number of States in 1961 could be accepted only after a one-year examination.[72]

Iran adhered to the IMF Agreement as a member under Article XIV. It has never withdrawn from that Article and has never adhered to Article VIII.

At no stage did Iran enter into consultations with the IMF for the purpose of changing its exchange policy with a view to accepting membership under Article VIII. Nor has it ever announced such acceptance, either formally or informally, to the IMF. Iran has filed its annual reports concerning its exchange control regulations every year with the Fund, as a member under,

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68 In its investigations, the IMF has concluded that it cannot announce the end of the so-called "transitional period" (of membership under Article XIV), and that "some countries could, if they wished, continue under Article XIV more or less indefinitely." HORSEFIELD op.cit. n. 30, Vol. 2 p. 284.

69 Ibid, pp. 284, 288.

70 Ibid, p. 288; see also the IMF Decision No. (6-/27) 1034) dated 1 June 1960, in HORSEFIELD op.cit. Vol. 3 pp. 260–261

71 Ibid. See also GOLD, Vol. 1, p. 116; and MANN, p. 396.

72 Following a long and intensive examination of applications whereby a number of States sought membership under Article VIII in 1960, the IMF finally accepted Saudi Arabia, Peru, Belgium, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Sweden and Great Britain to membership under Article VIII, in February and March 1961. HORSEFIELD, op.cit. n. 30 pp. 289 et seq.

and in compliance with, Article XIV.[73] Those regulations are reflected by the IMF in its Annual Reports.

There have been efforts, before the Tribunal, to represent certain instances of flexibility and relaxation shown by Iran since 1974 as constituting a sort of departure from its membership under Article XIV and as indicating its membership under Article VIII. These arguments are based primarily on

(a) the contents of a letter of 22 July 1983 from Mr NICOLETOPOULOS, the then Director of the Fund's Legal Department;[74]
(b) statements made by Sir J. GOLD in one of his articles;[75] and
(c) the IMF's Interpretative Decision in the *South Africa Case*.[76]

As to the first two bases, it should be noted that Mr. NICOLETOPOULOS made two general statements in his letter, without attempting to find a relationship between them and Iran's exchange regulations and without taking up the issue directly. First, he stated that when a member state has eliminated a restriction under Article XIV, they cannot be reintroduced under that same Article unless permission as provided for in Article VIII is obtained. This general point, which is also stated in different language by Sir J. GOLD, only confirms the obvious fact that a withdrawal from membership under Article XIV cannot be reconciled with the reimposition of exchange regulations permitted under that same Article. However, Mr. NICOLETOPOULOS did not specify (as will be shown below) at what stage, and under what circumstances, the elimination of an exchange regulation can be regarded as constituting withdrawal from membership under Article XIV or as a bar to its reinstitution—or as its adaptation to the changed circumstances, to put it more precisely. The second general point addressed in the letter, a point to which GOLD also refers,[77] is that publication of exchange regulations in the IMF's Annual Reports does not constitute or indicate the Fund's approval of such regulations, if they are subject to Article VIII. In this connection it should be noted, first that the IMF at no stage treated Iran as being other than an Article XIV member, so that the second point would need no further

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73 Affidavit of ALI MANAVI-RAD (Bank Markazi Iran's Director General in charge of International and Exchange Affairs in 1979, who was also a member of the Exchange Control Commission in Iran from that same year and the Director in Charge of the International Department for some time after preparing his affidavit), 1983, in *Schering Corporation and The Islamic Republic of Iran* (Award No. 122-38-3), 5 Iran-USCTR 361. See also in this connection, GOLD, loc.cit. n. 75 p.552.

74 The letter was addressed to Mr. JOSEPH P. GRIFFIN of WALD, HARKRADER & ROSS, Washington, D.C., a law firm representing a great number of United States claimants before the Tribunal. The letter is reprinted as exhibit 2 to the Memorandum of the Legal Adviser of the Department of State, in US *Congressional Record* (27 February 1984) Vol. 130, at S. 1685.

75 "The Iran-U.S. Claims Tribunal and the Articles of Agreement of the International Monetary Fund," 18 George Washington JILEc. (1985) 537.

76 IMF Exchange Restrictions 1967, 18th Ann. Rep. at 2; and HORSEFIELD, op.cit. n. 30 pp. 248–50.

77 Loc.cit. n. 75.

discussion; and second, the IMF Annual Reports relating to the periods before as well as after the years when the so-called "new" exchange regulations were imposed[78] explicitly considered Iran to be covered by the terms of, and to be a member under, Article XIV.

As to the third basis for the argument that Iran had abandoned its status under Article XIV, any comparison of Iran's status with that of South Africa is out of place. As to the latter, "South Africa had in fact declared officially in November 1946 that it did not maintain any restrictions on making payments or transfer [of exchange] on current international transactions"[79] and as we have seen above such a formal declaration is in fact among the requirements for accepting Article VIII membership and withdrawing from Article XIV. GOLD himself has stated that giving up privileges under Article XIV and declaring adherence to Article VIII are requirements for withdrawal from Article XIV and acceptance of Article VIII[80] Furthermore, having maintained that only the Fund possesses the competence to interpret its Articles of Agreement, he has noted the Fund's reluctance to classify a member as falling under sections 2–4 of Article VIII simply by virtue of certain practices, without its having notified the Fund that it adheres to that Article.[81] Therefore, any analogy between the *South Africa* case and Iran's status and situation would not be correct.

Apart from the fact that Iran's exchange regulations, the provisions of Circular No. 11600 (of 4 November 1978) in particular, were published in the 1979 Annual Report and brought to the attention of both the IMF and the public,[82] even a quick glance at the IMF's relations with Iran would show beyond doubt that the IMF has regarded Iran, before and after 1979 (following its imposition of exchange control regulations), solely as a member under Article XIV, and still treats Iran as such. The 1979 Annual Report shows that the IMF itself was aware that under certain conditions (*inter alia*, where the provisions of the Law Concerning the Attraction and Protection of Foreign Capital are observed) Iran still permitted the transfer of even capital funds,[83] and that payments for certain kinds of transactions (with the control and approval of Bank Markazi) were regarded permissible. The IMF described the recent changes as merely a policy of "terminat[ing] [Iran's] support of the noncommerical foreign exchange market ... to match supply with demand for foreign exchange in that market."[84] The IMF thus had an entirely clear

78 See also the certification by the Director of Foreign Relations of IMF, 19 January 1989, *infra* text at n. 87.

79 HORSEFIELD op.cit. n. 30 at 249.

80 Vol. 1 p. 116.

81 Op.cit. n. 67 at 555–556.

82 IMF Annual Report for 1979, p. 216. See also the Award in *Dallal, supra* no. 29 at 13.

83 IMF Annual Report for 1979, p. 215.

84 Ibid. p. 216.

understanding of Iran's exchange regulations and not only implicitly but also explicitly approved of them. Bank Markazi's policy of relaxation and flexibility as appeared from Circular No. 994/h of 14 January 1974 in connection with the sale of noncommercial foreign exchange constituted a permissible adaptation in the light of circumstances and within the scope of Article XIV, section 2. The IMF never interpreted these measures as constituting a shift away from membership under Article XIV, which understanding is entirely consistent with the spirit and tenor of the circular, pursuant to which the relaxing regulations were issued "until further notice."[85] Consequently, the IMF never removed Iran's name from the list of member States under Article XIV or added it to that of member States under Article VIII.[86]

In his certificate dated 19 January 1989, filed with the Tribunal by the respondents,[87] the IMF's Director of Foreign Relations attested that up to that date the Islamic Republic of Iran had not accepted the obligations imposed by Articles II, III, IV and VIII of the Agreement, adding that:

> "[t]he Islamic Republic of Iran therefore continues to avail itself of the transitional arrangements of Article XIV, section 2 for restrictions on payments and transfer for current international transactions that were in effect on the date on which it became a member of the Fund ..."

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85 Not only did Iran never formally or informally apply for membership under Article VIII, but Bank Markazi's circular of 1974 also lacked many of the necessary preconditions for membership under that Article, *inter alia*, the condition that exchange regulations be eliminated with no likely need for their reimposition in the foreseeable future.

86 It should be noted that in every instance where a member State has accepted membership under Article VIII, the Fund has, in its Annual Report for that year, or for the following year, deleted the name of that State from the list of Article XIV members, and added it to the list of Article VIII members. In its Report for 1980 (pp. 126, 150, 457) for example, the IMF reported that the Dominican Republic and Finland had accepted membership under Article VIII and accordingly omitted their names from the list of member's under Article XIV and added them to the list of Article VIII members. The 1988 Annual Report does not list Korea as a member under Article VIII (p. 107), whereas Korea was added to that list in the Annual Report for the following year (1989), because it had accepted the obligations under Article VIII in November 1988. Similarly, Cyprus, Thailand, Tonga, Turkey and Switzerland were not among Article VIII members until 1989, but had been added to the list of such members in the Annual Report of 1990 and 1991.

In the case of Iran, there has never been any such transfer and shift. Accordingly the IMF has not, since 1978, proceeded at any stage to hold Iran's foreign exchange regulations to be in violation of the IMF regulations. Nor has it ever given any advice or made any representation in that connection, whereas, according to its regulations, it would have the duty to do so if it had considered them to be in violation.

In the IMF Annual Reports for 1976 (p. 94), 1977 (p. 99), and 1978 (p. 109) reflecting the names of State members of the IMF as of 30 April 1976, 1977 and 1978, respectively relating to the period prior to the issuance of Circular 11600 which was portrayed as unauthorised, because of the alleged prior departure of Iran from the category of Article XIV and, as well as in the Annual Reports for 1979 (p. 467), 1980 (p. 457), 1981 (p. 471), 1982 (p. 498), 1988 (p. 107), and 1989 (p. 78) Iran was consistently listed as an Art. XIV member.

87 Filed on 16 May 1989, together with other evidence and a brief, all registered under No. 118.

Emphasis has been placed on Article XIV of the IMF Agreement in order to demonstrate that, even if the exchange transaction which Stanwick had in mind was regarded as a current transaction, the award would be difficult to justify. If, on the other hand, Stanwick's transfer request constituted a request for capital transfer, the whole discussion would be unnecessary: the funds subject of the transfer request had been in the (current and time deposit) accounts concerned for years before the request was made,[88] and the greater part of the funds were still in fixed deposit accounts at the time of the request. This would render the transfer of funds from the accounts entirely within the control of the relevant member State of the IMF, as foreseen by Article VI(3).[89]

4.4 Iran's foreign exchange regulations do not violate the Treaty of Amity[90]

This article is not concerned with the validity of the Treaty of Amity, nor with the question of whether or not it is applicable to disputes falling under the Tribunal's limited jurisdiction as governed, *inter alia*, by Article V of the Claims Settlement Declaration. The issues of validity and applicability of the Treaty are immaterial since the latter, far from undermining the effectiveness of exchange regulations, can be invoked to confirm them.[91]

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88 As already noted, in this connection, there is no need for us to examine the original sources making up the bank accounts. In this regard, see J. GOLD, Vol. 1 p. 116; and the Tribunal's awards in *Hood* and *Dallal, supra* nn. 28 and 29.

89 The test for distinguishing a current transaction from a transfer of capital is to find whether or not the funds whose transfer is sought represent the consideration for a transaction involving the purchase and sale of goods and services about which the parties have agreed upon to prompt payment. If the funds involved do not represent the immediate consideration for such a purchase and sales contract between the parties to that transaction, then the latter should be regarded as a transfer of capital. See, *inter alia*, the following sources: J. GOLD, *International Capital Movement under the Law of IMF* (1977), pp. 18, 19; J. GOLD, *The Multinational System of Payments: Keynes Convertibility, the International Monetary Fund's Articles of Agreement 20* (IMF Occasional Paper No. 6 (1981), at 19; FAWCETT, loc.cit. n. 47 at 59; SHUSTER, pp. 34, 148.

In the cases of *Kraus* v. *Zivnostenska Bank* (64 N.Y. Supp. (2d) 208, 187 Misc. 681 (Supp. CT. 1946); and *Spitz* v. *Schesische Kredit Anstalt AG* (*New York Law Journal*, 21 January 1948 p. 267), the New York Court found no difficulty in ruling that the requests to transfer funds in bank deposits with the Bank of Prague constituted applications for the transfer of capital, and that they were thus subject to the provisions of Article VI (3).

90 Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed 15 August 1955 (entered into force 16 June 1957), 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 900 ("Treaty of Amity").

91 Regrettably, despite the attention it paid to the difference between "validity" and "applicability," the Tribunal had confused these two concepts in its previous awards. Chamber Two of the Tribunal was the first to acknowledge the distinction between these notions in 1986, and yet in para. 27 of the Awards in *Phelps Dodge Corp. and Overseas Private Investment Corp. and The*

Before discussing the issue at hand, two preliminary points must be made. First, the United States Government and US nationals were familiar with Iran's restrictive foreign exchange regulations which in part had been in force for years since the Treaty of Amity became operative. Yet the United States had never taken the position that those regulations including the exchange regulations in Circular No. 11600 and subsequent circulars were in violation of the Treaty's terms. Nor did the United States ever take a formal position vis-à-vis Circular No. 11600 and subsequent circulars or did it refer to the IMF, the only forum competent to render a decision and interpretation on the matter, apparently because the United States found no conflict between its own position and that of Iran in this respect.[92]

The second point to be noted is that the United States took measures[93] arising from its overall policies towards Iran and directed towards objectives

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Islamic Republic of Iran (Award No. 217-99-2)—after noting that "the Tribunal does not find it necessary in this Case to determine whether the Treaty remains in force at present between the two States"—it abandoned its discussion of "applicability" and erroneously returned to the issue of "validity," at the time the claim arose, stating that "the Tribunal is satisfied that Article IV, para. 2, was, in any event, clearly applicable to the investment at issue in this case at the time the Claim arose" (10 Iran-USCTR 121 at 131-2). In the author's view the Tribunal here failed to give due weight to Article V of the Claims Settlement Declaration, to the limits of the competence conferred upon the Tribunal and to the special and limited subject matter of the Claims Settlement Declaration, compared with the Treaty's broader scope. The majority in Chamber Two invoked (n. 7, and para. 27) the judgment of the International Court of Justice in the case *Concerning United States Diplomatic and Consular Staff in Tehran (The United States* v. *Iran*) (19 I.L.M. (1980) 553, 556) without taking into account the difference in subject matter and the surrounding circumstances involved in these two cases. The circumstances had radically changed since the ICJ decision, the most important one being the entry into force of the Algiers Declarations with the creation of a special tribunal with the limited power to adjudicate special and particular claims and charged with the duty to respect the law and contractual provisions, taking into account "changed circumstances".

92 See Article XXIX, Section A of the IMF Agreement, cited in Part 4.6 of this paper, which relates to the issue of jurisdiction over disputes concerning exchange agreements and regulations.

93 The sole target of the 1979–1980 US President's Executive Order (including Executive Order No. 12170) was Iran's property and assets (whether moveable or immoveable), so that the measure would have been contrary to the terms of Articles VII and VIII of the Treaty of Amity, under which a party was prohibited from resorting to such discriminatory acts. American commentators who have written at length on the Orders freezing Iranian assets and property, in an attempt to justify those measure, have not denied the discriminatory nature of those Executive Orders. (See, *inter alia*, the article by EDWARD GORDON, "Trends, the Blocking of Iranian Assets", *The International lawyer* (1980) p. 659; and R.W. EDWARDS, "Extraterritorial Application of the U.S. Iranian Assets Control Regulations", 74 *AJIL* (1981) p. 870 at 883).

94 American authors have conceded that the measures taken by the United States were the result of "political pressure mounted on President Carter to take decisive action to force Iran to release the hostages" (EDWARD GORDON, loc. cit. n. 92, p. 660). It has been alleged that the freeze Order No. 12170 was issued in anticipation of the possibility that Iran might decide to withdraw the funds in its accounts from the US banks, but there is evidence that the orders was ready well before that

that were inconsistent with the IMF Agreement.[94] In 1979 the United States started to block, freeze and seize Iranian properties and assets that either lay within its territorial jurisdiction or were at the disposal of United States nationals and banking institutions around the world. Besides, the United States prohibited the transfer of any property or funds to Iran, whether related to current transactions or capital movements.[95] The United States' position was that the measures constituted valid exchange control regulations notwithstanding the fact that it was itself bound by Article VIII of the Bretton Woods Agreement.[96] The United States did not consider the Treaty of Amity a bar to the imposition of such severe restrictions. Furthermore, it argued before all fora and courts that Iranian demands for the transfer of its frozen assets which were kept in the accounts with European branches of United States banks[97] should be denied, in accordance with Article VIII, s 2(b) of the IMF Agreement.

Article VII of the Treaty of Amity reads, in part:

> "1. Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to ensure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund."

This Article of the Treaty of Amity thus provides the parties who are members of the IMF the rights recognized by the IMF Agreement and recognizes that, even where the Contracting Party is not a member of the IMF, it can impose restrictions without observing the provisions of the IMF Agreement, in order to ensure the availability of the foreign exchange essential for the health and welfare of its people. For now, the author will not take up this additional right under the Treaty.[98]

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time, for other purposes and (under both political and non-political pressures) aimed at protecting the banks' private interests (ibid p. 661, and n. 9 thereto). On the other hand, observers were fully confident that Iran intended (as proved to be the case in practice) to comply with its obligations, including those which it had undertaken under its loan agreements with US banks (see especially, ibid, p. 672, and the sources cited therein).

95 These measures against Iranian assets and property have been characterized or qualified as economic blockade and embargo. See EDWARDS, loc.cit. n. 93.

96 Apart from the fact that the Executive Orders to freeze, block and seize Iranian assets and property have been regarded as discriminatory, a further defect is, according to one view, that they cannot be regarded as valid restriction or control regulations. NUSSBAUM states that "the draftsmen of the Agreement of the International Monetary Fund apparently did not classify the Freeze Orders as an instance of foreign exchange control [regulations]". See NUSSBAUM p. 467.

97 See EDWARD GORDON and R.W. EDWARDS, loc.cit. n. 93.

98 The right to issue Circular No. 11600 and the need to control foreign exchange transfers not only were allowed by international law and the provisions of Articles XIV of the IMF Agreement.

As Iran was an IMF member under Article XIV of the IMF Agreement throughout the relevant period, and has continued to be so regarded down to the present time, Iran's "maintaining [or adapting] to changed circumstances the restrictions" was not, therefore, a surprise to the United States.[99] In addition, Article VI, s 3 of the IMF Articles of Agreement recognizes the right of IMF members to impose foreign exchange regulations, even of a discriminatory nature, in connection with capital transfers.[100]

So long as exchange regulations are not discriminatory, their imposition is not prohibited by the general principles of law and international law. Therefore, commercial treaties, such as the Treaty of Amity, usually do not impose any duty in this connection beyond that of acting in good faith and avoiding any misuse of discretion involving discrimination against the

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However, at the time the circular was issued, owing to the chaos attending the Revolution billions of dollars of Iran's foreign exchange reserves (which should have been used for the welfare of the nation) had been smuggled out of Iran by profiteers, foreign exchange dealers and those who fled the country. These circumstances are described in the *Middle East Economic Digest's* issue of 28 September 1979:

> ". . . nearly $3,000 million in foreign exchange has been taken out of the country since February's revolution. Western banking sources say about $200 million a month is being taken out legally by travellers, while Bank Markazi (central bank) officials say a further $2,000 million has been smuggled out.
>
> The illegal export of money has not been stopped yet, Bank Markazi secretariat head Hossain Hanjani said. Maintaining Iranian students abroad is also costing $2,000 million a year, he added.
>
> Several thousand million dollars were smuggled out [of Iran] in the three years before the exiled Shah's fall. Foreign exchange controls imposed late last year failed to stem the flow. . . ."

In the Case Concerning South Africa Case, referred to above, text at n. 79, the Executive Board of the IMF initially ruled that South Africa could not impose new, restrictive exchange regulations without permission from the Fund (after having eliminated the exchange regulations which it maintained as an Article XIV member, and having opted for membership under Article VIII), but later the Fund confirmed the validity of South Africa's foreign exchange regulations retroactively as from the time they were imposed, in view of that country's serious losses of foreign exchange reserves (see, *inter alia*, HORSEFIELD, op. cit. n. 30. pp. 248–249). France too, which had subscribed to membership under Article VIII of the IMF Agreement in 1961, imposed certain exchange regulations in 1968 in order to protect its currency following the disturbances of the spring of 1968, without encountering any interference whatsoever (IMF 20th *Annual Report on Exchange Restrictions* (1969) pp. 160–2).

99 In contrast to the unprecedented and unexpected Executive Orders by the President of the United States (which totally banned all transfers to Iran notwithstanding the provisions of Article VII, para. 2 of the Treaty of Amity and Article VIII of the IMF Agreement) Iran's foreign exchange regulations continued to permit the transfer of most, if not all, of the items enumerated in Article VII, para. 2 of the Treaty, upon notification to Bank Markazi.

100 See Decision No. 541 (56/39) of the Executive Board of the IMF, dated 25 July 1956, included in *Selected Documents*, op. cit. n. 59 p. 127.

nationals of a State party to the treaty.[101] This is because "there can be no vested right in the continuing value of the property or lines of trade."[102] Governments neither guarantee commercial relations nor ensure the value of properties within their territories.[103]

4.5 All IMF member States and adjudicating fora have a duty to observe and respect Iran's foreign exchange regulations

Article VIII, s 2(b) of the IMF Agreement prescribes, under the heading of "General obligations of Members":

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."[104]

Few of the other Articles of the IMF Agreement have been subjected to as much attention by the Fund, as well as by the world's jurists and judicial or administrative or other bodies.

There can be no doubt that Stanwick's request to the banks for the transfer

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101 See the writings by J. FAWCETT (p. 58), F.A. MANN (pp. 524–52) and M.R. SHUSTER (p. 85 et seq.) as cited in n. 47. In the *Case Concerning Rights of Nationals of the United States of America in Morocco* (*France* v. *United States of America*), the International Court of Justice ruled that Morocco's foreign exchange regulations were in violation of the treaty between France and the United States, because they were discriminatory (ICJ Rep. 1952 pp. 176–233). In the *Tabar Claim, supra* no. 47, the United States International Claims Commission found, in connection with funds in the claimant's accounts which a Yugoslav bank had refused to pay owing to the existence of certain exchange regulations, that:

> "International law and the usual commercial treaties are no bar to foreign exchange restrictions. So long as the control measures are not discriminatory, no principle of international law is violated."

102 FAWCETT, loc.cit. n. 48 at 247. See also the decision by the Permanent Court of International Justice in the *Oscar Chinn* case (1934), PCIJ Series A/B No. 63 at 88:

> "Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes... No enterprise... can escape from the chances and hazards resulting from economic conditions."

103 *Barcelona Traction Case* (*Belgium* v. *Spain*); ICJ Rep. 1970, at paras. 87–88; *Uptan Case* (*United States* v. *Venezuela*), g UNRIAA 236; *Avona Mines* case (*Britain* v. *Venezuela*) 1903 and *Volkman* case (*United States* v. *Britain*), g UNRIAA pp. 318, 424; See also IAN BROWNLIE, *System of the Law of Nations, State Responsibility* Part I (1983) p. 171; J.B. MOORE 6 *Digest of International Law* (1906) pp. 961–4; Award in *Starrett* (ITL 32-24-1), 4 Iran-USCTR 122; and *Braka et al.* v. *Bancomer SA*, loc.cit. n. 32.

104 There is no doubt as to the applicability of the provisions of Article VIII, s 2(b) to both categories of exchange transactions, i.e. those involving capital and current transfers. GOLD, Vol. 1, pp. 114–116.

of the balance of its "[rial] accounts in dollars at the current official exchange rate to ... Riggs National Bank of Washington,"[105] had as its subject an exchange transaction involving Iranian currency.

Regardless of whether a liberal or conservative interpretation is given to the term "exchange contract", it could never exclude the transaction intended by Stanwick from the coverage of Article VIII, s 2(b): first, it affected Iran's foreign exchange reserves,[106] and second, Stanwick was seeking to purchase dollars from the banks[107] in exchange for rials.[108] The request thus was concerned with, *stricto sensu*, a foreign exchange transaction.[109]

The law applicable to a foreign exchange transaction is usually determined by rules of conflict of laws. Nevertheless there is a virtual consensus that, under Article VIII s 2(b), no matter which law is applicable pursuant to conflict of laws rules, the law of the State whose currency is involved governs exchange transactions. In the *Perutz* case the New York Court of Appeals ruled that Czechoslovak exchange regulations governed a foreign exchange contract, regardless of when the latter was executed.[110] Pursuant to its authority under Article XVIII of the IMF Agreement (presently Article XXIX), the IMF Executive Board ruled that:

> "It also follows that such contracts will be treated as unenforceable notwithstanding that under private international law of the forum, the law

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105 Para. 14 of the Award in *Stanwick* and *supra*, text at n. 14.

106 See MANN, pp. 383–393; FAWCETT, loc.cit. n. 47 pp. 42–43; KRISPIS, "Money in Private International Law", 120 *RdC* (1967-I) 191, 256–7; DICEY and MORRIS, *Conflict of Laws* (10th ed.) Rule 179, pp. 1028–29; *Perutz* v. *Bohemian Discount Bank in Liquidation* 304 N.Y. 533, 110 N.E. (2nd) (1952). 110 N.Y.S. (2nd) 446 (1952); GOLD, Vol. 1, pp. 50–55 (with respect to *Perutz*), 84, 91–93; LORD DENNING in *Sharif* v. *Azad* (1967) 1 Q.B. 605, 613–14, 618 (CA), where he found that "exchange contracts which involve the currency of any Member" as set forth in Article VIII, 2(b) included "any contract which in any way affects the country's exchange resources." According to Lord Justice DIPLOCK, even though the term "exchange contract" has nowhere been defined, it should nonetheless "be liberally construed having regard to the objects of the Bretton Woods Agreement to protect the currencies of the States who are parties thereto." See also GOLD, *The International Monetary Fund and the International Recognition of Exchange Control Regulations: The Cuban Insurance Cases*, pp. 530–31; and the decisions cited in GOLD, Vol. 3 pp. 164–167, 266, 275–276, 354.

107 *Wilson, Smithett and Cope Ltd.* v. *Terruzzi* (1976) Q.B. 613; NUSSBAUM, pp. 426–7; GOLD, Vol. 3 pp. 59, 345–346; *United City Merchants* case (1979) 2 Lloyds Rep. 493; (1981) 3 W.I.R. 242.

108 The question whether Article VIII s 2(b) indeed prescribes a contract involving the currency of a member State to conform to the exchange regulations prevailing at the time of performance of the contract is not relevant in the present case as there was no difference between the regulations in force at the time of conclusion and those in force at the time of performance of the exchanges contract. Cf GOLD, Vol. 1 pp. 62–63; EDWARDS, loc.cit. n. 93, and the *Perutz* case, *supra* n. 106.

109 See *Recueil Dalloz Sirey*, 1985, No. 43, p. 500; and GOLD op. cit. n. 18, Vol. 4, p. 214.

110 *Loc.cit.* n. 106.

> under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance."[111]

Therefore, a contract which is regarded as valid under the law by which it is governed, but which contravenes the exchange regulations of the State whose currency is involved, will not be enforceable.[112] An identical conclusion may be arrived at by application of conflict of laws rules: in the present case Iranian law was obviously the governing law, by virtue of the terms of the contracts as well as by reason of the fact that the contracts were to be executed and performed in Iran.[113] Aside from all this, the money of account involved in both types of contracts involved (the bank accounts and the contracts with the Navy and Air Force, so far as the latter are deemed relevant to the issue at hand) was specified to be the Iranian rial. Although the majority of the Chamber one did not address the issue in the *Stanwick* Award, it is difficult to find an instance in which an adjudicating body would refuse to enforce the exchange regulations of the state whose currency is involved as being "revenue" or "territorial" regulations,[114] or else, that they were "contrary to public policy."[115] Failure to respect the IMF regulations would disrupt the global monetary order, an order that the nations of the world, by adhering to the Bretton Woods Treaty, consider mandatory, at least since 1945, and which

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111 Decision No. 446-4 (1949), HORSEFIELD, op. cit. n. 30, Vol. 3, pp. 256–7; *Selected Decisions, supra* n.59 pp. 251–252; *IMF Annual Report* 1949 (Appendix XIV) pp. 82–83.

112 GOLD, Vol. 2 pp. 395–408; FAWCETT, loc.cit. n. 47; *Van Den Bussche* v. *Karabassis*, 16 *Journal des Tribuneaux* (Brussels), (1987) No. 5423 pp. 343–4; *International Banking Law* (London), Vol. 6 No. 6 (1987) pp. 81–82.

113 When the law governing the contract is the same as that under which the exchange regulations are established, that law not only controls or restricts payments under the contract, but can also modify or even dissolve the contractual bond See MANN, pp. 407 *et seq*, in particular p. 412; DICEY & MORRIS, op. cit. n. 106, pp. 1023–24; Lord RADCLIFFE in *Kahler* v. *Midland Bank* (1950) A.C. 24 at p. 56; and GOLD, Vol. 3 p. 231. In *Zivnostenska Banka National Corporation* v. *Frankman* (1949) 2 All E.R. 671, known as *Frankman*, the plaintiff sought to recover dividends in a Czechoslovak corporation, which were on deposit with the London branch of a Prague bank in pounds sterling. The defendant invoked the Czechoslovak exchange control regulations under which it was necessary to obtain the permission of the National Bank. Quashing the judgment by the Court of Appeal and restoring the judgment by the lower court, the British House of Lords held that as the deposit agreement was made in Prague and the place of performance was deemed to be in Prague, Czechoslovak law (including its exchange regulations) governed the transaction. See GOLD, Vol. 1, p. 16; see also the decision in *Perutz*, loc.cit. n. 106.

114 See the IMF Decision No. 446-4 (1949), loc.cit. n. 111; MANN, pp. 273, 428–433, 511; GOLD, Vol. 1, pp. 11, 15, 52, 80; id., op. cit. n. 106 (*Cuban Insurance Cases*) pp. 524–525; FAWCETT, loc.cit. n. 48, pp. 290–291; CHESHIRE & NORTH, *Private International law* (10th ed.) p. 142; DICEY & MORRIS, op. cit. n. 106 p. 1025; *Perutz* loc.cit. n. 106; *Frankman* loc.cit. n. 113.

115 FAWCETT loc.cit. n. 48, pp. 289–291; GOLD, Vol. 1, pp. 11, 13, 15, 52, 109–111, 117; Vol. 2 p. 271; Vol. 4 p. 25; loc.cit. n. 106, pp. 524–525; EDWARDS, loc.cit. n. 93, pp. 882–883; IMF Decision No. 446-4 (1949), *supra* n. 111; HORSEFIELD op. cit. n. 30, Vol. 3 p. 256; and MANN pp. 403–406, 414–415.

they have made part of their own *ordre public*. It is worth noting that the party invoking Article VIII s 2(b) (here, the Iranian banks) need not even prove that the exchange regulations conform to a particular provision of the IMF Agreement, or that they have been expressly confirmed by the Fund.[116]

In their depositary contracts with Stanwick, the banks did not assume an obligation to pay the funds in those accounts in any currency other than rials at the request of the holder of the accounts, nor to transfer them abroad.[117] However, even if they had assumed such an obligation, it would hardly be possible, in view of settled rules of law, to award against the banks for non-payment of foreign exchange out of the monies in those accounts, when conversion would have meant violation and disregard of the prevailing Iranian exchange regulations.

The IMF regulations and decisions whereby member States and the courts[118] are categorically required not to enforce foreign exchange contracts that are in violation of other member States' exchange regulations are in line with the consensus of jurists and the uniform rulings by municipal courts. The general position is that the courts are not permitted to disregard the exchange regulations of a member State on the allegation that they constitute an expropriation,[119] or on the basis of breach of contract,[120] or by recourse to

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116 Tacit approval of the IMF, even in case approval is needed, has been regarded as sufficient. See MANN, pp. 518–519; the decision by the Hamburg Court, noted in GOLD. Vol. 1, p. 85; and EDWARDS, loc.cit. n. 93 p. 896.

In light of the language of Article XIV, which requires the IMF to advise or make representation to members as to any inconsistency of their regulations, or as to the need to withdraw them, it is clear that, with respect to regulations imposed by Article XIV members, silence on the IMF's part is tantamount to approval of such regulations. See also the IMF interpretation cited *supra* n. 30.

117 Payment in a currency other than that of the account, and the transfer of foreign currency by using funds of the account constitute totally distinct transactions, with respect to which the depositary bank has no inherent obligation towards the holders of the account, albeit the banks may engage in such transactions with their customers, within the limits of the prevailing regulations. A request to transfer foreign exchange constitutes a new transaction for the purchase of foreign exchange and its transfer abroad. See FAWCETT, loc.cit. n. 47, p. 45; loc.cit. 48 p. 282.

118 There is no difference in this connection between administrative and judicial authorities, nor international courts.

119 Particularly where (*Stanwick case*) owner/holder of the account has retained his rights in the actual funds. MANN, pp. 272, 474, 481, holds that the imposition of exchange regulations which affect the value, or limit the extent of the domestic use, of the money of account or even, the imposition of restrictions which prohibit payment in foreign currency, neither constitute expropriation nor entail responsibility.

Invoking Lord RADCLIFFE's decision in *Kahler* v. *Midland Bank* (*supra*, n. 113), MANN holds that if the law of the contract is the law of the restricting State, that law is able, without incurring responsibility, to modify, or even dissolve, the contractual obligation. See ibid., pp. 404–14 (especially p. 412), 465.

On page 481, he states that:

> "Since exchange control is designed to protect a State's exchange resources, the mere refusal to allow the transfer of funds abroad can hardly ever be such misuse of discretion as to be unfair and inequitable. Normally ... it will even be lawful for the restricting State to limit or

extra-contractual liability, such as unjust enrichment.[121] Any such contradictory position would be inconsistent with the provisions of Article VIII, 2(b), IMF Agreement while, on the other hand, ordering the enforcement of contracts inconsistent with the exchange regulations of a member state would be tantamount to circumventing such regulations.[122]

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cont.

exclude the internal use of the non-resident alien's internal funds ..."

See also FAWCETT, loc.cit. n. 47, pp. 58–59; loc.cit. n. 48 pp. 246–247 and the decisions examined by GOLD Vol. 1, pp. 87–89 (*Frankman* v. *Prague Credit Bank* and *White* v. *Roberts*, 33 *Hong Kong Law Reports* (1949) pp. 231–82).

SHUSTER pp. 72–85, (holds that governments have broad rights to introduce exchange regulations, and quotes *inter alia*, the United States Claims Commission in the *Chobady Claim* (1985) II I.L.R. pp. 292–4: "[A] prohibition against transfer of funds [a bank deposit with the Hungarian-Italian Bank] out of a country [Hungary] is an exercise of sovereign authority which, though causing hardship to non-residents having currency on deposit within the country, may not be deemed a 'taking' ..."

One extremely rare and uncommon instance where regulations that affected the right of ownership were regarded as expropriatory and giving rise to responsibility, was in the United States Claims Commission's decision in the case of *John Stipkola* SHUSTER p. 81). In that case, the total annulment of the plaintiff's ownership over his banking accounts was deemed as constituting a "taking." whereas the other measures taken by the Russian Government prior to that expropriatory act were not regarded as entailing responsibility on its part.

In numerous other cases (e.g. the *Evanoff Claim* and the *Muresan Claim*, ibid, pp. 79–80) the Commission recognized the sovereign right of nations to impose restrictions or control regulations that even limit the transfer and domestic uses of the currency in which accounts are denominated, and concluded that as the owner of the account was still able to enjoy and use the funds in the account, no matter how restricted and insignificant his right of access might be, neither expropriation nor responsibility could be attributed to the State that had imposed the regulations.

The decisions of the United States Claims Commission lead to the following conclusions: (1) it is a legal principle and a *prima facie* assumption that an exercise of sovereignty through the imposition of such regulations does not constitute a taking or entail State responsibility, unless the owner has been divested of ownership; and (2) as against such a principle, the onerous burden of proving the contrary rests with him who asserts responsibility (cf. SHUSTER, 76–84).

120 See *White* v. *Roberts* (1949), *supra* n.119. In that case, the Hong Kong High Court relied upon the provisions of Article VIII, 2(b) in dismissing the plaintiff's claim, ruling that "It is immaterial in such a case whether the plaintiff relies on the breach of contract or on an action for money had and received."

Following an examination of the Netherlands court decision in *Frantzmann* v. *Ponijen* (1959), GOLD (Vol. 1 p. 118) states that:

> "In other words, where a party's claim based on an 'exchange contract' is unenforceable because of Article VIII, section 2(b), he cannot succeed by reformulating the claim as one for damages or tort, or for the performance of a natural obligation, or for the restitution of an unjustified enrichment."

According to GOLD similar decisions have been reached in numerous cases. See the decisions cited in Gold, Vol. 2 pp. 23–24, 46; Vol. 3, pp. 90–92, 265, 272, 276, 282, 470–471; Vol. 4 pp. 181, 227. Compare them with the hasty dictum of the US-Iran Claims Tribunal in *Isaiah*: "In any event, exchange regulations are not relevant to a claim for unjust enrichment." *Supra* n. 39, at 239.

121 See the decisions cited *supra* n. 120.

122 See the decision in *Dallal, supra*, n. 29 and *infra* n. 152; also the decision in *Catz and Lips* v. *S.A. United Versicherung* (1949), GOLD, Vol. 1.

4.6 The Tribunal does not have jurisdiction over issues relating to exchange regulations

As adjudicative fora are required[123] under Article VIII, 2(b) IMF Agreement to respect the exchange regulations of member States, they do not have the competence to examine the validity of these exchange regulations. The competence to take up such issues has been vested in the Executive Board of the IMF, along with the authority to enforce certain limited sanctions. Article XXIX, s (a) of the IMF Agreement provides, *inter alia*:

> "Any question of interpretation of the provisions of this Agreement arising between any member and the Fund, or between members, shall be submitted to the Executive Board ..."

The reason for conferring this exclusive competence in the IMF is both understandable and justified: if member States were to be dragged before the various courts and tribunals, especially commercial arbitral bodies, in connection with the imposition of exchange controls, the IMF's objectives and the policies pursued in the Bretton Woods Treaty would become the subject of an infinite number of possibly conflicting and possibly self-serving decisions—and indeed, the members' worst fears would be realized.

States have thus bound themselves, first, not to refer disputes over interpretation to any other authority than the Fund itself[124] and, second, that if an issue brought before the Executive Board is of such a nature that it might possibly affect a member of the Fund not entitled to appoint an Executive Director, such member shall be entitled to representation. Furthermore, with concern for the impact which decisions on currency and foreign exchange regulations may have on other members, Article XXIX, s (b) of the IMF Agreement allows any and all members to require, within three months from the date of the decision, that the issue be referred to the Board of Governors. The interpretation rendered by the Board of Governors shall be final and binding.[125]

The effect of the Fund's decisions, and, for that matter, any decisions concerning exchange regulations upon (other) members of the IMF, and the

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123 See *Dallal*, loc.cit. n. 29, pp. 14, 16; 3 *Tijdschrift voor Arbitrage* (1982) p. 76; GOLD, Vol. 4, p. 229.

124 See, GOLD Vol. 3, pp. 207–208.

125 MANN, "The Interpretation of the Constitution of International Financial Organizations," 43 BYIL (1968–69); HORSEFIELD, op. cit. n. 30 pp. 267–273; US Federal Commission in *International bank for Reconstruction & Development & International Monetary Fund* v. *All American Cables & Radio, Inc.*, 17 F.C.C. 450 (1953) 22 ILR 705 (1958), discussed in GOLD, Vol. 1, pp. 20–27, 55–59.

objectives which States have intended the Fund to attain,[126] may explain why the member States were so careful and meticulous in drafting the IMF Agreement, so as not to surrender the fate of sensitive economic issues and matters relating to their national sovereignty and monetary and exchange policies into the hands of other fora, particularly arbitral bodies.[127] The states parties to the IMF Agreement have made it the duty and right of the Fund to render advice and carry out consultation. Thus, the Fund must, before taking any measures, undertake a lengthy process of consultation, discussion and advice, a duty and privilege quite outside the competence of municipal and international courts and arbitral fora.[128]

If it had been intended that the Tribunal was to have such competence by way of exception, this would have to have been expressly vested by the states parties to the Algiers Declarations. Moreover, such express stipulation would—in view of its possible impact on the Fund's objective and members and the international monetary order—not have relieved the Tribunal of an obligation to refer issues and disputes relating to exchange regulations of IMF member countries to the IMF Executive Board.[129]

In view of Article VIII, Section 2(b) of the IMF Agreement judicial fora are to seek the opinion of the Fund whenever they are confronted with the issue of (non-)conformity of exchange regulations with provisions of the IMF

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126 Among those objectives that are reflected in Article I of the IMF Agreement and pursued by the members are the following: to promote international monetary cooperation through a permanent institution for consultation and cooperation; to facilitate the expansion and balanced growth of international trade and thereby to promote high levels of employment and real income through development of the productive resources of members; to stablize the currency market; to establish a system of payments acceptable to the members; to build confidence among the members; and to prevent measures disequilibrating their balances of payment. Not only municipal courts of members, but *a fortiori*, arbitral fora, would be unable, no matter how dedicated they consider themselves to these objectives, to take the place of an institution in which all members have an active and direct participation.

127 In some extremely limited instances efforts have been made to separate arbitrable issues from disputes related to exchange contracts, but these efforts had to yield to non-arbitrability under Article VIII, s 2(b). See OTTO SANDROCK, loc.cit. n. 29.

128 See HORSEFIELD, op. cit. n. 30, Vol. 2 pp. 231–232.

129 The decision of the ICJ in *Rights of US Nationals in Morocco*, (ICJ Rep. 1952 p. 176) has been criticized on the grounds that the Court should have remitted the case to the Fund (see, *inter alia*, FAWCETT loc.cit. n. 47, p.60 et seq., especially p. 63). It has been said that, having held the act by the French Government to be discriminatory and in violation of the treaty between France and the United States, the World Court considered it unnecessary to pronounce on the exchange regulations issue and the Fund's competence. It is interesting to note that in that case the United States took the position that the regulations concerning the Fund's competence with respect to interpretation are mandatory, that the Fund enjoyed sole jurisdiction, and that the issue should have been referred to the Fund (GOLD Vol. 1 p. 47, and Vol. 4 p. 206; FAWCETT, loc.cit. at 70).

Agreement.[130, 131] In other words, they should relinquish such issues to the Fund for decision.

It is noteworthy that although the United States, as one of the members of the IMF Agreement, has the right to seek an interpretation from the Fund, it has not to date availed itself of that right. This fact may confirm that it agrees that Iran's exchange regulations do conform to the IMF Agreement.[132]

5. THE RIAL WAS THE MONEY OF ACCOUNT AND MONEY OF PAYMENT

By ordering payment in dollars from the funds in the rial accounts and by factually enforcing contracts inconsistent with Iran's exchange regulations, as well as by requiring the Iranian banks to transfer foreign currency abroad without the permission of Bank Markazi, the Award in *Stanwick* did not take into account international rules and principles governing "money".

This issue was discussed generally in paragraphs 39–40 of the Dissenting/Concurring Opinion filed with the Tribunal in *TME International Inc.* and *The Government of the Islamic Republic of Iran et al.* ("TME"), Award No. 473-357-1,[133] by the arbitrator who also dissented in *Stanwick*. It was pointed out in that opinion that, except where expressly provided in the contract, the currency specified in a contract not only determines the currency of account but also specifies that of payment, i.e., whether the obligation is one requiring discharge in local or foreign currency. Any increase or decrease in the value of the money of account at the time of payment is thereby deemed to be irrelevant.[134] Nor would change in the locus of payment change the currency of

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130 Or, for that matter, in case of a dispute or uncertainty over distinguishing a current transaction from a transfer of capital. See Decision No. 446-4 (10 June 1949), *Selected Decisions...*, op. cit. n. 59 pp. 251–252; GOLD, loc.cit. n. 75 pp. 578–579.

131 In addition to the sources *supra* n. 129, see also *Dame Dong Thi To Tam et Autres* v. *Banque Française Commerciale*, Recueil Dalloz 1985 No. 43, pp. 500–501; GOLD, Vol. 4 pp. 206–209; Hamburg Landesgericht, 24 February 1978, cited in GOLD, Vol. 1 p. 85, Vol. 3, p. 272, Vol. 2 p. 291–292; BERNARD S. MEYER, loc. cit. n. 30.

132 Cf. GOLD, Vol. 3 p. 76; BERNARD S. MEYER, loc.cit. n. 30.

133 Dissenting/Concurring Opinion of ASSADOLLAH NOORI, 24 Iran-USCTR 162, pp. 107 *et seq.*

134 See MANN, pp. 199, 272–299, 304–307, 322, 339–343, 467; DICEY & MORRIS, op.cit. n. 106, ss 173, 176–178; NUSSBAUM, pp. 172–183; Article 1895 French Civil Code; and MAZEAUD, *Droit Civil*, Vol. 2 s 860.

In *Deutsche Bank Filiale Nurnberg* v. *Hamphreys* (1926) 272 US 517 at 519, the United States Supreme Court ruled:

> "We may assume that when the bank failed to pay on demand, its liability was fixed at a certain number of marks both by the terms of the contracts and by the German law, but we may also assume that it was fixed in marks only, not at the extrinsic value that those marks had in commodities or in the currency of another country."

the obligation, which is the specified means of satisfying the debt.[135] The obligation is satisfied upon payment of the currency specified in the contract.[136]

In *Stanwick*, the money of account and the money of payment were the same. Therefore, in view of the universally recognized principle of the nominal value of the currency ("nominalistic principle"), the banks in that case incurred an obligation to pay the holder of the accounts in rials.[137] According to most legal systems, payment in the currency of the obligation, by depositing the money in an account in the obligee's name, constitutes proper satisfaction of the obligation.[138] In the *Stanwick* case, the claimant's right was only in respect of the rials it had in its accounts, and those rials were at all times available to it. Accordingly, the Tribunal should not have ordered the banks to pay the claimant the equivalent, in dollars, of the rials out of the funds in the Security Account[139], thereby circumventing Iran's exchange regulations which governed the contract and the currency.[140]

Where an obligor has undertaken to satisfy his obligation in local currency or in some specified currency, he cannot be assumed to have undertaken the risk of paying in any of the manifold currencies of many countries in the world

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135 MANN, p. 274; and *Sternberg* v. *West Coast Life Insurance Co.*, 16 Cal. Rep. 546 (1961) p. 550.

136 Art. 275 of the Iranian Civil Code prescribes:

> "The obligor shall not be required to submit anything other than what he has undertaken to provide, even if it has the same value as, or is less valuable than, the subject of the obligation."

137 See MANN, loc.cit. n. 134 (and pp. 539–541). According to NUSSBAUM, op.cit. n. 53, pp. 172–175, the nominalistic principle, i.e., dollar for dollar, franc for franc, etc. has become so deeply ingrained in the public conscience that the courts, especially the municipal courts, seldom find it necessary to pronounce on the principle in their decisions (p. 175). Relying on the ruling by the US Supreme Court in *Nortz* v. *United States* (1935) 294 US 317, 55 S. Ct. 428, 79 L. Ed 907, and the decision by the British courts in *The Baarn* (1933), pp. 251, 265 (C.A. 1933), and after examining the practice under French law, he arrives at the conclusion that the nominalistic principle is a rule which governs the discharge of obligations (pp. 180–183).

138 See MANN pp. 413–415 and the decisions invoked by that author, *inter alia: De Beeche* v. *South American Stores (Gatt & Chaves) Ltd*, (1935) A.C. 148, and *St Pierre* v. *South American Stores (Gatt & Chaves) Ltd* (1937) 3 All. E.R. 349. In both cases the court ruled that the plaintiff's only alternative was to appoint a representative in Chile to obtain the rents in the currency of the obligation, which the defendant had declared willing to pay. In his comparative study, the writer arrives at the conclusion that the courts of Germany, Canada, Great Britain, the United States, and certain other countries have followed the same pattern.

139 The Security Account provided for by Paragraph 7 of the General Declaration, *supra* n. 5.

140 See ASSADOLLAH NOORI's Opinion in *TME, supra* n. 133, paras. 39–40, and also the quotation from the Award in *Dallal, infra* n. 152.

Besides, a private claimant should not be allowed to alter the basis of the obligation and the subject thereof, by means of forum shopping. See *Siriev* v. *Godfrey* (1921) 196 App. Div. 529, 188 N.Y. Supp. 52; *Metcalf* v. *Mayer* (1925) 213 App. Div. 607, 211 N.Y. Supp. 53; *Buxhoeden* v. *George Frank* (Textile Ltd.) (1976) A.C. 443, 468, 469. In this regard, it does not matter whether the claim arises from contract or from tort. See MANN, pp. 339–347.

where he might eventually be sued.[141] Nor would it be logical to assume that banks, in opening accounts, agree implicitly to pay the deposited funds in any currency the account holder desires. Such obligations could not arise except under the express provisions of a contract which would be binding only if not in violation of the law governing the contract and the currency.

Even if the banks were found to have been in breach of their contractual obligations towards Stanwick, such breach would not by itself be sufficient to convert their rial obligations into dollar-denominated obligations.[142] According to a settled rule of law, the obligor can in fact choose whether to pay in the money of account or in its equivalent in the foreign currency requested.[143] If the obligor fails to discharge his obligation, or if he chooses to satisfy the debt by payment in the currency requested by the claimant or else in that of the court's venue, then the debt shall be converted at the rate of exchange in force as of the date of payment,[144] whether the actual obligation be in cash or a judgment debt for damages for breach of contract, or damages in tort.[145]

Finally, no provision in either of the Algiers Declarations requires payment of dollars in satisfaction of rial-denominated obligations, much less at the rate prevailing at the date when the obligations arose.[146] Although the dollars in the Security Account are, pursuant to paragraph 7 of the General Declaration, "to be used for the sole purpose of securing the payment of, and paying, claims against Iran",[147] and although United States claimants would not be entitled to look to other fresh sources of money so long as the Security Account subsists, the provisions of paragraph 7 do not *ipso facto* change the Iranian respondents' obligations denominated in other countries, including rials, into dollar-denominated ones. Nothing would prevent Iranian respondents from fulfilling their obligations, if and as they wished, from other sources[148] or funds and in

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141 MANN, p. 324, citing ATKIN, L.J.

142 MANN p. 76.

143 MANN pp. 310–317; DICEY & MORRIS, op.cit. n. 106, s 177; *Barclays International Ltd* v. *Levin Bros* (1977) Q.B. 27 at 277.

144 See CHESHIRE & NORTH, op.cit. n. 114 pp. 715–716 and the sources cited in ASSADOLLAH NOORI's Opinion, loc. cit. n. 133 at nn. 33, 36.

145 MANN pp. 224, 341, 347–352; NUSSBAUM p. 304; MR. NOORI's Opinion, loc.cit. n. 133 at n. 35. As has been noted, damages for delayed payment on the principal amount of debt are compensated through calculation of interest in the actual currency of the account. See NUSSBAUM pp. 159, 184; MANN, p. 290; ASSADOLLAH NOORI's Opinion, loc. cit. 133 at n. 33.

146 See, e.g., *McCollough and Company Inc. and The Ministry of Post, Telegram and Telephone, et al. (McCollough)*, Award No. 225-89-3 (para. 108), 11 Iran USCTR3; and *T.C.S.B., Inc. and The Islamic Republic of Iran* ("*T.C.S.B.*"), Award No. 114-140-2 (pp. 13–14), 5 Iran-USCTR 160, 168–169.

147 See *supra* n. 5.

148 See Awards on Agreed Terms in cases filed by *Flour Corporation* against certain Iranian respondents, Awards No. 433-333-1, 434-810-1 and 435-811-1, *Iranian Assets Litigation Reporter* (22 September 1989) p. 17814.

the contractually stipulated (French, German, British etc.) currency[149] or in any currency agreed between the Iranian respondent and the United States claimant for the purpose of satisfying the claim.

It would follow that, where the Iranian respondent refused to satisfy an obligation by payment in the contractually denominated currency,[150] the dollar funds in the Security Account should be used to pay or satisfy the debt or obligation by applying the rate of exchange prevailing at the time such monies were withdrawn from the Security Account.[151] The Tribunal should not, by specifying the rate of exchange at the date the obligation arose, have disregarded Iran's valid exchange regulations merely because a Security Account denominated in dollars is foreseen by the Algiers Declarations.[152]

6. CONCLUSION

In sum, the Award in *Stanwick* does not satisfy any of the well-established rules and principles of law, in particular the rules governing "money" in the national and international spheres and the provisions of the IMF Agreement. In finding the Iranian banks to be in breach of their statutory or contractual obligation, the Award is also inconsistent with the facts of that case and with Tribunal precedents established both prior to[153] and after[154] the Award in

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149 It has been the Tribunal's practice in such circumstances that the judgment debt "be converted to US dollars ... at the conversion rate then prevailing [at the date of withdrawal from the Security Account]" and paid to the United States Claimants. See, *inter alia, Rexnord Inc* and *The Islamic Republic of Iran et al*, Award No. 21-132-2, 2 Iran-USCTR 6 at 9, and the Award in T.C.S.B., loc. cit. n. 146 at 169.

150 See Dissenting/Concurring Opinion of ASSADOLLAH NOORI, loc.cit. n. 133, and n. 35 thereto, which reads:

> "The compensation will be limited to the value of the undertaking plus interest from the moment the debt arose to the day of payment, if international law is not breached and the wrongful act consisted merely in not having paid ... the just price. (See Chorzow Factory Case, PCIJ Series A, Vol. 3 N) 3 pp. 46–47 and para. 96 of *Amoco Int'l Finance Corporation* and *The Government of the Islamic Republic of Iran et al*, Award No. 310-56-3, reprinted in 15 Iran-USCTR p. 189 at 247.)"

151 See *McCollough*, loc. cit. n. 146; Dissenting/Concurring Opinion of ASSADOLLAH NOORI, *supra* n. 133 n. 34.

152 So "if the Tribunal were to permit the claimant to obtain payment for the cheques in United States dollars from that account, the Tribunal would in fact enforce the exchange contract. Such an award would in practice circumvent the currency regulations which, if valid, both Iran and the United States as well as all other member States of the IMF are obliged to respect. Strong reasons suggest that also international tribunals should respect the relevant provisions in the IMF Agreement." (*Dallal, supra* no. 29)

153 *Dallal, supra* n. 29; *Hood, supra* n. 28; *Grune and Stratton, Inc, supra* n. 27 (the latter award has been issued by the same composition of arbitrators in Chamber One who rendered the Award in *Stanwick*).

154 *Ali Asghar, supra* n. 25.

Stanwick. To this extent, the Award in *Stanwick* has little to offer by way of precedent.

TOWARDS MORE EFFECTIVE MANAGEMENT OF HIGH SEAS FISHERIES*

Edward L. Miles**

1. INTRODUCTION

The issue of management of high seas fisheries has increased rapidly in salience over the last five years. Increasing concern by coastal State officials and the general public has been generated by various conflicts which have occurred over stocks which straddle exclusive economic zones (EEZs) and the high seas; by conflicts over the harvest of marine mammals, especially cetaceans, on the high seas; and by conflicts over the use of large-scale pelagic driftnets and the level of incidental or non-target catch (bycatch) associated with the use of this type of fishing gear.

Canada and the South Pacific island States, in particular, working together at the UN Conference on Environment and Development (UNCED) in Rio de Janiero in June 1992, succeeded in getting high priority to be placed on convening an international conference in July 1993 to consider the problems of high seas fisheries management. The concerns of the Canada/South Pacific coalition focused primarily on the problems of straddling stocks for Canada and highly migratory species, particularly tuna and tuna-like species, for South Pacific island States. But the truth is that the record of management for almost all high seas fisheries is quite poor.

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The only example of successful high seas fisheries management to which one can readily point concerns the harvest of Northern Fur Seals in the Pacific Ocean/Bering Sea. Originally negotiated in 1911 between the US, UK (on behalf of Canada), Russia, and Japan, and reconfirmed in 1957 with Canada replacing the UK, the North Pacific Fur Seal Convention prohibited pelagic sealing and created a Commission to manage the harvest of males only at rookeries.[1] The 1957 Convention also prohibited pelagic sealing on a commercial basis and allocated the catch on a 70:30 basis, i.e. 70 per cent to the rookery States (USSR and USA) and 30 per cent to Japan and Canada. However, neither Japan nor Canada harvested any seals. The rookery States harvested 100 per cent of the catch and paid 30 per cent of the proceeds of sales to Japan and Canada.

On the basis of more than 300 years' experience with the Grotian, i.e. open access, regime governing the management of marine fisheries, we have learned that this regime carried in its train primarily flag State jurisdiction, a unanimity requirement to implement management decisions within regional commissions, and weak surveillance and enforcement practices beyond the territorial sea. The combined result of these three antecedent conditions is always the tragedy of the commons, as defined by GARRETT HARDIN,[2] i.e. there is no incentive for any vessel to leave resources in the ocean for tomorrow because, inevitably, what is left will be taken by someone else today.[3]

We can therefore generalise the lessons we have learned from the experience of the Grotian regime in the following way: the key question in the international management of fisheries is *always* control over the stocks. If the authority to manage is fragmented and participation in the management system is voluntary, with serious constraints on surveillance and enforcement, then biological and economic waste will be high, conflict will be endemic in the system, decision systems will be cumbersome, decision times will be protracted, and management effectiveness will be low.

Largely in response to the perceived ineffectiveness of the Grotian regime, the Third United Nations Conference on the Law of the Sea (UNCLOS III) enshrined within the 1982 UN Convention on the Law of the Sea a system, based on the EEZ concept, which effectively gives to the coastal State property rights in living resources within a zone of 200 miles adjacent to the coast. We

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1 EDWARD MILES et al, *The Management of Marine Regions: The North Pacific*, Berkeley, Los Angeles, and London, University of California Press, 1982, Chapter 3, esp. pp. 58–61.

2 GARRETT HARDIN, "The Tragedy of the Commons", *Science*, Vol. 162 (1968), pp. 1243–1248.

3 The conditions that HARDIN characterized as the tragedy of the commons were first elaborated in relation to fisheries by H. SCOTT GORDON, "The Economic Theory of a Common Property Resource: The Fishery", *Journal of Political Economy*, Vol. 62 (1954), pp. 124–142. GORDON's approach was later elaborated into a classic analysis of the global problem by FRANCIS T. CHRISTY Jr., and ANTHONY SCOTT, *The Common Wealth in Ocean Fisheries*, Baltimore and London, The John Hopkins Press for Resources for the Future, Inc., 1965, 2nd printing,1972.

argue that the coastal State effectively has property rights (the term in the convention is "sovereign rights") as a result of the following provisions:

> "Article 61(1). It is the coastal State that establishes the TAC within the EEZ. Article 62(2). The coastal State also decides its own capability to harvest the TAC and whether or not there is any surplus to be shared.
>
> Article 297(3). These decisions are at the heart of 'the discretionary authority of the coastal State' which may not be called into question via the dispute resolution mechanism (itself limited to conciliation only). As such, these decisions are non-reviewable by any third party."

It is true that the coastal State is obligated to avoid endangering stocks within the EEZ by over-exploitation but the only redress available to a plaintiff lies in convening a conciliation commission operating under the constraints noted above.

We should note, however, that even though coastal States are currently leading the fight against distant-water fishing nations (DWFNs), particularly with issues left somewhat murky in the 1982 Convention concerning straddling stocks and highly migratory species, most coastal States in the world do not come to the table with clean hands. The fact is that most coastal States are derelict in their responsibilities for managing fisheries within EEZs. They have chosen to put most of the restrictions on foreign fleets, i.e. the DWFNs, while they perpetuate the conditions of open access domestically.[4] The consequences are that the world ocean is in worse shape now as far as the status of stocks is concerned, than it was prior to the emergence of extended coastal State jurisdiction and the level of over-capitalization in fishing fleets has vastly increased.

The issue of the effective management of high seas fisheries is not only a very difficult issue to tackle but is also a very sensitive one which is directly related to the stability of the new ocean regime created by the 1982 Convention. The Convention contains a delicate balance between the interests of coastal States and the interests of the international community. Where there is ambiguity in the provisions, as is the case with the provisions on straddling stocks (Article 63) and highly migratory species (Article 64), we must be careful that new policy, especially as it relates to the regime of the high seas, be clearly in the spirit of the Convention, with safeguards to protect community interest. If this delicate balance is tipped by policy innovations which have not been

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4 See EDWARD MILES (ed), *Management of World Fisheries: Implications of Extended Coastal State Jurisdiction*, Seattle and London, University of Washington Press, 1989, esp. pp. 282–308. See also: Dept. of fisheries, FAO, with the assistance of FRANCIS T. CHRISTY, Jr., "Marine Fisheries and the Law of the Sea: A Decade of Change", in *The State of World Food and Agriculture*, Rome, FAO, 1992, FAO Fisheries Circular No. 853. FIDI/C853, 66 pp.

adequately thought through, we run the risk of feeding the fires of further unilateral extensions of coastal State jurisdiction beyond 200 miles. This outcome will be neither equitable nor wise.

As a contribution to the on-going debate, this paper considers

(a) the nature of the high seas fisheries regime and present trends in high seas fisheries;
(b) continuing problems and deficiencies in the management of high seas fisheries; and
(c) the requisites for more effective management of high seas fisheries.

2. THE NATURE OF THE HIGH SEAS FISHERIES REGIME AND PRESENT TRENDS IN HIGH SEAS FISHERIES

2.1 The Regime

There are major differences in the geographic scope of the high seas between the current regime and the Grotian regime which preceded it but there are not major differences in the content of the rules which apply. As BURKE[5] has pointed out, in the Grotian regime, the high seas included all but a narrow strip of the coastal ocean defined as the territorial sea, so almost all significant commercial fishing effort occurred in the high seas. Regulation of fishing operations occurred only pursuant to agreement negotiated among the States concerned. On the other hand, in the regime of extended coastal State jurisdiction, the high seas have been reduced to an area beyond the EEZ and most commercial fisheries are now contained wholly within 200 miles, subject to the unilateral control of the coastal State. However, the new regime has created many more shared stock management problems than existed previously and issues of straddling stocks and highly migratory species remain, along with the issue of effective management of purely oceanic stocks.

With respect to the content of the rules, the 1958 Convention on the High Seas[6] confirms (Article 2) that freedom of fishing is a basic freedom of the high seas. This freedom is re-confirmed in the 1982 Convention (Article 87). Article 1 of the Convention on Fishing and Conservation of the Living Resources of the High Seas[7] makes two important points:

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5 WILLIAM T. BURKE, "High Seas Fisheries", in press (1993) in: JON VAN DYKE, DURWOOD ZAELKE, and GRANT HEWISON (eds.) *Freedom for the Seas in the Twentieth Century: Ocean Governance and Environmental Harmony*, Washington, D.C., Island Press.

6 UN Doc. A/CONF. 13/L.53, adopted 29 April 1958.

7 UN Doc. A/CONF. 13/L.54, adopted 28 April 1958.

(1) All States have the right for their nationals to engage in fishing on the high seas, subject
   (a) to their treaty obligations,
   (b) to the interests and rights of coastal States as provided for in this Convention,
   (c) to the provisions contained in the following articles concerning conservation of the living resources of the high seas.
(2) All States have the duty to adopt, or to cooperate with other States in adopting such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

The 1982 Convention repeats these two basic points but splits them into two separate articles (Articles 116–117). In addition, the reference to the "...rights and duties as well as the interests of coastal States..." is made more specific, i.e. "...provided for, *inter alia*, in Article 63, para. 2, and Articles 64–67..." Article 63, para. 2 refers to straddling stocks and Articles 64–67 refer to highly migratory species, marine mammals, anadromous species, and catadromous species.

The obligations which devolve upon high seas fishing States in the 1982 Convention (Articles 117–119) include the following:

(1) To conserve the living resources of the high seas (including the obligation to take unilateral measures for its own nationals when a fishery is conducted by them alone);
(2) to employ the best scientific evidence available to establish needed conservation measures;
(3) to cooperate with other States in conserving high seas living resources;
(4) to negotiate with other States over conservation measures;
(5) to generate, contribute, and exchange scientific and other information (e.g., catch and effort statistics); and
(6) to refrain from discrimination in the enactment of conservation measures.

2.2 Present Trends in High Seas Fisheries

In their comprehensive paper on high seas resources, GARCIA and MAJOWSKI[8] distinguish three types:

(1) Neritic high seas resources or those associated in their life cycle primarily with the continental shelf or upper slope. In this case, these stocks either move in or out of EEZs or are associated with a continental margin

8 SERGE GARCIA and J. MAJOWSKI, "State of High Seas Resources". in TADAO KURIBAYASHI and EDWARD L. MILES (eds.) *The Law of the Sea in the 1990s, A Framework for Further International Cooperation*: Honolulu, Law of the Sea Institute 1992, pp. 175–237, esp. pp. 175–176.

which extends beyond 200 miles, as in the case of the Grand Banks off Nova Scotia and Newfoundland, Canada. Neritic high seas stocks can also exist where no EEZs have been declared, e.g. off China or in the Mediterranean.

(2) Stocks which have primarily oceanic life cycles beyond 200 miles. These are mainly pelagic stocks but they include mid-ocean demersal species which congregate over seamounts. In all there are about 400 species in this category, including 50 cephalopods, 40 sharks, 60 marine mammals, and 230 fish.

(3) All living resources of the Southern Ocean south of the Antarctic convergence. The Antarctic is a special case since the existing regime excludes State sovereignty over islands, continent, or ocean.

Note that the cost of fishing high seas resources is always greater than fishing within EEZs. This is so as a function of both distance (i.e., steaming time to fishing grounds, fuel consumption, labour, etc.) and density. The average densities of oceanic species are much lower than those found within EEZs as a function of greater depth, the absence of upwelling, and therefore the lack of nutrients in the photic zone.

Two conditions currently characterize high seas fishing operations. The species noted above congregate in hydrographic structures which accumulate plankton, mesopelagic species (i.e., those which occur at between 200m–1000m depth), krill, and various small prey fish. These aggregations naturally attract predators, like jacks, gadiod (codlike) species, squids, tunas, sharks, marine mammals, and humans. As EEZs enclose the most productive regions of the world ocean, DWFNs are pushed further out. These fleets search for and target such concentrations. However, given the lack of effective controls over fishing effort, these resources are usually overfished in the short run and the fleets move on to other concentrations.

Large-scale distant-water commercial fishing has existed only since World War II. The phenomenon is based on a combination of monofilament nets, at-sea freezing and processing of the catch, in addition to significant technological innovations in fishing vessel design and capacity across all gear types, i.e. long-line, trawl, purse-seine, driftnet, and pots. The development of modern, distant-waters fleets began first in Western Europe and Japan in the early to mid-1950s, followed by the USSR and the Eastern Europeans (Bulgaria, the DDR, and eventually Cuba). After these countries, Korea and Taiwan emerged, followed by Spain, Mexico, Venezuela and others focused primarily on purse-seining for tuna. One difficult control problem which has emerged has been the creation of "flag of convenience" fishing fleets under the registration of the Cayman Islands, Bermuda, and Vanuatu, among others. Once these open registries emerged, a considerable amount of re-flagging of fishing vessels has occurred, the purpose of which is to escape restrictive coastal State regulation.

The recent FAO study cited above[9] has made a major contribution to the current debate by showing that even after the introduction of EEZs, a lot of investment is still flowing into distant-water fleets. The reasons for this surprising development would include: the continued existence of open-access regimes, both on the high seas and within EEZs; the widespread practice of national subsidies for fishing fleets; and rising real prices for fish and fish products. On a global basis, the fishing industry is highly concentrated and overcapitalized. The FAO study has conservatively estimated that in 1989 the annual operating costs of the world marine fisheries fleet was about US$15 billion greater than annual revenues and capital costs were not included in this estimate.

There is also cause for concern when one looks at current trends in world catch. ALVERSON and LARKIN,[10] using data published by FAO, note that the total world catch in 1990 (marine and fresh water) amounted to more than 100 mmt. or a 33 mmt. increase since the 1970s. However, *only 20 species* contribute most of the world marine catch. Of these 20, seven are highly volatile coastal pelagics (herrings, sardines, anchovies, etc.). These yields are not stable: the Japanese sardine catch for example, went from 9,000 mt. in the mid-1950s to 5.1 mmt. in 1989. Like the Peruvian Anchovetta, this production will decline precipitously in the future and there will be a lag before another species moves into the niche vacated by the Japanese sardine. Similarly, since 1970, there has been a 1.5 mmt. increase in the whitefish category (cods, hakes, red fishes, flounders, etc.), but this increase is based on a single population of North Pacific pollock.

In addition to unstable increases in coastal pelagics and the major increases in North Pacific pollock production, more stable increases have occurred in two areas; in the production of skipjack and yellowfin tuna in the West Central and Southwest Pacific and in the production of shrimp from aquaculture where world production, now in excess of 2 mmt., has more than doubled since 1970.

Looking at the same data considered in the 1992 FAO study cited above, ALVERSON and LARKIN infer that the increasing conflicts over access to world fish resources which we are all now experiencing is driven by increasing demand for fish and fish products and the imbalance which exists between aggregate fleet capacity and available resources. This demand is, of course, driven by world population. Using the UN projection that by 2025 the world population will be at 8 billion, ALVERSON and LARKIN note that fish and fish products currently provide about 50 per cent of total animal protein consumed,

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9 "Marine Fisheries and the Law of the Sea: A Decade of Change," FAO Fisheries Circular No. 853, 1992.

10 DAYTON L. ALVERSON and PETER A. LARKIN, "Fisheries: Fisheries Science and Management", in *Century 21*, Proceedings of the World Fisheries Conference held in Greece in 1992, in press, American Fisheries Society, 1993.

either directly, or indirectly as fishmeal for poultry or livestock. If the same proportion is to exist in 2025, total world catch must increase 1.6 times the present catch to about 160 mmt.

Such a large increase is very unlikely. What is far more likely is a decline in world catch as a result of the natural variability in the yield of coastal pelagics. The shortfall in production relative to steeply growing demand will provide a major additional boost for aquaculture, where Asia is by far already the dominant producer. Such a growing imbalance between demand and supply will further accentuate conflicts over access to fisheries resources.

Let us now return to my charge, stated at the beginning of this paper, that even though coastal States are now leading the attack on DWFNs, the former do not come to the table with clean hands. ALVERSON and LARKIN point out that, of the 176 stocks of stock complexes for which we have data in the FAO *Yearbook of Fishery Statistics* for 1990, seven were under-exploited, 39 lightly to moderately exploited, 79 fully to intensely exploited, and 51 (29 per cent) were over-exploited. It is this trend that is most disturbing since, in 1983, 20 stocks were unexploited, as opposed to seven in 1990 and 23 were over-exploited as opposed to 51 in 1990.

All of this has occurred *after* the introduction of EEZs. Not every failure is a failure of management, to be sure, because the ocean environment itself is a powerful generator of inter-annual variability in fish stocks. But a lot of the failures *are* management failures and most coastal States as well as DWFNs have simply failed to enact comprehensive effort controls. Moreover, many of the failures have occurred *within* EEZs, not only on the high seas. For instance, 38 stocks (or 53 per cent) of a total of 72 stocks in the Northwest, Northeast, East Central, and Southeast Atlantic have been overfished to a considerable degree. DWFNs bear most of the responsibility in the East Central and Southeast Atlantic but they are not responsible for the failures which have occurred in the Northeast Atlantic. And it must be admitted that a considerable amount of overfishing in the Northwest Atlantic has been done by US and Canadian fishermen.

3. CONTINUING PROBLEMS AND DEFICIENCIES IN THE MANAGEMENT OF HIGH SEAS FISHERIES

The current focus on high seas fisheries is inextricably linked to developments within EEZs. First, DWFNs have been displaced from many traditional fishing grounds now coming within coastal State jurisdiction. Consequently, they seek new areas to fish free of such constraints. At the same time we have seen the rapid expansion of coastal State fleets, of which the US

West Coast is a prime example.[11] As fishing effort increases, allocation conflicts intensify between coastal State fleets and the DWFNs. These allocation conflicts are far more complex than the traditional conflicts over fishing grounds. They now embrace national, and in the case of the EEC, even regional strategies with respect to a wide range of harvest and marketing opportunities.

As conflicts over fisheries fester, they become entangled with conflicts between environmentalist organizations in the US, Canada, Western Europe, and Australia, and certain DWFNs over driftnets, marine mammals, and increasingly the use of purse-seines to catch tunas in the Eastern Tropical Pacific. Strange alliances are then formed between certain groups of fishermen, especially in North America, and environmentalist organizations against DWFNs. But what this process often masks is that, the question of values apart, much of the root of current problems is in fact overcapitalization, both old and new, in fishing fleets.

Having recognized that coastal States themselves are as much to blame as DWFNs, we must also recognize that we face here a genuine dilemma which is not susceptible to easy resolution. The fact is that the traditional regime for the management of high seas fisheries is demonstrably ineffective because it is based on the principle of flag State control. On the other hand, if coastal States are permitted to extended jurisdiction beyond 200 miles, the consequences will assuredly be the disintegration of the current regime for the world ocean and an increase in national control. But, as we have already seen, such an eventuality will not solve the problem either. It will only result in greater restrictions on "foreigners" at the same time that the coastal State itself feeds the fires of overcapitalization.

How do we get out of this dilemma without incurring the disintegration of the present regime? Let us focus on the entire set of problems which are now on the table, i.e., not only straddling stocks and highly migratory species but the large question of how to increase the effectiveness of high seas fisheries management generally. Before we offer prescriptions for solving these problems, let us be clear about the deficiencies of high seas management regimes. We would argue that there are four major ones:

(1) Participation in the regime and in its management organizations often does not include all participants in a fishery. This gap leads to the

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11 See: E.L. MILES, "The Evolution of Fisheries Policy and Regional Commissions in the North Pacific Under the Impact of Extended Coastal State Jurisdiction", in *Essays in Memory of Jean Carroz: The Law and the Sea*, FAO, Rome, 1987, pp. 139–157; DANIEL D. HUPPERT, *Managing Alaska Groundfish: Current Problems and Management Alternatives*, Seattle: Fisheries Management Foundation and the Fisheries Research Institute, April 1988, FMF, FRI-001, 83 pp.; and EDWARD L. MILES. *The US/Japan Fisheries Relationship in the Northeast Pacific: From Conflict to Cooperation?* Seattle, Fisheries Management Foundation and the Fisheries Research Institute, July 1989 FMF-FRI-002, 128 pp.

problem of new entrants, of which the re-flagging issue is but a subset. The problem of new entrants is, in fact, one of the most difficult issues to be solved in international fisheries management. On the one hand, parties to any arrangement could claim that once the TAC is fully allocated, no new entrants could be permitted without endangering the stocks in question and therefore violating the duty to conserve. New entrants, however, always have the right to claim access on the basis of the freedom to fish high seas resources and therefore to demand a share *within* the agreed TAC. Since exclusion of new entrants is currently beyond what international law permits, most regional arrangements simply reduce the magnitude of the share available to each party in order to accommodate new entrants. Even if they did not do so, the inability to enforce on the high seas against vessels flying the flags of non-parties to the arrangement would yield the same effect.

(2) High seas management organizations often lack the requisite authority:
   (a) independently to assess the status of stocks and determine TACs, especially biomass and species quotas;
   (b) to decide on the basis of majority vote; and
   (c) to enforce management decisions.

(3) All high seas fisheries management regimes leave as matters to be negotiated the components that really count in fisheries management, i.e., effort controls, data gathering and quality controls, and penalties.

(4) Most high seas management organizations lack the financial resources to perform their tasks effectively.

The current debate so far has not focused on these basic flaws in the system. Instead, it has taken on a strong coastal State versus DWFN cast which is unlikely to produce fundamental solutions. As we have stated above, the current debate has so far only revolved around two issues.

With respect to highly migratory species, the problem arises only with respect to high seas enclaves surrounded by EEZs. This issue is therefore most acute in the West Central and South Pacific region. In that context, coastal States argue that within the terms of Articles 61 and 62 of the 1982 Convention, they can make access to their EEZs by DWFNs in part contingent on certain behaviour within these high seas enclaves, especially with respect to providing data and information on catch and effort. Such a provision is of course enshrined within the regional treaty between the South Pacific and the US. More problematic, however, have been the bilateral negotiations between particular island States and the governments and/or fleets of Japan, Korea, and Taiwan.

The issue of principle raised by the DWFNs is that they are not obligated under international law to provide data and information to coastal States concerning fishing operations conducted on the high seas adjacent to EEZs. The response of the South Pacific Forum Fisheries Agency (FFA) has been for member States to enact within their respective national legislations certain

minimum terms and conditions pertaining to access for DWFNs within EEZs. As such, these provisions become non-negotiable and there is grudging acceptance of the rule by DWFNs at least *vis-à-vis* those island States with traditionally the most productive zones. Japan, however, remains adamant on the issue of principle, even though the trend in State practice is toward the position favoured by island States.

In particular, the Japanese maintain that it is impractical and unfair for FFA and its member States to attempt to manage tuna fisheries within EEZs and in the high seas enclaves by an organization that includes as members only coastal States. Such a grouping, they argue, cannot provide adequate scientific assessment of tuna resources throughout their range of migration.

With respect to the issue of straddling stocks, on the one hand, coastal States and some commentators[12] argue that coastal States have a superior right under the 1982 Convention with respect to straddling stocks. On the other hand, DWFNs reject the notion that coastal States have superior rights over straddling stocks and they maintain that coastal States and DWFNs in this context stand on equal footing.[13] The result of this disagreement on principle is that very often in negotiation over the management of straddling stocks, parties arrive at an impasse over two issues: allocations and enforcement. An additional problem of importance, even if agreement is reached, is again the issue of new entrants.

4. THE REQUISITES OF MORE EFFECTIVE MANAGEMENT OF HIGH SEAS FISHERIES

The most important event which must occur in order to begin moving towards more effective high seas fisheries management would be a general recognition among the international community that there is an urgent need to break away from the common property/open access regimes of the past and present. It seems that there is very little support for the idea of vesting property rights to high seas living resources in a global organization. If this avenue is closed, then the only apparent alternative available is to seek to strengthen the duty to cooperate and the duty to conserve by means of agreement on a set of

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12 See, for instance, EDWARD L. MILES and WILLIAM T. BURKE, "Pressures on the Convention on the Law of the Sea of 1982 Arising From the New Fisheries Conflicts: The Problem of Straddling Stocks", *Ocean Development and International Law Journal*, Vol. 20 (1989) pp. 343–357.

13 See KUNIO YONEZAWA, "Some Thoughts on the Straddling Stock Problem in the Pacific Ocean", in TADAO KURIBAYASHI and EDWARD MILES (eds), *The Law of the Sea in the 1990s: A Framework for Further International Cooperation*, Hawaii, Law of the Sea Institute, 1992 pp. 127–135. See also the paper submitted to the FAO Technical Consultation on High Seas Fisheries, 7–15 September 1992 by the Government of Japan: "Basic Position of Japan at the FAO Technical Consultation on High Seas Fishing".

principles to guide high seas fisheries management and by attempting to shape the development of customary international law beyond, but in the spirit of, the 1982 Convention.

Lest it be thought that we have too hastily dismissed the possibility of agreement on vesting property rights in a global organization, let us recall[14] that the provisions that exist in the UN Convention of 1982 relating to high seas fisheries are

(1) those that emerged in the ISNT in 1975 and remained unchanged until 1982;
(2) that the basic framework for these provisions was derived from the 1958 Conventions on the High Seas and on Fishing and the Conservation of the Living Resources of the High Seas; and
(3) that early in the negotiations "...there were suggestions that high seas fisheries should be managed internationally..." by the International Seabed Authority, *inter alios*.[15]

These proposals never garnered enough support to warrant inclusion in the Convention.

Another alternative approach that some might find appealing is to pursue an extreme application of the precautionary principle combined with coercive diplomacy and the threat of trade sanctions after the example of General Assembly Resolutions 44/225 (1989) and 46/215 (1991) and the policy of the US government with respect to the use of high seas pelagic driftnets. In our view, this would be a severe mistake since there is no evidence to support a complete global termination of pelagic driftnetting on the high seas and what evidence is available does not indicate that any marine exosystem is in danger of imminent collapse.[16] The precautionary principle is not an instrument that should routinely be resorted to because it is very blunt and categorical. It is most appropriately a response to a crisis situation. Its justification must rest on the basis of *some* evidence that collapse is imminent.

On the basis of the argument elaborated above, we see no feasible alternative to the suggestion we have made earlier, i.e. seek to strengthen the duty to

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14 United Nations, Office for Ocean Affairs and the Law of the Sea, *The Regime for High Seas Fisheries: Status and Prospects*, 24 September 1991, pp. 10–11.

15 See J.E. CARROZ, "Institutional Aspects of Fishery Management Under the New Regime of the Oceans," *San Diego Law Review*, Vol. 21 (1984), pp. 516–517.

16 This case has been elaborated both separately and jointly by WILLIAM BURKE, MARK FREEBERG, and EDWARD MILES. See ROBERT W. SCHONING *et al* (eds.), *Proceedings of the National Industry Bycatch Workshop*, 4–6 February 1992, Newport, Oregon: MARK W. FREEBERG, "A National and International Perspective on Bycatch and Bycatch Management", pp. 15–22, esp. pp. 18–19; Dr. WILLIAM T. BURKE, "An International Legal Perspective on Bycatch", pp. 23–29; Dr. EDWARD L. MILES, "The Need to Identify and Clarify National Goals and Management Issues Concerning Bycatch", pp. 169–177, esp. pp. 171 and 174. See also: WILLIAM BURKE, MARK FREEBERG, and EDWARD MILES, *The United Nations Resolution on Driftnet Fishing: An Unsustainable Precedent for High Seas Fisheries Management* (in press, July, 1993).

cooperate and to conserve through a set of principles and attempt to shape the development of customary international law. These principles must safeguard living resources while at the same time protecting the community interest in free navigation on the high seas. They must also carefully balance biological and economic approaches to management by means of comprehensive controls on fishing effort, quotas, closed areas and seasons, mesh size regulations, and bycatch regulations.

For such an effort to succeed, we cannot stop at principles alone but must move on to implementing effective monitoring and enforcement approaches; systems for gathering and exchanging scientific data, information, and analysis; pre-agreed allocation mechanisms, including the issue of how to deal with new entrants; and, finally, effective dispute settlement mechanisms.

How shall these major and difficult objectives be secured? The FAO (1992) study suggests a basic principle and a set of strategies which are highly informative and which should be carefully considered.[17] This policy is applicable equally within as well as beyond EEZs. The principle is that the international community should treat fishery resources as resources which have value *in situ*. This value is definable in monetary terms. Accordingly, the community should seek stability by sharing the benefits generated by the use of these resources. Benefits should be used to provide compensation for the less well-endowed members of the regime.

The strategies which are recommended proceed in step-wise progression:

Step 1 The community should seek to move from management based on physical quantities (i.e., amount of catch) to management based on economic values. From this perspective, the community should seek to maximize not physical quantities (catch) but *net* economic revenues from the exploitation of living resources. One can achieve this objective through implementation of vessel licences, transferable use rights, and transferable individual shares of the TAC, or total revenues, or total allowable investment.

Step II The community should then create the means for extracting the economic rents from the exploitation of high seas living resources. Such extraction can be achieved by auctioning use rights and imposing taxes or user fees for all stocks which are fished, including straddling stocks. However, if the latter are being dealt with, one must calculate stock value in terms of maximum economic rents from the entire stock, both within and outside EEZs. In this connection, preferences can of course be given to coastal States but, if such preferences are awarded, they should be in the form of distribution of revenues rather than lower access

17 See: "Marine Fisheries and the Law of the Sea: A Decade of Change", FAO Fisheries Circular No. 853, pp. 41–42.

fees. Lower access fees should be avoided because they only serve to attract fishing effort and thereby dissipate potential economic rent.

Step III The community should establish a system for distributing the benefits generated. These benefits are defined as total economic rents minus the costs of administration, research, and enforcement. The distribution of benefits must be managed to assure stability of the regime. All parties to the arrangement must feel that they are better off from collaboration than they would be from unilateral action, although the amounts of individual shares would be subject to negotiation.

One does not need a centralized global organization to manage high seas fisheries in order to achieve the objectives outlined above. One needs a change in the emphasis of the applicable international law and a change in perceptions. The change in emphasis requires less stress on the freedom of all States to fish the high seas and far more stress on the duty to conserve. Consequently, this shift in emphasis will imply that *new entrants do not have the right to enter into a fishery in which the TAC is fully allocated and in which benefits are being shared*. The shift in perceptions relates to the way in which we manage fisheries. At the national level, the Government of New Zealand has shown that one can move from a chaotic, ineffective system if one has control over the stocks and if one has the will to insist on creating a system that deliberately seeks to maximize the economic returns to society of exploiting living resources.[18]

At the global level, no one *per se* has control over the stocks but we can choose to treat control as being vested in the international community and change the rules to strengthen the duty to conserve. We can also choose to experiment with the basic principle and strategies suggested by FAO. The first step is to move away from the perception that we must always seek to maximize amount of catch and instead to embrace the notion that we should maximize economic values. This shift is a question of political will at the level of the global community. Failure to make this choice soon will imperil not only the resources but also the stability of the current regime governing human activities on the world ocean. Regime instability and breakdown will lead only

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18 See, *inter alia*: IAN N. CLARK and PHILIP J. MAJOR, "Development and Implementation of New Zealand's ITQ Management System", *Marine Resource Economics*, Vol. 5 (1988), pp. 325–349; IAN N. CLARK and ALEXANDER DUNCAN, "New Zealand's Fisheries Management Policies—Past, Present, and Future: The Implementation of an ITQ-Based Management System" in NINA MOLLETT (ed.), *Fishery Access Control Programs Worldwide*, Proceedings of the Workshop on Management Options for the North Pacific Longline Fishery, Alaska Sea Grant Report No. 86–4; and PETER H. PEARSE, "From Open Access to Private Property: Recent Innovations in Fishing Rights as Instruments of Fisheries Policy", in ALASTAIR COUPER and EDGAR GOLD (eds), *The Marine Environment and Sustainable Development: Law, Policy, and Science*, Honolulu, Law of the Sea Institute,1993, pp. 178–195.

to further unilateral extensions of coastal State jurisdiction.

Specifically, what principles should we seek to embrace in an attempt to strengthen the duty to conserve? The seven principles that are offered below are based on some of the recommendations of the International Conference on the Conservation and Management of the Living Resources of the High Seas, sponsored by the Government of Canada in St. Johns, Newfoundland, 5–7 September 1990. However, principle 7 is not derived from that Conference. A variety of guidelines has also been offered by the UN Office of Ocean Affairs.[19] These guidelines are more extensive than, but not incompatible with, the principles offered below.

Fisheries conducted on the high seas must be consistent with the following principles and/or conditions:

(1) Adequate and verifiable statistics must be provided on the catch and effort utilized to harvest target and non-target fish, marine mammals, birds, and/or other sea life.
(2) The fishery must be conducted in a manner so that it does not jeopardize the option of achieving the maximum sustainable yield of the target species.
(3) The fishery should not result in a substantial reduction or depletion of non-target species (bycatch).
(4) The fishery should not be directed toward species fully utilized by fisheries conducted from the adjacent coastal States.
(5) The fishery activity should be compatible with and not detrimental to the environment.
(6) Fisheries regulations applicable on the high seas should be compatible with regulations applicable in EEZs.
(7) The obligation to conserve high seas resources includes the possibility of closing a fishery to new entrants once the optimum yield is fully allocated. Closing fisheries on the high seas to new entrants raises questions of equity and enforceability. Equity can be dealt with through approaches to taxation. Enforceability requires some additional controls on flag State jurisdiction tied to a dispute settlement procedure.

It is worth noting that principle 6 puts the onus on coastal States to improve their management performance as much as it does for DWFNs on the high seas. The principle recognizes that where coastal States have been diligent in implementing their management responsibilities, the benefits of such actions should not be dissipated by lax behaviour of DWFNs fishing the high seas adjacent to the EEZs in question. But, equally, the principle implies that coastal States cannot reasonably expect to be lax in their EEZs and to put the burden of effective management solely on DWFNs operating beyond EEZs.

Principle 7 is novel and controversial but it shows the direction in which we

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19 *The Regime for the High Seas: Status and Prospects*, 1991, pp. 38–40.

think the international community should seek to shape the development of customary international law. It is controversial because it reduces, to some extent, the scope of jurisdiction of the flag State, subject to certain powerful constraints. But the idea is not new, really. It is derived from the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas and was used by WILLIAM BURKE and EDWARD MILES to shape their recommendations for solving problems concerning straddling stocks.[20] Because solving the new entrants problem is so fundamental to achieving effective management of high seas resources, the same idea can be generalized for this purpose.

The 1958 Convention on Fishing notes (Article 6) that the coastal State has a special interest in the conservation of living resources in any area of the high seas adjacent to its territorial sea. Article 116 of the 1982 Convention extends this interest beyond the territorial sea to the EEZ and adjacent high seas. The 1958 Convention also permitted unilaterally prescribed regulations by any coastal State party for adjacent high seas fisheries in default of agreement, subject to binding dispute settlement on the basis of agreed scientific standards.

In order for such action to be valid, it must meet certain tests as specified in Article 7 of the 1958 Convention of Fishing:

(a) That there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery;
(b) That the measures adopted are based on appropriate scientific findings; [and]
(c) That such measures do not discriminate in form or in fact against foreign fishermen.

As it stands, both conventional and customary international law require States fishing the high seas to cooperate to conserve the living resources subject to exploitation by their nationals to negotiate to this end, and to regulate their nationals as necessary. It is but a small step, therefore, to require that where *more* than one State is engaged in fishing high seas resources, such exploitation be conducted *only pursuant to international agreement among the parties concerned.* The machinery for insuring effective management is already embedded in conventional and customary international law and this machinery increasingly contains joint inspection or surveillance enforcement schemes. The proposal for strengthening the duty to conserve therefore generalizes the procedure envisaged in Article 7 of the 1958 Convention to *all parties* to the particular international agreement, not just the coastal State.

By making the right to fish subject to international agreement, the means exists for controlling the problem of new entrants via the management infrastructure and the joint surveillance and enforcement scheme. Yet, the parties to the agreement are themselves subject to the constraints set out in

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20 MILES and BURKE, loc.cit. n. 12, esp. pp. 350–356.

Article 7 of the 1958 Convention on Fishing. There remains only the necessity of tying these recommended changes in the law to an explicit and binding dispute settlement procedure, such as that recommended in Article 9 of the 1958 Convention.

THE NON-ALIGNED MOVEMENT AT THE CROSS-ROADS—THE JAKARTA SUMMIT ADAPTING TO THE POST-COLD WAR ERA.

J.J.G. Syatauw*

1. INTRODUCTION

The 10th Conference of Heads of State or Government of Non-Aligned Countries which convened in Jakarta from 1–6 September 1992, known as the "Jakarta Summit", began under rather difficult conditions. In the three years which followed the Belgrade Summit of September 1989, the post-Cold War world had not yet settled down. The disturbing effect of the disintegration of the Communist bloc in Eastern Europe was still being experienced in the world at large. As the Eastern European drama unfolded, the Middle East came to the boil when Iraq threatened Saudi Arabia and subsequently invaded Kuwait. A number of Arab non-aligned countries became involved in a conflict that the Non-Aligned Movement (hereinafter referred to as "the NAM" or "the Movement") itself could not solve.

The situation for the NAM worsened still when the Balkans were caught in a new wave of political unrest which saw the Federal Socialist Republic of Yugoslavia, which at that time held the chair of the NAM, slowly disintegrate. Yugoslavia had held the chair of the Movement since the 9th Non-Aligned Conference in Belgrade in 1989. In that capacity and as a Balkan State herself, Yugoslavia had every opportunity to use her influential position and her own leadership qualities to guide the NAM through the turbulent waters of the post-Cold War period.

Caught in a disintegration process, which threatened to tear her apart,

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Yugoslavia. like her neighbours, had apparently become convinced that only a radical change in her former political and economic policies could save the country from disaster. The Yugoslavs appeared equally convinced that for the NAM, at the global level, a similar change of policies was needed if the Movement was to survive the challenges of the new times. Hence Yugoslavia in chairing the 9th Summit of Belgrade developed and advocated what it called the "modernization of the Non-Aligned Movement[1]," which in fact implied the discarding of the NAM's former attitude of assertiveness *vis-à-vis* the two power blocs. Instead the NAM had to adopt a more tolerant and flexible position with the emphasis on cooperation and dialogue. So strongly were the Yugoslav leaders convinced of the need for this policy change that they accused those members of the NAM who disagreed with her of being dogmatic, conservative and radical.[2]

Many others within the NAM apparently did not share the Yugoslav views, nor were they convinced that the international political changes, however profound, would be of a permanent nature. During the formulation of the Final Documents of the Belgrade Summit, Yugoslavia's views were only partially adopted, namely where the Movement explicitly endorsed a future policy of dialogue and cooperation. At the same time, the Documents stated that while the world political climate had improved and tension had eased, peace was not stable and there was no cause for undue optimism.[3]

In fact, by the subsequent Ministerial Conference of the Non-Aligned Countries in Accra, Ghana, in September 1991, the world political situation had deteriorated further, including, among other things, the entire break-up of the Yugoslav federation. The report of the Accra Conference concluded that no consensus had been reached in support of the view that the Cold War had ended and that the New World Order had actually emerged.[4] The meeting did, however, reaffirm its earlier commitment to a policy of compromise and consultation.[5]

When the Jakarta Summit convened in September 1992, three years had elapsed since the preceding Belgrade Summit, sufficient time for the NAM finally to outline a well-defined policy for the new post-Cold War era, to be implemented this time under the leadership of Indonesia. For Indonesia, the chairing of the Jakarta Summit was the fulfilment of a long-held dream. In the

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1 See for these views the writing of Dr RANKO PETKOVIC, the leading Yugoslav theorist on non-aligned matters, for instance in RANKO PETKOVIC, "Modernizing Non-Alignment," RIA No. 947, 20 September 1989, pp. 1–4.

2 Ibid: See also DARKO SILOVIC, "Response to the Challenges of the Times," loc.cit. n. 1, pp. 4–5.

3 See *Belgrade Declaration*, loc.cit. n. 1, pp. 27–31, paras. 1 and 3.

4 Annex II of the *Report of the 10th Ministerial Conference of the Non-Aligned Countries, Accra, 2–7 September 1991*, (hereinafter referred to as *Accra Report*), para. 1(e), published by Media Centre of the 10th Non-Aligned Summit, Jakarta 1992.

5 Id. para. 1(g).

1960s and 1970s the deplorable state of the Indonesian economy required that the highest priority be given to economic development. Now that the country's economy had made substantial progress, the time had come to return to the international stage and reclaim the prominent position which Indonesia had once occupied in the NAM as one of its leading founding members.[6] However, Indonesia's efforts to chair the NAM, and therefore also to host and chair the NAM Summit, had been thwarted in recent years by the rival candidacy of Nicaragua. Only after Nicaragua withdrew her candidacy was Indonesia finally chosen in 1991 to host the 10th Summit.

The NAM could do little about some of the turbulent developments of the post-Cold War period (for example in Yugoslavia, Iraq, Kuwait and Somalia, all members of the NAM) and these events had a rather dampening effect on the spirit of the Movement. Moreover, critics of the Movement began to claim that the NAM had not been able to play a significant role in world affairs and that the NAM had been pushed virtually to the margins of international politics. Some even questioned whether the NAM had any role to play in the new world in which the former system of bipolarity had been transformed into one of multipolarity or, according to some, unipolarity. Some NAM members had apparently even raised the possibility of dissolving the NAM. It was against this uncertain background that the Jakarta Summit took place.[7]

Ultimately, around 100 members, including some 60 heads of State or government, arrived in Jakarta. The conference admitted four new members (Brunei Darussalaam, Myanmar, the Philippines and Uzbekistan), while earlier Guatemala, Mongolia and Papau-New-Guinea had also been admitted and Cambodia[8] had returned to the Movement. In the meantime, one country, Argentina, had left the NAM bringing the total membership to 108.[9]

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6 For the recent changes in Indonesian foreign policy, see M.R.J. VATIKIOTIS, "Indonesia's Foreign Policy in the 1990s," 14 *Contemporary Southeast Asia* (1993) pp. 353–367.

7 At the NAM Ministerial Meeting held in Larnaca, Cyprus, in early 1992, some of these pessimistic and critical comments were made even by some of the delegates, see "Non-Aligned Will Go for Changes at the UN," *The Times* (Malta), 5 March 1992, p. 12/1.

8 The Cambodian delegation in Jakarta was led by His Royal Highness Prince NORODOM SIHANOUK, President of the Supreme National Council of Cambodia.

9 Members of the NAM are: Afghanistan, Algeria, Angola, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Benin, Bhutan, Bolivia, Botswana, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Côte d'Ivoire, Cuba, Cyprus, Djibouti, Ecuador, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea Bissau, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Jordon, Kenya, Kuwait, Korean Dem. People's Rep., Laos, Lebanon, Lesotho, Liberia, Libya, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Palestine, Panama, Papua New Guinea, Peru, Philippines, Qater, Rwanda, Saint Lucia, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Suriname, Swaziland, Syria, Tanzania, Togo, Trinidad and Tobago, Tunisia, Uganda, United Arab Emirates, Uzbekistan, Vanuatu, Venezuela, Vietnam,

As an increasing number of other States and organizations wanted to attend NAM summits, it has become customary for the NAM to admit some of them as observers or guests at each of its summit meetings. Observers are entitled to attend summit meetings without having a vote, but, with the permission of the chair, they can speak at the meetings. Guests, on the other hand, can attend the meetings but without the right to vote or speak. In Jakarta, observer status was accorded to some eight states, including for the first time Armenia, Croatia and Thailand, and eight international and other organizations, while China had earlier already been granted observer status. Guest status had been granted to 18 States and 13 organizations[10] including for the first time Bosnia-Herzegovina and Slovenia. Requests for guest status by Kyrgyztan and Macedonia were referred to the Co-ordinating Bureau of the Movement for further consideration.

Rather than going into the general aspects of NAM's development, the present article will devote most of its attention to some specific issues that came up as a result of recent changes in the world community. These issues which have become the subject of intense discussion among delegates and outside observers alike, are:

(1) the relevance of the NAM in the post-Cold War era;
(2) the status of the chair, Yugoslavia;
(3) the New World Order;
(4) the contribution of the NAM to international organization;
(5) the contribution of the NAM to international law;
(6) human rights; and
(7) North-South relations.

2. THE RELEVANCE OF THE NAM IN THE POST-COLD WAR ERA

From its very beginnings the NAM has experienced criticism, hostility and gross misunderstanding of its objectives and method of operation, often being forced to justify its *raison d'être*. The major criticism which had previously been made by the Western world was that it was immoral for the non-aligned countries to stay aloof from the great ideological struggle of the Cold War

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Yemen, Yugoslavia, Zaire, Zambia and Zimbabwe. See "Facts and Figures about NAM Member States," *The Jakarta Post*, 1 September 1992, p. 3/5.

10 For the complete list of members, observers and guests attending the Conference, see *Final Documents of the 10th Conference of Heads of State or Government of Non-Aligned Countries, Jakarta, 1–6 September 1992*, published by PT Gramedia Pustaka Utama, Jakarta 1992 (hereinafter cited as *Final Documents*), Chapter I, paras, 3,4 and 5.

between Western democracy and Eastern communism, between "good" and "evil".[11]

A frequently heard and perhaps the major criticism today is that the NAM, whatever its earlier merits, has now become ineffective and irrelevant.[12] In the past the NAM had vigorously pursued a policy of keeping the Third World out of the Cold War rivalry between the two superpowers and their allies. Now that the Cold War has ended, critics of the NAM maintain that the existential basis of the NAM has disappeared and with it the justification for the continued existence of the Movement.

Before going directly into the merits of these arguments, it should be said that, as often in the past, the NAM is again being subjected to a double standard. While Western international organizations, which owe their existence entirely to the outbreak of the Cold War (for example, NATO and the West-European Union), continue to exist, no such accusations of irrelevance are being made against them, in spite of the official declaration by the West that the Cold War is now over and won. What is more, these organizations have been looking desperately for new or alternative objectives in order to justify and prolong their existence. In the present climate of global insecurity this poses no real problem for them.

A more direct counter-argument against the contention of irrelevance of the NAM is that its critics have allowed themselves to be deceived into wishful thinking and actually believe that the end of the Cold War automatically implies the arrival of a truly peaceful world. Carried away by euphoria, they have failed to realize that the end of the Cold War may also release certain disruptive forces which had so far been dormant. To that extent statesmen and commentators in the Third World have been more realistic and less ideological than their Western colleagues. Once signs of *rapprochement* between the superpowers were noticed, Third World commentators warned against expecting a speedy and substantive improvement of the international *détente*, since former *détentes* had also been expected to last and intensify, only to relapse into a new confrontation a little later.[13] The continuing political unrest around the globe serves to illustrate how premature the euphoria in the West has been.

Historically, another counter-argument can be made in reply to the accusation of irrelevance. Contrary to what is often claimed, the NAM is

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11 The most notorious statement was made in 1956 by the former American Secretary of State, JOHN FOSTER DULLES, who referred to "neutralism", as Non-alignment was then called, as an "immoral and shortsighted conception" (cited in PETER LYON, *Neutralism* (1963) p. 47).

12 A.W. SINGHAM has given much attention in his writings to frequent criticism launched against the NAM. See for instance A.W. SINGHAM, "Perestroika for Non-Alignment?", RIA No. 948, 5 October 1989, pp. 8–10.

13 Cf. M.S. RAJAN, "Non-Alignment in the 'Unipolar' World", RIA No. 982, 5 March 1991, pp. 1–3. Id. *Jakarta Message*, in *Final Documents, supra* n. 10, para. 3, reproduced 2 AsYIL (1992) 424.

not the product of the Cold War although the rivalry this engendered has always greatly affected her philosophy and policies. The origins of the NAM predate the Cold War. As early as 1946, Mr. Nehru, the Indian leader projected a non-aligned foreign policy for his country stating that India intended "to keep away from the power politics of groups, aligned against one another."[14] The direct precursors of the NAM: the Asian Relations Conferences of New Delhi, India, in 1947 and 1949, the Asian Powers Conference of Colombo in 1954 and, particularly, the Asian-African Conference of Bandung in 1955, were primarily convened to promote the political emancipation of dependent territories. These were mainly former colonies established after World War II, which sought protection from the dangers of returning colonialism, imperialism and neo-colonialism. The forceful return of the colonial powers (notably Britain, France, and the Netherlands) to their African and Asian dependencies immediately after the end of the Second World War, is sufficient evidence that such fears were justified.[15] While it is today conceded by the NAM that colonialism is on the retreat, removing its remaining manifestations will continue to be a major preoccupation of the NAM until all peoples have exercised their inalienable right of self-determination and attained the freedom and independence of their homelands.[16] Until this aim has been achieved, there is sufficient reason for the NAM to continue to function in the interest of its Members.

Politically, the NAM has always taken a firm stand against the division of the world into two rival power blocs whose massive weaponry held the world to ransom. The non-aligned States have therefore steadfastly refused to join a power bloc and insist instead on their right to pursue their own, independent foreign policy, free from pressure and domination by any country or bloc of countries. The NAM wishes to maintain that position regardless of whether there are one, two or more powerblocs. The upholding of this right remains an important task for the NAM today and in the future.

The fact, that the objectives and policies of the NAM still appeal to many States and nations is amply demonstrated by the continuing flow of new candidates applying for membership of the NAM. For instance, hardly had the break-up of the Soviet Union and Yugoslavia happened before some of their constituent States were already seeking contacts with the Movement to explore the possibility of becoming members. A similar interest in the NAM is shown by the ever-increasing number of observers and guests, including members of

14 Quoted in K.C. CHAUDHARY, *Non-Aligned Summitry* (1988) p. 2.

15 For the origins and establishment of the NAM, see A.W. SINGHAM & S. HUNE, *Non-Alignment in an Age of Alignments* (1986) pp. 57–75.

16 *Final Documents, supra* n. 10, Chapter III (Political Issues), para. 85.

the former Warsaw Pact, as well as some present members of NATO.[17] It is inconceivable that all these States would have bothered to attend the Jakarta Summit if they had thought the NAM irrelevant.

However, the ultimate proof of the relevance of the NAM must be provided by the NAM members themselves. Besides the expanding membership, the uninterrupted and intensifying activities of the NAM confirm that the members are fully convinced of the continued usefulness of their Movement. They are equally aware of the relative insignificance of the Third World without the combined strength of all of its members brought together in the NAM.

The NAM therefore derives its main significance from the fact that it has become the chief spokesman and main guardian of the interests of Third World countries. The NAM, however, must do some "new thinking" of its own in order to redefine its position within the new international political environment in which concepts such as Cold War, bipolarity and a three-world division are now out of date.

3. THE STATUS OF THE CHAIR: YUGOSLAVIA

Despite the excellent preparations of the organizers of the Jakarta Summit, the recent horrendous events in Yugoslavia could not be prevented from casting a dark shadow over the summit, adversely affecting at least the first part of the conference. Yugoslavia, a once proud country, which in the Second World War withstood the Nazi German hordes and later on the Russian "bear", had succeeded against all odds in unifying a complex multicultural society. She also became the first European country, and a founder State at that, to join Third World States in creating the NAM, only to be engulfed by civil war just as, as the NAM had long hoped for, the Cold War ended. The disintegration of Yugoslavia also threw the NAM into turmoil.

As the official chair of the Movement since the Belgrade Summit of 1989, Yugoslavia was entitled to occupy the chair until the opening session of the Jakarta Summit, when the position was to be transferred to her successor, Indonesia. However, during the preparatory meetings directly preceding the Conference, fierce objections were raised to Yugoslavia keeping the chair. In the eyes of many members, in particular the Muslim countries, the new Yugoslavia (Serbia and Montenegro) had disqualified herself by her aggressive and dehumanising treatment of the ethnic minorities of the former Yugoslavia, in particular those of Bosnia-Herzegovina. Under pressure from these

17 The list of guest countries at the Jakarta Summit showed, among others, the following names: Bulgaria, the Czech and Slovak Federal Republic, Germany, Greece, Hungary, The Netherlands, Norway, Poland, Romania and Spain.

members, Yugoslavia had to yield the chair to Indonesia even before the official opening of the Conference. Still not satisfied, these members pressed for the expulsion of Yugoslavia from the conference. However, since the NAM does not have an expulsion procedure, they argued instead that the State of Yugoslavia had disintegrated into a number of separate States and had thus ceased to exist. Hence, Serbia-Montenegro, now called the Federal State of Yugoslavia, should, as other components of the former Yugoslavia had done, apply anew for membership of the NAM.

However, there was also support for the opposing view, that only a few constituent parts of the former Yugoslav federation had seceded but that the main body of that State, namely Serbia-Montenegro, had maintained "the state continuity and international and legal subjectivity of Yugoslavia".[18] Many African countries with multi-ethnic populations themselves favoured the latter position. This debate on Yugoslavia's membership of the NAM followed in broad outline the opposing positions taken at the UN during the similar debate on Yugoslavia's membership of the UN.[19] There was one fundamental difference. Unlike UN decisions, NAM decisions are reached through consensus. With opposing parties so strongly divided, no consensus and therefore no decision could be reached. Therefore, the so-called Yugoslav delegation was allowed to remain at the conference pending a final decision on the legitimacy of her membership to be taken at a special ministerial meeting of the NAM in New York in September 1992. Unfortunately, this meeting could not break the deadlock either and only produced a compromise solution in which the issue was postponed for an uncertain period of time. The present chairman, Indonesia, will now attempt to resolve the matter, while Yugoslavia (Serbia-Montenegro) had agreed to suspend participation in NAM meetings and activities until its status in the international community is resolved.[20]

For Serbia-Montenegro in particular, which regarded itself as the continuity (in truncated form) of the former State of Yugoslavia, it must have been a bitter experience to see that the Movement which the Yugoslavia of an earlier time had helped to create and sustain, was now turning its back on them. However, the prevailing mood seemed to suggest that precisely because the former Yugoslavia had been a leading member, Serbia-Montenegro should have respected the principles of the Movement and had recourse to peaceful methods of settling the conflict. For example, they might have requested the

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18 This statement was made by the Serbian foreign minister himself, VLADISLAV JOVANOVIC, in: "Settlement of the Yugoslav Crisis by Peaceful Means", RIA No. 1012–13, 1 January–1 February 1993, at p. 1.

19 See Y.Z. BLUM, "UN Membership of the 'New' Yugoslavia: Continuity or Break?", 86 AJIL (1992), pp. 830–833; "Correspondents Agora: UN Membership of the Former Yugoslavia", 87 AJIL (1993), pp. 240–251.

20 ANA DAMIAN, "Echoes of Non-Alignment in the Balkans", RIA No. 1016–1017, 1 May–1 June 1993, p. 32.

NAM to mediate in the matter, the more so since the other States of the former Yugoslav federation had expressed the wish to join the NAM, giving the latter considerable leverage in attempting to resolve the conflict. Serbia-Montenegro came to realize too late that resort to violence and "ethnic cleansing" were unacceptable even within a Movement which is a strong supporter of the principles of State sovereignty and of non-interference in the internal affairs of a State.[21]

4. THE NEW WORLD ORDER

The New World Order (NWO) in international relations received considerable attention at the Jakarta Summit. In the first place, the concept attracted great attention since it had been presented and developed in connection with the Gulf War, in which Iraq and Kuwait, two Arab members of the NAM, were the main protagonists. Secondly, as a movement pursuing certain international objectives, including the democratization of international relations, the reference to a New World Order involving a new system of international relations was of direct interest to the NAM. The NWO was therefore closely scrutinised to see what consequences it would have for the NAM.

The origins of the NWO lay in the disintegration of the Communist bloc in Eastern Europe and the disappearance of the rivalry between the Eastern and Western blocs during the Cold War. For the first time it became possible for the major powers, and in particular the permanent members of the UN Security Council, to pursue in unison the objectives of the UN. Apparently deeply impressed by these events and their implications for the future of the world, President George Bush of the US gave his vision of the future of international relations in a speech before the US Congress on 11 September 1990. He described the NWO in the following terms:

> "A new world order ... a new era—freer from the threat of terror, stronger in the pursuit of justice, and more secure in the quest for peace, an era in which the nations of the world, East and West, North and South, can prosper and live in harmony ... Today that new world is struggling to be born, a world quite different from the one we have known, a world where the rule of law supplants the rule of the jungle, a world in which nations recognize the shared responsibility for freedom and justice, a world where the strong respect the rights of the weak."[22]

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21 For a Yugoslav point of view on the difficult options she had to choose from, including those she faced at the Jakarta Summit, see RANKO PETKOVIC, "The Non-Aligned in Jakarta", RIA No. 1007–8, 1 August–1 September 1992, pp. 7–8, 29.

22 Cited in T.B. MILLAR, "A New World Order?", *The World Today*, (1992) p. 7.

It is quite possible, and indeed understandable, that world leaders such as President Bush, who during the Cold War period had lived for so long with the threat of annihilation by nuclear weapons, should be so carried away by the possibility of great and peaceful transformations taking place as to become convinced that the world had reached the threshold of a new and ideal world order. Others, however, regarded these developments with scepticism. When subsequent world events failed to accord with President Bush's expectations of the NWO, the prevailing situation was soon referred to in cynical terms, such as "the new world disorder".[23] As could be expected in a movement of more than 100 members there were mixed reactions to President Bush's references to a NWO. Some members endorsed President Bush's vision of the NWO, and favoured strong action against Iraq in response to her attack on Kuwait, a fellow-member of the Movement. Some even contributed to the forces of the international coalition deployed in the Gulf.

However, soon after the end of the Gulf War doubts were expressed about the NWO, due mainly to the ambiguous nature and lack of clarity of the concept. There was some uneasiness that the actions of the Security Council (for example, the creation of a no-fly zone over Southern Iraq,[24] might go too far in depriving Iraq of its sovereignty, and thus set a dangerous precedent. This in turn caused many in the Third World to feel that the NWO had simply become a handy policy instrument for the big powers and that the actual interpretation and implementation of the NWO had become the prerogative of the permanent members of the UN Security Council.[25] The NWO ran into real trouble when it was put to the test in the Yugoslav crisis and, in the eyes of many non-aligned States, was found wanting. In this case, it seemed that the principles of the NWO were forgotten or ignored, with tragic consequences for the peoples of the former constituent States of Yugoslavia. Here, little was seen of the determination and assertiveness the Western States had demonstrated

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23 JIM HOAGLAND, leading columnist of the *International Herald Tribune*, wrote: "All this change can sound like a script for a New World Disorder rather than for the harmonious global arrangement under American leadership that President GEORGE BUSH sketched a year ago as the Gulf War ended." "Stopping Halfway along the Road to a New Order", IHT 23 April 1992. See also STANLEY HOFFMANN, "Delusions of World Order", *New York Review of Books*, 9 April 1992, pp. 37–43, and A.M. ROSENTHAL, "The New World Order Died in Vilnius, Age 4 Months", IHT 16 January 1991, p. 9/1.

24 A couple of days before the opening of the Jakarta Summit Western countries began to enforce a no-fly zone over Southern Iraq deepening the concern of the NAM over the situation. Even a leading Western newspaper questioned the legitimacy of the action: 'No to the No-Fly Zone', IHT 29–30 August 1992, p. 10/1.

25 See the following analyses by very diverse authors: P. DE WAART, "Het westen maakt de VN oorlogszuchtig" [The West is Making the UN Warlike] in the Dutch daily *De Volkskrant*, 19 August 1992, p. 1/2; ANTHONY LEWIS, "So Whatever Happened to the New World Order?" IHT 29 September 1992, p. 4/3; JOHN PILGER, "Keeping the Violent Peace –the UN is Becoming an Instrument of Western Power", *New Statesman and Society*, 10 July 1992, p. 10.

during the Gulf War. On the contrary, indecision and double standards seemed to characterize the policies of those countries. These contradictions did not of course go unnoticed by the non-aligned members as was evident during the general debate in Jakarta. No one expressed that reaction more dramatically and forcefully than Prime Minister Mahathir of Malaysia, who began his speech with a critique of the NWO in the light of the many crimes committed in Bosnia-Herzegovina. Why had the West adopted a hesitant attitude towards the daily killings in Bosnia having taken such strong action against "the alleged killing of the Kurds in Iraq ... even when the evidence is not clear?" Prime Minister Mahathir therefore continued:

> "Is this the face of the New World Order? If it is, it is a frightening face because it is grotesquely distorted. While minor human rights infringements will attract retribution, blatant abuses on a massive scale go unpunished. What kind of New World Order is this? What will be the fate of the many small and weak countries who make up the majority in our Organization? If we are subjected to the same Serbian-type brutality, will the world watch uncaringly on their TV-screens?"[26]

The general feeling of discontent expressed with regard to the NWO led the NAM to decide that the formulation of the NWO could not be left to the permanent members of the UN Security Council. Hence, the NAM was determined to be actively involved in shaping the NWO.[27]

There was general agreement that a NWO could best be pursued at the UN, and taking into account the basic principles of the UN Charter. If the NAM had to be changed to adapt itself to the newly emerging international order, so should the UN as the centrepiece of that order itself be modified. What was particularly resented in the old order, and therefore to be abandoned in the new one, was the element of inequality built into the UN as a post-war organization set up to prevent a repetition of the Second World War. Anachronisms in the UN's structure which still reflected the political configuration of the middle 1940s, including a Security Council in which each of the five principal victorious nations of World War II have been given the privileged position of permanent member and a concommitant right to wield the power of the veto, had to be eliminated.

Remarkably, even the present Secretary-General of the UN, Dr Boutros-Ghali, in his much commended report on"Agenda for Peace", did not use the opportunity to suggest any structural changes to the UN system nor did he examine specific options for power distribution in a newly structured United

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26 *Statement by His Excellency Dato' Seri Dr. Mahathir Mohamad at the 10th Non-Aligned Summit in Jakarta*, p. 6, para. 3.

27 This was already NAM's position in 1991, when the 10th Ministerial Conference in Accra, Ghana, made a statement to that effect, See *Accra Report, supra* n. 4, para. 1(c).

Nations. Dr Boutros-Ghali was even reported to have said in Jakarta that it was not his job to persuade the five permanent members to revise the UN Charter; that this was almost an impossible task and that the other UN Members should themselves try in some way to persuade the permanent members to accept a change in the composition of the Council.[28]

In contrast, the NAM was keen to urge the restructuring and revitalization of the UN, particularly of the Security Council, although more time is needed to reach a consensus since many different opinions were expressed in Jakarta. Some members wanted an expansion of the number of permanent members of the Security Council to reflect the international reality of the 1990s. Others preferred a more democratically structured Security Council, though the elements of the idea were not precisely stated. Malaysia did suggest the use of a population criterion or at least a combination of relevant factors.[29] President Soeharto of Indonesia later suggested that developing countries with a population exceeding 150 million should become permanent members of the Security Council.[30] Zimbabwe proposed that any current chairman of the NAM should also be given a permanent seat on the Security Council. Other members wanted to raise the status of the General Assembly by establishing a more balanced relationship with the Security Council. No objection was heard against the possible inclusion of Japan and Germany as permanent members. However, in the case of Germany one may wonder whether—in view of the high profile of human rights protection in contemporary international relations—the frequent racial attacks on minority groups in Germany and the apparent inability or unwillingness of the German security forces to prevent such atrocities, would qualify Germany at this time for such a prominent and responsible position.

In view of the importance of this matter, participants at the Jakarta Summit thought it necessary to set up a high-level working group under the NAM's current chairperson and charge it with the elaboration of concrete proposals for the strengthening of the UN as well as the effective participation of the NAM in the shaping of the NWO.[31] Although the NAM had called for a restructuring of the entire United Nations system, it was clear that the real focus of its action was the Security Council. What the NAM members really wanted, however, could hardly be expressed in the context of a huge conference where speaking time was rather limited.

A better opportunity presented itself just three months later when the General Assembly requested the Security-General of the UN to invite member

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28 "Reforming UN Almost Impossible: Boutros-Ghali", *The Jakarta Post*, 3 September 1993, p. 1/8.

29 Statement by Dr MAHATHIR MOHAMAD, *supra* n. 26, p. 6.

30 "Falling Short in Tokyo", *The Jakarta Post*, 9 July 1993, p. 4/1.

31 *Decision on the Establishment of a High Level Working Group for the Restructuring of the UN*, (NAC 10/Doc.10/Rev.1), also published in *Final Documents, supra* n. 10.

States to submit written comments on a possible review of the membership of the Security Council.[32] Of the 50 replies that were returned by member States by 9 July 1993, 21 came from NAM members. What this exercise reveals is a clear affirmation of the feelings expressed on this topic at the Jakarta Summit. This time the comments went much further and into greater detail. There were clear expressions of discontent with regard to the present unrepresentative composition of the Security Council and strong demands were made for increasing the membership of the Council. Furthermore, there were strong expressions of concern about the "antidemocratic" or "anachronistic" nature of the veto which, according to some, should be abolished and about the tendency of the Security Council to expand its powers at the expense of other organs, in particular the General Assembly. There was criticism of the lack of "transparency" in the work of the Security Council and the increasing use by this organ of informal meetings as well as the inadequate reporting of the Council to the General Assembly under Article 15 of the Charter.[33] It would not be surprising if these opinions were to re-emerge in the NAM Working Group on the Restructuring of the UN.

Since the organs of the UN are interrelated, the privileged position of the permanent members of the Security Council occasionally impacts on other organs of the UN even though in the latter that privileged position is not officially sanctioned by the UN Charter. It would therefore be expedient for the NAM Working Group on the restructuring of the UN also to look at the need for the restructuring of the other organs in order to bring them in line with the general trend towards a reformed UN.

The relevant organs referred to here are some of the other principal organs of the UN, in particular the Economic and Social Council (ECOSOC), the Trusteeship Council (TC) and the International Court of Justice (ICJ or "the Court"). The first two organs do not pose any real problem. The TC is slowly fading away for lack of trusteeship territories, with presently only one remaining. In the ECOSOC the five permanent members of the Security Council are still permanently represented, presumably on the basis of their economic importance and political influence. However, the undue importance attributed to the presence of permanent members has in the course of the last few decades been counterbalanced by the subsequent expansion of the total membership of ECOSOC to 54, so that in comparison with the combined influence of the 49 other members, the privileged position of permanent members has now become more plausible and acceptable.

Such is not the case, however, with the ICJ. The Statute of the ICJ sets out the composition of the Court, the qualifications of the judges as well as the

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32 U.N. Doc. A/RES/47/62, 11 December 1992.

33 *Report of the Secretary-General on the Equitable Representation on and Increase in the Membership of the Security Council*, U.N.Doc.A/48/264, 20 July 1993.

method of their selection.[34] Today the Court is composed of 15 independent judges, elected regardless of nationality from among persons of high moral character who also have the highest judicial qualifications. The election procedure is conducted concurrently but independently by the General Assembly and the Security Council from a list of persons nominated by the "national groups" of the Permanent Court of Arbitration. In order to arrive at a broadly representative character, the electors should also bear in mind that the main forms of civilization and the principal legal systems of the world are represented in the Court (Article 9 of the Statute of the ICJ).

The electoral system of the Court has for long been subject to criticism.[35] The most anomalous result of this electoral system is that while neither the Charter of the UN nor the Statute of the ICJ reserves a permanent seat on the Court for any UN Member, by having a minimum of understanding between themselves and making clever use of the electoral system, these five members (with the exception for a time of China) have been able to make sure that their national nominee would always be elected or re-elected to the Court,[36] thus virtually having a permanent hold on five of the 15 seats of the Court. This represents a serious disadvantage for the other UN Members. As early as 1945, it was pointed out that in a court of only 15 members, the smaller countries would have little chance of seeing their nationals elected to it.[37] Since then the electoral situation has deteriorated even further for the smaller nations. In 1946 with 15 judges forming the ICJ and the permanent members of the Security Council occupying five seats, the other 45 UN Members had to compete for the remaining ten seats. Today with more than three times as many UN members as in 1945 (namely 184), 179 Members must compete for the same ten places on the Court.

The situation might still be acceptable if the attitude of the permanent members towards the Court had shown them fully deserving of their privileged position. The facts show a different picture, though. After almost half a century of existence, the Court's records show that the permanent members of the Council are among the least supportive of the principles on which the Court is based. Although some of them have been willing to submit to the jurisdiction of the Court on the basis of a special agreement or a compromissory clause in treaties, most of them have refused to accept the compulsory jurisdiction of the Court under Article 36(2) of the Court's Statute (the so-called "optional clause") in spite of the fact that the optional clause was originally introduced to meet the objections of the Great Powers to a system of

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34 Statute of the ICJ Chapter I, Organization of the Court, Article 2 *et seq.*

35 See SHABTAI ROSENNE, *The Law and Practice of the International Court* (1965) p. 184.

36 Id, at pp. 185–186.

37 RUTH B. RUSSELL and JEANETTE E. MUTHER, *A History of the United Nations Charter* (1958) p. 870.

general compulsory jurisdiction for the Court.[38] They also continue to ignore the fact that as early as 1947 the UN General Assembly drew attention to the "desirability of the greatest possible number of States accepting the compulsory jurisdiction with as few reservations as possible."[39] Such an appeal was repeated as late as 1992 by the UN Secretary General in his report on "An Agenda for Peace" where he urged that the role of the ICJ should be reinforced and recommended that "all Members should accept the general jurisdiction of the International Court under Article 36 of its Statute, without any reservations, before the end of the United Nations Decade of International Law in the year 2000".[40] Yet, today only one of the permanent members of the Security Council (i.e. the UK) has accepted the compulsory jurisdiction of the Court under Article 36(2) of its Statute.[41] Worse still some of them have even refused to appear before the Court as defendants, or are unwilling to comply with the decisions of the Court.[42]

The situation will become even more complicated when, as seems certain, Germany and Japan will join the Security Council as permanent members. Will they also be assured of places on the Court? And if the efforts to restructure the UN were to lead to some Third World States also becoming permanent members of the Council, would they also be accorded the same privilege?

In 1945, when the UN was created, with the horrors of the war still fresh in the mind, there was a strong case for the introduction of permanent members into some of the UN organs given their political, economic and military importance for the reconstruction of a more peaceful post-war world. Fifty years on, however, one may question whether under completely different conditions, there is still a need for "permanent members", and if so, how they should be selected. At any rate, these questions can no longer escape close examination, since the UN is currently being subjected to such an examination arising from the widely felt need for the restructuring and revitalization of the UN. These efforts will focus particularly on the structure and functions of the Security Council, and therefore also on its structural linkages with other UN organs, including the General Assembly and the ICJ.

One final reason why the issue is particularly topical is that the ICJ is now increasingly being asked to pronounce on matters which have serious political, economic and military consequences for the world as a whole. The most recent example of this being a request by the World Health Organization (WHO) for

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38 C.H.M. WALDOCK, "Decline of the Optional Clause", 32 BYIL (1955–56) at p. 244.

39 ROSENNE, op. cit. n. 35, Vol. 2, Appendix 9, p. 879.

40 U.N.Doc. A/47/227, 17 June 1992, para. 39(a).

41 *International Court of Justice, Yearbook 1991–1992*, Chapter IV, Section II: Declarations Recognizing as Compulsory the Jurisdiction of the Court, pp. 73–111, at 73 (footnote 1) and 109.

42 For more facts and statistical data, see RENATA SZAFARZ, "Changing State Attitudes towards the Jurisdiction of the International Court of Justice", in: A. BLOED and P. VAN DIJK, *Forty Years International Court of Justice: Jurisdiction, Equity and Equality* (1988) pp. 1–26, at 20-21.

an advisory opinion of the Court on the legality of the use of nuclear weapons.[43] It is therefore of the utmost importance that the composition of the Court effectively and equitably reflects the present UN membership rather than reflecting the situation of 50 years ago.

5. THE CONTRIBUTION OF THE NAM TO INTERNATIONAL ORGANIZATION

When, after World War II, newly independent States embarked on a process of international cooperation, it might have been expected that they would follow existing models of international organization which had already proven their usefulness. However, these States seem to have preferred to strike out along new paths in the field of international organization and have experimented with different structures which they regard as more suitable for their purposes: the founding fathers among the non-aligned endorsed a form of cooperation that was not an international organization, but a movement.[44] The NAM was not set up by treaty or convention. It has no constitution, no specific rules of procedure, no permanent secretariat, no annual budget, and no international legal personality. It functions in a fairly loose and flexible manner, guided by accepted principles and practices, and taking decisions only on the basis of consensus. In fact, the First Non-Aligned Summit at Belgrade in 1961 was convened as an *ad hoc* international conference without the intention of making it a periodical event. Only later did the members decide to have a summit meeting every three years.

The reasons for choosing this model have their roots in the history and early experiences of the States concerned. As former colonies which had fought long and hard for their freedom, they had the tendency to be jealous of their newly won independence and sovereignty, and were inclined to look with some suspicion on any structure that would require the surrender of any of their powers as States. They also feared that an international organization created for the purpose of achieving the common goals of the members, could in course of time become an end in itself and start to pursue its own interests rather than those of its members. Some of the founders of the NAM felt that traditional international organizations could be less than democratic in their internal operation, often enabling the more powerful States to monopolize important functions.

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43 *Resolution of the Assembly of the World Health Organization on Health and Environment Effects of Nuclear Weapons*, 8 May 1993, requesting the ICJ to give an advisory opinion on the following question: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?" This request has now been officially confirmed by the ICJ in its Communique of 13 September 1993.

However, it was eventually conceded that to make international cooperation a success, some basic structures were necessary, if only to enhance internal communication and the implementation of agreed policies. As the membership came to feel the need for periodical meetings and permanent and regular organs, the Movement gradually adopted more of the characteristics of the traditional international organization than had originally been intended.

The two principal organs of the NAM are the **Conference of Heads of State or Government** (the Summit), the primary policy-making body which convenes every three years, and the **Foreign Ministers Meeting**, which is convened at least twice in three years. Both have become regular organs, as has the **Chair** which is customarily assigned to the host State for the duration of three years until the next summit. For the crucial task of co-ordinating the NAM's activities there is a **Co-ordinating Bureau** operating at two levels, namely that of the Ministers of Foreign Affairs, meeting at least once a year, while the Permanent Representatives of the non-aligned countries at the UN meet in New York as often as the business of the Movement requires.

On political matters, much preparatory work is done by working groups dealing with special issues. As to economic issues, the increased attention being paid to development problems is reflected by functional bodies, each responsible for a particular field of activity covered by the Action Programme for Economic Cooperation among Non-Aligned Countries.[45]

While at a superficial level the present NAM might appear structurally to resemble other international organizations, it is markedly different from most of those bodies in that it does not have, nor does it desire, a permanent secretariat. Instead the chair is expected to provide, during a three-year term of office, the administrative and technical support usually furnished by a permanent secretariat. Members, including a former chairperson (President Robert Mugabe of Zimbabwe) have frequently proposed that a permanent secretariat be created, but time and time again the proposal has been rejected, apparently for fear that a permanent secretariat would signal the creation of an unwieldy and expensive bureaucracy often associated with traditional international organizations.

An important feature of the NAM is that all decisions are arrived at by consensus. For a Movement that includes countries with widely different political and social systems, and peoples of various ethnic and cultural origins, the adoption of consensus rule might seem to be to court disaster. However, NAM members could in turn argue that, to ignore these differences and to

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44 The *Accra Report* states explicitly that "the Movement is not an organization", *Accra Report, supra* n. 4, Annex III, para. 3.

45 The best source for non-aligned material is as yet ODETTE JANKOWITSCH & KARL P. SAUVANT, *The Third World without Superpowers—The Collected Documents of the Non-Aligned Countries*, Oceana Publ., New York (1978).

impose majority decisions on such a diverse gathering of States, would inevitably lead to the break-up of the Movement. This fundamental and perennial dilemma that the NAM faces has to be kept in mind if one is to understand the often slow and arduous method of operation of the Movement.[46] It is the price that the Movement has to pay for its survival and a price that so far it has been quite willing to pay. Media and professional observers, even from the Third World, who are not restrained by the responsibility of holding the Movement together, can sometimes be far more critical than non-aligned leaders themselves of the way the Movement functions. They feel that the price is too high and that progress is too slow. One Indonesian newspaper had this to say about the important meeting of the Standing Ministerial Committee for Economic Cooperation in Bali in May 1993:

> "The outcome fell short of what we originally expected from the meeting at such a level. We actually expected at least clearly-designed blueprints of workable cooperation programs between the NAM members themselves ... Instead the committee has set the Movement into a seemingly endless series of future meetings by proposing the establishment of two *ad hoc* advisory groups of experts and the convening of a summit meeting on economic and social development and international cooperation, as well as another conference on development issues. The sheer process of forming and arranging the composition of the advisory groups and the uphill and very costly exercise of preparing for a summit meeting will have heavily taxed the scarce resources of NAM before it can even begin to embark on concrete cooperation projects ..."[47]

The NAM is itself clearly aware of the need to assess its performance periodically and introduce changes if they are called for. In 1988 a committee was set up, strikingly designated the Committee on the Methodology of the Movement, which was given the task of examining the working methods and procedures of the Movement in order to make it more effective.[48] One of its suggestions that was discussed in Jakarta was the creation of a Back-up System to the Coordinating Bureau which, in the absence of a secretariat, could provide the necessary services and continuity. In its report to the Summit Conference in Jakarta, the Committee recommended that the back-up system would comprise senior representatives of Permanent Missions to the UN in New York.[49]

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46 For the operation of the consensus rule in the NAM, including the decisive role of the Chairman, and the use of reservations, see SINGHAM & HUNE, *op. cit.* n. 15, at pp. 43–47, 114–116 and 311–313.

47 "The View from Bali", *The Jakarta Post*, 17 May 1993, p. 4/1.

48 *Accra Report, supra* n. 4, Annex II, para. 1-1.

49 "NAM Ministerial Meeting Agree(s) to Adopt Recommendations for Summit", *Summit News*, published by the Media Centre of the 10th Non-Aligned Summit, Jakarta, 1 September 1992, p. A-6.

6. THE CONTRIBUTION OF THE NAM TO INTERNATIONAL LAW

The NAM is essentially an informal movement pursuing certain commonly agreed objectives and ideals without imposing legal obligations on its members, and without relying on the kind of structural support provided by a regular international organization. Since it is not an international legal person, the NAM has no capacity to enter into legal relations under international law. It does not, for example, conclude treaties.

This does not mean that the NAM is unable to influence the development of international law. In fact, the views of its members are heavily influenced by the policies and positions adopted by the Movement. Non-aligned summit meetings are convened, in part, to undertake a collective assessment of the international situation and enable the members jointly to formulate the NAM's position on certain important general and specific issues. The Final Declarations of each summit meeting represent the official position of the NAM arrived at by consensus. Hence, it is natural to assume that NAM members, who have participated fully in the formulation of these policies would generally support them and feel morally bound to bring their own policies into line with those of the Movement. In this way State practice among some 100 States is being influenced on such issues of general importance as the New World Order, human rights, the environment and the restructuring of the UN, as well as on more specific issues, such as the situation in the Gulf, Bosnia-Herzegovina, Somalia, Western Sahara and South Africa. Efforts are also continuously being made at the UN by the Coordinating Bureau of the NAM, as well as by the non-aligned caucus or non-aligned groups in the various organs of the UN, to achieve some degree of coordination of the activities and policies of non-aligned countries. With so many of its members adopting, or at least being influenced by NAM positions, State practice among them will inevitably tend to show a considerable degree of uniformity. In this indirect way the NAM has a clear influence on the development of international law.

One international law concept which is of relevance to non-alignment and keeps interacting with it, is neutrality. Although neutrality shares certain common characteristics with non-alignment, the concepts are in other respects different. In general, neutrality is a position of non-participation or non-involvement in a war between belligerents. Non-alignment, often earlier called "neutralism", is non-involvement in, or dissociation from, a particular type of war, the "Cold War", a rivalry and conflict between two powerful States, in which contending parties pursue their objective by a variety of means short of war.[50] Historically, both concepts have gained in importance as methods by

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50 For an early comparative discussion of neutrality, neutralism and neutralization, see PETER LYON, *op, cit* n. 9, Chapter I and IV. At one time Sweden held a rather particular view on her neutrality. Her Minister of Foreign Affairs, STEN ANDERSSON, stated in 1986 that "we define our

which States defend their independence by staying outside international conflicts and wars. Neutrality has, however, in course of time achieved recognition as a legal status, conferring rights and duties on belligerents and neutral States alike.

Such is not the case with non-alignment, in spite of forceful support for its legal status from several jurists. As a Movement dependent entirely on the voluntary support of its Members, non-alignment cannot expect to create legal obligations for its adherents, let alone for other members of the international society of States. The Yugoslav jurist Petkovic is on sounder ground when he stresses that because of its constant support for, and emphasis on, the UN and the principles of the UN Charter "as the 'constitutional' norms of the present legal order", the NAM has been expanding its base in international law.[51]

After World War II neutrality has lost some of its importance because the post-war legal system forbids war. As non-alignment arose as a response to the Cold War, the end of the Cold War could have a similar impact on non-alignment. Neutrality, on the other hand, may now be undergoing a renaissance, for in a new world wherein regional disputes and ethnic confrontations seem to have replaced the Cold War, third States may increasingly want to remain aloof and avail themselves of the neutral option in case such conflicts were to erupt in war. A revival of the practice of neutrality may therefore be expected in contemporary and future international relations.

Paradoxically, at this very time of the resurgence of neutrality, some long-standing champions of the concept (e.g. Sweden, Switzerland, Finland and Austria) are considering modifying their traditional policy of permanent neutrality. This change of policy may be the price that they have to pay for joining the European community (EC) and share in the riches expected from economic cooperation within it. Yet it seems that, in their negotiations with the EC, some mode of accommodation may still be found that will enable them to keep some measure of their traditional status of neutrality.[52] Some experts have even suggested that in the future Europe there may be room for a so-called "cooperative security system" in which a redefined type of neutrality would have its own role to play. It might even be conceivable that a "corridor of neutral States" would be necessary to secure peace between the new power concentrations of Western Europe and the Confederation of Independent

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main foreign policy line as 'non-participation' in alliances in peacetime with a view to neutrality in war," "Neutrality and Non-Alignment," RIA No. 872, 5–20 August 1986, p. 7.

51 RANKO PETKOVIC, "Non-Alignment and International Law", RIA No. 575, (1974) pp. 23–26 at p. 26.

52 SURYA P. SUBEDI, "Neutrality in a Changing World: European Neutral States and the European Community", 42 ICLQ (1993) pp. 238–268, at p. 258–259.

States in Eastern Europe.[53] However, it could well be that the EC, which is already facing serious problems in its integration efforts, may not look very favourably on conditions suggested by new applicant States if such conditions have the potential further to complicate and hold up the creation of a European Union which aspires to adopt a common foreign and security policy, and eventually even a common defence policy.[54] This again underlines the fact that the concept of neutrality is showing two trends: a trend that strengthens its further development, and a counter-trend which could retard it.

As a result of the integration processes taking place in Europe, a number of European members of the NAM are now aspiring to join the EC. Malta and Cyprus, two of the three oldest European members of the NAM, have already entered into negotiations with the EC. Some of the new republics which emerged from the Yugoslav tragedy and are now either member or observer (i.e. a potential member) of the NAM, may in due time also consider entering into some form of cooperation relations with the EC.[55] The question of the compatibility of a NAM membership with an EC or EU (European Union) membership will then have to be faced by all parties, because the foreign and defence policies of the EC or EU might sometimes be at variance with NAM's policies.

In areas such as this the NAM may have to adopt innovative policies to respond to the profound changes that are reshaping the world that existed during the Cold War. Towards the end of that period the NAM became more lenient towards applicant States with some involvement in military alliances. In the present world, where the dangers of military confrontation between the two major military alliances no longer exist, and where the UN, in particular the Security Council, is able to perform its major function of maintaining international peace and security, there would appear to be no reason to deny NAM members the right to join regional international organizations, even those with their own defence policies. Moreover, one of the strong points of the NAM has always been the extensive network of international diplomatic contacts which it is able to use through its large and varied membership. Thus, non-aligned members such as Cyprus and Malta, who have been long-standing and faithful members of the NAM, may well be able to serve as useful channels of communication if they were to be admitted to the European Union. At any rate, these countries could always remain within the non-aligned circle as observers. If for some reason no mutually agreeable solution could be found they would be entirely free to leave the Movement, since the NAM does not

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53 J. BINTER, "Neutrality in a Changing World: End or Renaissance of a Concept?", 23 *Bulletin of Peace Proposals* (1992) pp. 213–218.

54 For the process of establishing a European Union, see e.g. *Towards a European Union* (publication of the Commission of the European Communities, 1992).

55 *Europe and the Challenge of Enlargement* (Bulletin of the European Communities, Suppl. 3/92, Brussels, 1992) pp. 17–20.

have any rule preventing a member from leaving if it so desires.

Although, as a loosely organized political movement, the NAM may not be the most suitable forum for carrying out a concrete project for the progressive development of international law or its codification, its initiatives in organizations better equipped for such tasks can stimulate the development of international law. It was one such non-aligned initiative that led to the launching of the UN Decade of International Law. In June 1989 an extraordinary Ministerial Meeting of the NAM was convened in The Hague to discuss the issue of peace and the rule of law in international affairs. The meeting adopted the Hague Declaration on Peace and International Law (Hague Declaration). It expressed many of the non-aligned views on the need for peace and harmony between nations and

> "called upon the United Nations General Assembly to declare a Decade of International Law to begin in 1990 and conclude in 1999, marking the centennial of the first Peace Conference held in The Hague, and to provide for the establishment of a commission led by a distinguished international jurist to organize and conduct the activities of the Decade of International Law and to prepare a Third Peace Conference at its conclusion."[56]

In spite of the lukewarm, and at times rather hostile, response from Western States, the General Assembly finally adopted Resolution 44/23 on 17 November 1989, declaring that the period 1990–1999, the UN Decade of International Law, should be devoted to the strengthening of the international legal order.[57]

As for the second proposal, the Sixth (Legal) Committee of the General Assembly has set up a Working Group on the UN Decade of International Law which has already produced reports presenting a programme of activities for the first term (1990–1992)[58] and the second term (1993–1994)[59] of the Decade. However, in the face of certain objections from some major UN members the proposal for a Third Peace Conference has not yet been pursued.

The Hague Declaration contained certain broad suggestions as to the nature of the work that could be undertaken in the Decade of International Law. General Assembly Resolution 44/23, adopted in implementation of the initiative of the NAM, redefined and restricted the scope of the Hague Declaration and affirmed that the main purposes of the Decade should be, *inter alia*:

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56 *The Hague Declaration of the Ministers of Foreign Affairs of the Movement of the Non-Aligned Countries Meeting to Discuss the Issue of Peace and the Rule of Law in International Affairs*, (NAM/Conf. 8/P.R.L./MM/2/Rev.1.) at p. 8.

57 See JEREMY THOMAS, "The United Nations Decade of International Law", 3 Afr.JICL (1991) pp. 386–398.

58 U.N.Doc. A/C.6/45/L.16.

59 U.N.Doc. A/C.6/47/L.12.

(1) to promote the acceptance of and respect for the principles of international law;
(2) to promote the means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;
(3) to encourage the progressive development of international law and its codification; and
(4) to encourage the teaching, study, dissemination and wider appreciation of international law.

The history of the adoption of the UN Decade of International Law is another example of the now familiar phenomenon: when Western and Third World countries have different political interests regarding important global issues, focus on the legal aspects of such a particular issue readily produces controversy.[60] In this connection it is worth noting that the NAM acts as initiator or promoter of the Third World views on international law. For instance, the NAM has consistently emphasized, and thus contributed to the consolidation of international law on such concepts as non-interference, sovereignty over natural resources and economic self-determination.

In some ways the Third World States may now be said to replace Western countries as the most ardent supporters of international law and have seemingly embarked on a "crusade for international law".[61] Fully aware of their strength in numbers they miss no chance to stimulate its progressive development, as was demonstrated in the early calls for a New International Economic Order,[62] and more recently in initiatives to formulate the non-aligned position on human rights and to bring about a UN Decade of International Law. Moreover, intent on the promotion of the role of international law in the settlement of international disputes, the NAM has frequently recommended that States, members as well as non-members of the NAM, resort to the ICJ and comply with its judgments.[63]

In view of its disagreements with Western countries, it might be worthwhile for the NAM to give more consistent attention to the legal bases of its claim, as these may at times become the object of strong opposition from Western countries. It is equally desirable for the NAM not only to limit itself to the taking of initiatives in the field of international law but to consider setting up its own legal committee to be composed, for instance, of international law experts from ministries of foreign affairs, legal departments or academic institutions of member States. The primary task of such a committee would not only be to underpin the legal initiatives of the NAM but also to anticipate and

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60 JEREMY THOMAS, loc. cit. n. 57 at p. 388 and 395–6.
61 M. BRUS, "A Non-Aligned Crusade for International Law?", 2 LJIL (1989) pp. 240–247.
62 See SINGHAM & HUNE, op. cit. n. 15, pp. 22–25.
63 See *Hague Declaration on Peace and the Rule of Law, supra* n. 56, p. 4.

prepare for the crucial legal controversies of the future. The human rights debate is a case in point.

7. HUMAN RIGHTS

It is a measure of the prominent position which the human rights issue is now taking in international affairs that it has also become a major topic in discussions at Jakarta. For the first time in the history of the NAM Summits, the Movement dealt directly with the human rights issue and formulated its own official position to which it devoted a special section, both in its Final Documents, as well as in the Jakarta Message.[64]

It was the discussion of the NWO which first raised the issue of human rights, particularly in reference to events taking place in Yugoslavia and Bosnia-Herzegovina. In addition, the current situations in South Africa, Somalia and Cambodia obviously drew attention to the deplorable state of human rights in these countries.

The case of East Timor, however, was not formally raised, probably because during the summit new, informal initiatives were taken by, among others, the Secretary-General of the UN, Dr Boutros-Ghali. who attended the Jakarta conference as an official guest. When the Indonesian Government intimated that it was willing to discuss the matter with the Portuguese Government without making any pre-conditions, Dr Boutros-Ghali invited both parties to meet in New York during the following UN General Assembly to take place a few weeks later.[65] The sensitive and complex nature of the dispute is indicated by the fact that after several rounds of negotiations not much progress has yet been reported.[66] However, as long as relations have not been completely severed, there remains the possibility of a breakthrough. In July 1993, it was reported that some East-Timorese leaders living in exile in Portugal sought to open lines of communication with pro-integration leaders in East Timor. President Soeharto of Indonesia has apparently given his approval for such a dialogue.[67]

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64 *Final Documents, supra* n. 10, Chapter 2 (Global Issues), Section G (Human Rights), paras, 73–80; *Jakarta Message, supra* n. 13, para. 18.

65 "Boutros Ghali: RI, Portuguese Foreign Ministers to Meet", *Summit News*, published by the Media Centre of the 10th Non-Aligned Summit, Jakarta, Indonesia, 2 September 1992, p. A-9.

66 "Talking about East Timor", *The Jakarta Post*, 21 April 1993, p. 4/1; "Indonesia, Portugal Open 'Confidence Building' Talks, *The Jakarta Post*, 22 April 1993, p. 1/4. See on the third tripartite talks between Indonesia and Portugal, "Alatas Sees Progress in East Timor Talks with Lisbon", *The Indonesian Times*, 18 September 1993, p. 8/1.

67 "President Agrees to Hold Dialogue with East-Timorese Figures", *The Indonesian Times*, 21 July 1993, p. 1/7; "East Timorese in Exile Seek Dialog: Lopez da Cruz", *The Jakarta Post*, 21 July 1993, p. 1/3.

One of the main reasons for the important role that the human rights issue played in Jakarta was the effort made in recent years by the Western world to mobilise world public opinion for the protection of human rights. The Western emphasis is so great that human rights have now become a major foreign policy objective of Western Governments. In pursuing these policies they have taken on themselves the task of monitoring the performance of other countries, and censuring them when, in their opinion, these countries fail to perform satisfactorily. It would be only one step further to take certain measures against these countries for actual or alleged violation of human rights. It is here that the strongest protests are made by the NAM for what they consider a violation of the sovereignty of the State and interference in domestic affairs.

Strong reactions to the Western position on human rights were heard during the general debate. For instance, Mr Nyerere rejected the "exclusively individualistic definition of human rights."[68] In the Final Documents of the 1992 Jakarta Summit the Western position is rejected and NAM's own view is defended. Since the official position of the Summit as laid down in the Final Documents does not amount to more than a brief series of general statements presenting the non-aligned position on human rights issues, and in views of the prominence given to human rights in the world at large, this chapter aims to deal more extensively with some aspects of the human rights issue as they were raised as a result of the discussions in Jakarta.

Contrary to what had been anticipated by those outside the Movement, the conference did not reject the binding nature of human rights. In fact, the heads of State or government explicitly affirmed the universal basis of basic human rights and fundamental freedoms that serve as a common standard of respect for the dignity and integrity of man.[69] However, they added some of their particular and more relativist views on human rights. For example, they upheld the competence and responsibility of national governments in the implementation of human rights and they stressed that the promotion of human rights should take greater account of varying historical, political, economic, social, religious and cultural realities, and of the balance between the fundamental rights and freedoms of the individual and his obligations to society and the State, as embodied in the Universal Declaration of Human Rights.[70] They also particularly stressed the indivisible nature of human rights which precludes the neglect of economic, social and cultural rights in favour of civil and political rights. In addition, they reaffirmed their conviction that the right to

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68 *Statement by His Excellency Mr Julius Nyerere, former President of the United Republic of Tanzania and Director of the South Centre, Jakarta, September 1992*, p. 10.
69 *Final Documents, supra* n. 10, Chapter 2 (Global Issues), para. 73.
70 Id, para. 74.

development is an integral part of fundamental human rights,[71] as is the right to self-determination.[72]

Strong objections were raised against certain tendencies which have developed elsewhere with regard to the promotion of human rights. NAM members assert that no country should use its power to dictate its own concept of democracy and human rights or to impose conditionalities on others[73] as is often done with regard to socio-economic assistance.[74] No country or group of countries should arrogate to themselves the role of judge and jury over other countries on this sensitive and critical issue which is of concern to the entire international community, nor should human rights be used as instruments of political pressure, since all nations have the right freely to establish their own political and economic systems and institutions on the basis of respect for the principles of national sovereignty, self-determination and non-interference in the internal affairs of others.[75]

For a possible accommodation of these various conflicting views the NAM points to the fact that the UN Charter has placed the question of universal observance and promotion of human rights squarely within the context of international cooperation[76] and its members explicitly commit themselves to cooperating in the protection of human rights.[77] The above statements also raise the questions of the political and moral aspects of the human rights issue.

In their desire to promote the worldwide protection of human rights, Western countries have not hesitated to use a mixture of overt and covert pressures in the political, economic, financial, artistic and even sporting (e.g. the threat of boycott of future Olympic Games in China) fields, for which purpose, when necessary, their entire diplomatic machinery is activated. It is questionable, though, whether the resolution of such a sensitive and morally important issue as human rights is best promoted by use of such methods. Moreover, Western policy makers who must certainly be aware that their own human rights record is far from perfect, should be slow to set themselves up as the immaculate champions of human rights, since the tables could be turned on them occasionally.[78]

There were early indications that Western countries intended to use the opportunity of the Second World War Conference on Human Rights in Vienna in June 1993 to push through their own views on the nature and importance of human rights, and by implication criticize those who took a different stand. It

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71 Id, para. 75.
72 Id, para. 76.
73 *Jakarta Message, supra* n. 13, para. 18.
74 *Final Documents, supra* n. 10, para. 75.
75 Id, para. 73.
76 Ibid.
77 *Jakarta Message, supra* n. 13, para. 18.
78 "Asians, Turning Tables, Denounce EC in Bosnia", IHT 28 July 1993, p. 2/2.

was, therefore, to be expected that the developing countries would also prepare themselves for such a confrontation, using their own legal and diplomatic instruments and making full use of their group bargaining and voting strength.

In the Final Documents of the Jakarta Summit the NAM therefore outlined its strategy and called on its members to:

> "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."[79]

If anything, human rights are a moral issue *par excellence* and are indeed being dealt with and debated in highly moral terms. While the issue of human rights has a long history, it only gained real prominence as a result of the horrors experienced in the two World Wars, in particular the barbarism perpetrated by some of the warring parties on civilian populations in general, and on certain social and ethnic groups in particular. These shocking experiences gave the Western countries ample cause to try to mobilize the entire post-war international community in an effort to prevent any repetition of such atrocities. After the Second World War the protection of human rights was pursued by the West as a primary objective and with a single-mindedness which was, at first, quite commendable.

However, because of their obsession with the Cold War, Western countries began to use the human rights issue as an instrument of pressure and propaganda with which to attack the Communist governments of Eastern Europe for their gross violations of human rights, embarrassing them in the eyes of both their own people and the outside world. The success of this effort has apparently led the West to believe that the same missionary zeal could be used against the countries of the Third World. One may question, however, whether the moral justification for the West to impose human rights standards on the Communist world holds equally for the Third World.

In the first place, the Third World was not party to, nor guilty of, waging the World Wars which resulted in the deaths, disablement and displacement of millions. Some writers in the Third World still prefer to speak of "the Great European Wars" or "the European Civil Wars"[80] for which they feel no guilt or responsibility. While massive violations of human rights have also occurred and still occur in the Third World, the Second World War conclusively demonstrated that some of the most heinous atrocities in World War II were committed in some of the most "civilized" and "advanced" countries in the world.

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79 *Jakarta Message, supra* n. 13, para. 18.

80 K.M. PANIKKAR, *Asia and Western Dominance* (1953) pp. 259 *et seq.*

Secondly, the idea seems to exist that Western policies successful in the Communist world would also be successful in the Third World. The fact is overlooked, however, that the historical and political context of Western involvement in Eastern Europe is quite different from that in the Third World. In relation to the Third World, some countries in the West bear heavy responsibility, at least in moral terms, for their imperialist and colonial adventures and the suffering inflicted upon indigenous peoples which makes it more difficult for them to claim to be able to lead by way of example.

Even the present record of some Western countries can hardly be described as perfect. Although these countries have made important progress in the protection of human rights in their own societies, many problems, such as discrimination against and vicious attacks upon groups in their societies—for instance, Jews, homosexuals, refugees and migrant labour—remain unresolved. Their record is particularly poor with regard to racial discrimination. Indeed, it is now generally admitted that racism is on the rise across Europe.[81]

The point to be made here is not that human rights are not important or do not deserve so much attention: no measure of attention could today be too much to defend the cause of human rights, and the Third World with its long history of colonial and post-colonial human exploitation and suffering would and should be the first to recognize this. However, it is worth emphasizing that the cause of human rights will not be advanced through aggressive and self-righteous action.

Western countries often fail to see that their attitude towards human rights is open to criticism as being Eurocentric. The record concerning human rights in the Third World, as indeed in the West, has been determined by historical, political, religious, economic and other realities. It is doubtful whether, without the historical experience of the massive human suffering in Europe in World War II, and the resulting sense of guilt and responsibility for the slaughter of the Jewish people, the States of Western Europe would have developed so great a concern for human rights and fundamental freedoms.

The Second World Conference on Human Rights in Vienna in June 1993, which started in an atmosphere of disagreement and recrimination, did not, therefore, produce the positive results for which the world had been waiting. With the negotiating parties so strongly divided on crucial issues, one could hardly expect the conference to run smoothly and productively. It was remarkable that a final document could be adopted by consensus in time, even though it cannot be said to be a model of clarity and coherence. If the end result was therefore not satisfactory, it was the best that could be achieved at the time. Only time will tell whether this result is sufficient to form the basis for a positive long-term development of human rights.

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81 "Stamping out the Scourge of Racism", *The Guardian*, London, 20 February 1993, p. 14/1.

For the NAM, as the initiator of policies for the Third World, it might be worthwhile to look into the possibility of a special review session for its own members in order to assess the impact of the Vienna Conference on its own position. This would also be an appropriate opportunity to compare the differences in human rights approaches existing between its African, Asian and Latin American members. An open exchange of views and experiences between these continental or regional groups might be useful in order better to coordinate, rationalize and consolidate a general non-aligned position with regard to human rights. It is a fact that the human rights issue has increasingly engaged the imagination and emotion of the general public, both internationally and domestically. The adoption by the NAM of a well-balanced and progressive non-aligned position on human rights will therefore not only enhance NAM's prestige in international relations, but it will at the same time go a long way towards meeting the legitimate demands of their own citizens for better observance of human rights.

One general lesson of the Vienna Conference is therefore that to clear the atmosphere in the human rights debate, one must accept that only through cooperation and dialogue, as foreseen in the UN Charter, and not one of recrimination and self-righteousness, could progress be achieved toward universal respect for human rights.

8. NORTH-SOUTH RELATIONS

Over some two decades the centre of attention of the NAM has been shifting from the great political issues of the post-war era (e.g. Cold War confrontation, the arms race, colonialism, racism and foreign intervention) to the economic and development issues of today (for example, the North-South dialogue, the debt issue, international trade and commodity prices, and South-South cooperation). This is quite understandable in the light of the fact that after having achieved their political independence, the new States soon became aware of the fact that in economic terms their independence was impaired by the working of world economic forces beyond their control. This shift in emphasis has become more prominent in recent times not only because of the impact of the global recession but also because of the growing concern among non-aligned States that in the interests of European and perhaps world stability, the Western world will have to divert much of its resources to the political and economic development of Eastern Europe. This may eventually result in a decreasing flow of capital and other resources to the developing world.

Under the leadership of Indonesia, whose national policies give high priority to the search for development, the Jakarta Summit has paid special attention to development issues. It should be noted that in contrast to the NAM's approach

towards international political issues, it has now come to admit openly that "without establishing ties and dialogue with the developed world there can be no solution to economic problems facing our countries."[82] On the other hand, it has to be borne in mind that interdependence also means that the sustainable development of the North will not be possible without a reasonable measure of development and stability in the South. The Jakarta Summit called, therefore, for the reactivation of a constructive dialogue between the North and the South, this time to be based on genuine interdependence, mutuality of interests and benefits, and shared responsibilities.[83] The high priority given to North-South relations was also demonstrated by its decision to reactivate the Standing Ministerial Committee for Economic Cooperation, which had been dormant for some time, and charge it with the task of finding new ways of restarting the dialogue.

An inseparable part of NAM's development strategy, is the so-called South-South cooperation, cooperation among developing countries themselves. The Conference appealed to its members to intensify such cooperation in order to promote their own development and reduce undue dependence on the North. To that end, members should endeavour to initiate concrete and practical forms of cooperation in such areas as food production and population, trade and investments, and should devise realistic modalities for their implementation.[84] Furthermore, trade and other economic activities should be expanded and if possible pursued through, for example, cooperation or technical assistance agreements between NAM member countries. During the Jakarta Summit several such agreements were concluded.[85] It was also felt that success in South-South cooperation was a pre-condition for the strengthening of the bargaining position of the South in future negotiations with the North. Following up quickly on the decisions by the Jakarta Summit, the Indonesian Chairman drew up and proposed an Economic Agenda for Priority Action 1992–1995 to be implemented during the three-year chairmanship of Indonesia. The Agenda comprises among other things such issues as external debt, food security and population, commodities, the Uruguay Round, South-South trade promotion, as well as the strengthening of international cooperation and developing support mechanism.[86] Indonesia also convened a meeting of the

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82 *Belgrade Declaration, supra* n. 3, Section II, para. 7.

83 *Jakarta Message, supra* n. 13, para. 16.

84 *Jakarta Message, supra* n. 13, para. 17.

85 See e.g. "RI [i.e. Republic of Indonesia] to Offer Technical Environment Assistance to NAM Countries", *Summit News*, published by the Media Centre of the 10th Non-Aligned summit, Jakarta, Indonesia, 27 August 1992, p. AZ-11; "RI Takes Opportunity of NAM to Sign Cooperation Agreements", *Summit News*, 4 September 1992, p. A-1.

86 "NAM Chairman's Plans: Economic Agenda for Priority Action 1992–1995", *South Letter*, published by the South Centre, Geneva, No. 15, Autumn 1992, pp. 14–16.

Standing Ministerial Committee for Economic Cooperation in Bali as early as May 1993.[87]

For the realization of the North-South dialogue, it was also thought necessary to strengthen cooperation with the group of seventy-seven (G-77). The current chairman of the G-77, Colombia, was also present at the above-mentioned Bali meeting. Earlier there had been suggestions that the NAM and G-77 should be merged, but they were always decisively rejected. Instead a Joint Coordinating Committee (JCC) was established to improve exchange of views and coordination between the NAM and the G-77. The JCC is comprised of the present and immediate past chairmen of the NAM and the G-77 and meets every three months.[88]

Equally important for the success of the North-South dialogue, in the opinion of the NAM, was the improvement of its relations with the group of seven major industrialized countries (the G-7), whose support would be crucial for the success of a new North-South dialogue. It was also hoped that, conversely, the North would realize that in an increasingly interdependent world the link between development in the South and world peace and global stability will become progressively stronger, making a speedy resumption of the North-South dialogue a real necessity for both parties. Immediately after the Jakarta Summit, President Soeharto of Indonesia set out on a journey to several capital cities in the West as well as to the General Assembly of the UN in New York in order to promote such a dialogue. On his return from New York he stopped over in Tokyo to discuss with the Japanese Government the possibility of his addressing the G-7 summit of July 1993 in order to explain in person the views and the new approach of the NAM with regard to the reactivation of the North-South dialogue.

When no immediate and positive reactions were forthcoming, Indonesia embarked on an active diplomatic campaign to seek further support for the NAM's plans. No diplomatic occasion was allowed to pass without persuading the leading Western countries to accept the proposals. The issue was therefore also raised during the visits to Indonesia of Prime minister Miyazawa of Japan, Chancellor Khol of Germany, and Foreign Secretary Hurd of Britain. Yet all these efforts seemed of little avail. It was later reported that while Germany, Japan and the US would be willing to receive Soeharto at the G-7 meeting in Tokyo, other members of the group were opposed to his presence. Instead Prime Minister Miyazawa was mandated by his colleagues to meet President Soeharto on their behalf. The two statesmen met before the opening of the G-7

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87 For one assessment of the results of this Bali meeting, see *supra* Section 4 of this article (the New World Order).

88 "NAM Ministerial Meeting Agree(s) to Adopt Recommendations for Summit", *Summit News*, published by the Media Centre of the 10th Non-Aligned Summit, Jakarta, Indonesia, 1 September 1992, p. A-6.

meeting giving Soeharto the opportunity to submit officially two messages outlining the non-aligned views on the nature and modalities of the desired dialogue.[89]

Regrettably, the final communiqué of the G-7 meeting makes no reference whatsoever to the approaches made by the NAM, nor does it mention the possibility of a new North-South dialogue. The communiqué did at least reflect some of the ideas and policies suggested in the course of President Soeharto's mission and it welcomed the initiatives taken by the developing countries to establish a more constructive partnership and dialogue on issues of mutual interest.[90] One wonders what conclusions the NAM should draw from the fact that its new and "non-confrontative" approach produced so little positive reaction from the North.

9. EVALUATION AND CONCLUSION

The fact that NAM has outlived the Cold War has proved once again the strength of its major premise, namely that world peace is not served by the formation of huge military alliances, nor by States joining any rival groups in a Cold War confrontation. Rather world peace would be enhanced if States were to refrain from joining military alliances and instead pursue active and independent policies, while committing themselves to the search for ways to manage emerging world conflicts, or settle disputes peacefully.

In a world no longer affected by Cold War problems but still troubled by other types of tension and conflict, the developing world will have to deal with an unfamiliar, now unipolar international system, dominated by the West and heavily influenced by the USA. The Jakarta Summit has given the NAM an opportunity to adjust its position and speak out about some of the most vital and controversial issues of our time. It has offered its members guidance on how they might pursue their own foreign policies and yet remain within the general framework of the Movement's principles. However, an ever-changing international arena demands from the NAM constant alertness in order to review and re-adjust its policies whenever necessary.

The most striking result of the Jakarta Summit was the clear confirmation of support by the members for the NAM's objectives and principles, and the closing of ranks at a time when serious doubts were being expressed about its relevance and importance. This outcome renewed the Movement's dynamism

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89 See "NAM to the G-7: An Invitation to Dialogue", *South Letter*, published by the South Centre, Geneva, No. 17 (Spring/Summer 1993), pp. 2–4.

90 Indonesian newspaper reports were also rather conflicting in their assessment of the results of the G-7 meeting for the NAM. Cf. "Falling Short in Tokyo," *The Jakarta Post*, 9 July 1993, p. 4/1' "G-7's Answer to NAM Leader," *The Jakarta Post*, 12 June 1993; "RI [Republic of Indonesia] Salutes G-7 for Dialog," *The Jakarta Post*, 16 July 1993, p.1/1.

after years of relative inactivity, caused, in part, by the tragedy in Yugoslavia.

The Jakarta Summit also saw the return of Indonesia to the centre of the international political arena. Fully aware of the importance of the occasion for NAM as well as for itself, Indonesia spared neither expense nor effort to make a success of the conference. Everything possible was done to create the most favourable conditions for the delegates while great attention was paid to organizational matters.

The Jakarta Conference once again demonstrated that an international movement without permanent organs and permanent staff has to rely heavily on the resources, human as well as material, that the host nation can provide for the general running of its affairs both during and after the Summit meeting. President Soeharto was fully involved in all stages and aspects of the conference, personally chairing almost every session of the plenary and other meetings and yet finding time to have daily bilateral meetings with other heads of State or government. He also took it upon himself to follow up on some of the difficult assignments decided upon by the conference, not least the formidable task of trying to convince the G-7 countries that a new North-South dialogue was not only necessary but also mutually beneficial.

For the task of organizing the summit as well as chairing the NAM for the next three years, Indonesia has made available some of her high-ranking officials. In his difficult task President Soeharto had the assistance of his dynamic and accessible minister of foreign affairs, Mr Ali Alatas. He made himself accessible to the national and foreign press. His frequent press conferences did a lot to make the general public, at home and abroad, more aware of the particular positions and policies pursued by the NAM. The significance of these efforts cannot be overstated, given the ignorance and misunderstanding which exist in the world at large about the NAM. Mr Alatas has recently been made chairman of a new NAM executive board which includes some of Indonesia's senior diplomats as well as one of its top economists.[91]

For the all-important task of promoting the economic and social development of the Third World in the context of deteriorating world economic conditions, the NAM will have to mobilize all its available resources. This may be a long and arduous task. Mr Julius Nyerere, the present Director of the South Centre, in a sharply-worded speech before the conference, warned that the end of the Cold War and the possible emergence of a united North, may not entirely be in favour of the South. It might, he feared, increase the North's control over all aspects of Third World development. Nyerere therefore felt that the NAM should be expanded and strengthened and he called upon all the countries of the South to join the NAM in creating a real

91 "Top Economist Joins NAM Executive Board", *The Jakarta Post*, 14 September 1993, p. 2/4.

"Movement of the South."[92] With many other speakers he welcomed the entry of China into the Movement. It is true that China presently has only observer status, but in practice that has often been the first step towards full membership. For example Thailand, which, having joined the NAM as an observer at the Jakarta Summit, has now announced its application for full membership of the NAM.[93]

All this points to the importance of the North-South dialogue so earnestly sought by the NAM. It makes it very clear that the next three years will make great demands on the leadership qualities of Indonesia as the current NAM chairman. One may also be able to see whether the new, so-called "non-confrontative" approach of the NAM towards North-South relations will bear fruit.

There is one more task for which the NAM seems to be eminently qualified under the changing conditions of the New International Order. During the East-West rivalry of the Cold War, each camp was constantly kept alert by ever-present criticism and comments from the opposing bloc, with the non-aligned countries making their views known occasionally when they felt that it was necessary to remind the superpowers of the greater interest of the world at large. Now that only one superpower remains, it is important that the NAM assumes the task of monitoring developments. Critical comments from the NAM could dissuade those whom a consciousness of power could tempt to pursue unnecessarily dangerous policies or lose sight of the rights and needs of the other nations of the world. In the past, the superpowers were not known for accepting criticism graciously, least of all from the developing countries. In the present situation, where power seems concentrated in one region, the NAM is the only independent element of some weight that can assume the task of criticism.[94] If the NAM were to carry out this task in an objective, balanced and independent manner, it will strengthen its moral authority and enhance its role as the protector of the interests of the majority of humankind.

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92 Statement by JULIUS NYRERE, op. cit. n. 68, p. 10.

93 "Thailand Applies to Join NAM", *The Jakarta Post*, 16 June 1993, p. 12/4.

94 Dr. MAHATHIR MOHAMAD, the Malaysian prime minister, who in the personal opinion of the present author showed himself in Jakarta to be a sharp but fair critic of certain Western policies, had to suffer rather rude and unfair criticism from members of the foreign press. Although Dr. MAHATHIR was perfectly able to cope with this, it is a clear sign of what critics who dare to challenge super-powers will have to expect.

THE BHOPAL GAS LEAK DISASTER LITIGATION: AN OVERVIEW

Bharat Desai*

The Bhopal gas leak disaster has left a deep scar on the human psyche, in terms of the catastrophic proportions and the callousness of the safety measures shown in a plant controlled by a multinational company in a developing country. The escape of a highly toxic methylisocyanate (MIC) from the Union Carbide Corporation's (UCC) pesticide plant at Bhopal in the early hours of 3 December 1984 brought havoc to the people of Bhopal, resulting in the death of more than 3,000 people and leaving more than 200,000 people injured—many seriously and some permanently. There was confusion about the treatment warranted by exposure to MIC, compounded by the Union Carbide's insistence that the gas was not lethal! However, the immediate consequences of the gas leakage were very clear, and its long-term effect to human beings as well as to the eco-system could prove to be quite serious.

The Bhopal disaster, regarded as the world's worst industrial accident, led to one of the biggest litigations for damages. This litigation faced questions of jurisdiction and passed through many tortuous twists and turns before ending up as a damp squib—in a sad, much maligned out-of-court settlement. This article traces this litigation in and out of India, and is designed as informative rather than analytical or evaluative.

As soon as the news spread about the escape of deadly MIC from the plant of the Indian subsidiary of Union Carbide Corporation of USA, several American personal injury lawyers descended upon Bhopal to take up class

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action for compensation against UCC. Some of these lawyers—dubbed as ambulance-chasers—filed suits for astronomical sums in the United States courts on behalf of some of the gas victims.[1] However, the Union of India, initially shaken by the tragedy, rose to action and tried to take over control of the whole litigation process against Union Carbide. Accordingly, a special statute entitled the Bhopal Gas Leak Disaster (Processing of Claims) Act,[2] replacing an earlier Ordinance to that effect, was enacted by the Parliament. The Act, which received the assent of the President on 29 March 1985, sought to confer certain powers on the Union of India, as *parens patriae*, to secure that claims arising out of or connected with the Bhopal gas leak disaster were dealt with speedily, effectively, equitably and to the best advantage of the victims. Following this special enactment, the Union of India assumed the exclusive right to represent and act on behalf of every person (whether within or outside India) who made or was entitled to make a claim concerning the gas disaster.[3]

By virtue of the authority conferred by this Act of Parliament, the Union of India faced a crucial choice as regards filing of a case against the parent company, UCC, or its subsidiary Union Carbide India Ltd (UCIL), from whose plant the gas actually leaked. Moreover, the Union of India also had to make a strategic choice as regards the forum for filing the suit: either in India (Bhopal) or in the United States (in New York) where UCC was registered. In the end the Union of India decided, for tactical reasons, to file the suit against the parent company in the United States.

1. DISTRICT COURT, NEW YORK

The suit was filed by the Union of India as *parens patriae* on behalf of the gas victims for recovery of damages for any and all claims, present and future, before the United States District Court, Southern District of New York. Ironically, the defendant UCC sought to oppose the suit on the grounds of *forum non conveniens* while the plaintiff insisted for the case to be dealt with by the American Court instead of an Indian court. The Union of India considered that courts in India were not an alternative forum for the following reasons:

"(a) the delays inherent in the Indian Court system would lead to an unconscionable delay in the resolution of the cases in India;
(b) India's Court system lacked the procedural and practical capability to handle the litigation;

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1 See *The Hindu* (Madras), 9 December 1984. See also *Wisconsin State Journal*, 8 December 1984.
2 Act No.21 of 1985. See *The Gazette of India*, Extraordinary, Part II, Section 1, No.24 (March 1985). (Hereinafter referred to as "the Bhopal Act").
3 This enactment articulated a new conception of the role of *parens patriae*, on which the capacity of the Union of India to sue the Union Carbide Corporation rested. See s 3 of the Act, which conferred the "exclusive right" on the Central Government for the purpose.

(c) a judgment rendered by an Indian Court could not be enforced without resort to United States courts;
(d) UCC's *forum non conveniens* motion was nothing more than forum shopping."[4]

As against the contention of the Union of India, the UCC insisted that Indian courts were the best forum for the litigation. In support of its plea on the adequacy of the Indian legal system, UCC submitted affidavits of two senior advocates of the Supreme Court of India, NANI PALKHIVALA and J.B. DADACHANDJI. Thus the main battle was fought at the preliminary stage itself on the issue of the best forum to deal with the Bhopal litigation.

The presiding judge, J.F. KEENAN, accepted the plea of UCC and dismissed the case on the ground of *forum non conveniens.*[5] The judge noted that the Indian legal system was in a far better position than the American courts to determine the cause of the tragic events and fix liability. The judge, in fact, took recourse to the private interest factors described in the *Gilbert*[6] as well as *Piper Aircraft*[7] cases. Moreover, he felt that no American interest in the outcome of the litigation outweighed the interest of India in applying Indian law and Indian values to the task of resolving the case.

Rejecting the argument of the plaintiff that the Indian judiciary was yet to reach full maturity, Judge KEENAN held that to retain the litigation before [the New York Court] would be yet another example of imperialism which would deprive the Indian judiciary of this opportunity to stand tall before the the world. Hence Judge KEENAN dismissed the consolidated case on the grounds of *forum non conveniens* subject to the following conditions:

"1. Union Carbide shall consent to submit to the jurisdiction of the courts of India and shall continue to waive defences based upon the statue of limitation;
2. Union Carbide shall agree to satisfy any judgment, rendered by an Indian court, and if applicable, upheld by an appellate Court in that country, where such judgment and affirmance comport with minimal requirements of due process;
3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after an appropriate demand by plaintiffs."[8]

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4 See "Memorandum of Law in Opposition to Union Carbide Corporation's Motion to Dismiss These Actions on the Grounds of *Forum Non-Convienens*", in *Re: Union Carbide Corporation Gas Plant Disaster at Bhopal*, India, December 1984, MDL No.626, Misc. No.21–38 (JFK) 85. Civ.2696 (JFK), 6 December 1985.

5 In *Re: Union Carbide Corporation Gas Plant Disaster at Bhopal*, India in December 1984, MDL No.626, Misc.21–38 (JFK). All Cases, Opinion and Order of Judge JOHN F. KEENAN, New York, dated 12 May 1986.

6 *Gulf Oil Corporation* v *Gilbert*, 330 US 501 (1947).

7 *Piper Aircraft Co.* v *Reyno*, 454 US 235 (1981).

8 *Supra* n.5 at p.69.

2. US COURT OF APPEAL

Against the order of Judge KEENAN, appeals and counter-appeals were made before the United States Court of Appeals for the Second Circuit. While the Union of India continued to oppose the dismissal of the suit on the ground of *forum non conveniens*, UCC opposed, *inter alia*, the conditions imposed upon it concerning discovery. The Court of Appeals quoted the rationale given by the US Supreme Court in the *Piper Aircraft* case in endorsing the District Court's dismissal of the suit:

> "The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the Court has considered all relevant public and private interest factors and where its balancing of these factors is reasonable, its decision deserves substantial deference.[9]

The Court of Appeals took the view that there was no abuse of discretion in granting dismissal of the action, as all relevant factors demonstrated the transfer of the case to India for trial and adjudication as fair and just to the parties. As for the UCC challenge to the conditions imposed by Judge KEENAN, the Court of Appeals endorsed the first condition on limitation. It rejected the contention of UCC to monitor Indian Court proceedings, considering the proposed remedy both as impracticable and an abysmal ignorance of basic jurisdictional principles.[10] The Court considered the concept of shared jurisdiction as illusory and unrealistic, and viewed that a judgment of a foreign country that is final, conclusive and enforceable must be recognized and enforced in the United States under Article 53 of the Civil Practice Rules on Recognition of Foreign Country Money Judgments.[11] Furthermore, the Court took the view that the District Court erred in requiring UCC to consent (which UCC did under protest and subject to its right of appeal) to broad discovery of it by the plaintiffs under the Federal Rules of Civil Procedure when UCC was confined to the more limited discovery authorized under Indian Law. The Court of Appeals held in this regard:

> "We recognize that under some circumstances, such as when a moving defendant unconditionally consents thereto or no undiscovered evidence of consequence is

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9 In *Re: Union Carbide Corporation Gas Plant Disaster at Bhopal*, India, December 1984 in the United States Court of Appeals for the Second Circuit, dated 14 January 1987, p.16.

10 Ibid, p.22.

11 New York's Article 53 is based upon the Uniform Foreign Money-Judgements Recognition Act. See 13 U.L.A. 263 (1962). It has been adopted by 15 States in addition to Neew York. In states that have not adopted the Uniform Foreign Money-Judgements Recognition Act, foreign judgments may be recognized according to principles of comity. See *Hilton* v *Guyot*, 159 US 113 (1895).

> believed to be under the control of a plaintiff or co-defendant, it may be appropriate to condition a *forum non conveniens* dismissal on the moving defendant's submission to discovery under the Federal Rules without requiring reciprocal discovery by it of the plaintiff.[12]

The Court ruled that both sides need to be treated equally, with each having equal access to the evidence in the possession or under the control of the other. Thus, subject to these modifications, the Appellate Court upheld the order of dismissal by Judge KEENAN on the ground of *forum non conveniens.*

The Union of India still not satisfied with the Court of Appeals' ruling, filed a writ of *certiorari* before the US Supreme Court. However, the Supreme Court denied this in its order of 5 October 1987, without assigning any reasons.[13]

After these legal moves and counter-moves before the American courts, the scene of the Bhopal gas leak disaster litigation moved back to India. The Union of India filed a fresh case in the Court of the District Judge, Bhopal against UCC.

3. DISTRICT JUDGE, BHOPAL

In the regular civil suit before the District Judge, Bhopal, the parent company, UCC, was again made the defendant. The plaintiff, Union of India, under her statutorily conferred role as *parens patriae* sought to recover damages for "all persons" in respect of deaths, personal injuries to individuals, loss of property, business loss, damage to environment and other losses—present and future—arising from the Bhopal disaster.[14] Contentions in the plaint sought to show that the defendant UCC was the mind and soul of the Bhopal plant and UCIL only its docile arm, as at all material times the UCC:

> "(a) designed, constructed, owned, operated, managed and controlled a chemical plant in the city of Bhopal in the State of Madhya Pradesh through its subsidiary Union Carbide India Limited.
> (b) manufactured, processed, handled and stored at its Bhopal plant, methyl isocyanate, a chemical used in the manufacture of agricultural pesticide produced and marketed by Union Carbide.
> (c) knew or should have known that MIC is an extraordinarily reactive, toxic, volatile, flammable and ultra-hazardous chemical;

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12 *Supra* n.9, p.23.

13 See *Union of India* v ***Union Carbide Corporation*** *et al.*, United States Supreme Court Reports 98 L Ed. & d 150.

14 See Plaint, *Union of India* v *Union Carbide Corporation* in the Court of the District Judge, Bhopal, Regular Civil Suit No.1113 of 1986.

(d) knew or should have known that the long-term effects of human exposure to MIC could lead to genetic and carcinogenic consequences."[15]

The plaintiff emphasized that by virtue of their global purpose, structure, organization, technology, finances and resources, the multinational corporations have within their power to make decisions and take actions that can result in industrial disasters of catastrophic proportion and magnitude. Accordingly, the Union of India prayed for:

"1. A decree for *such amount as may be appropriate* under the facts and the law and as may be determined by this Court so as to fully, fairly and adequately compensate all persons and authorities, who have suffered as a result of the Bhopal disaster and having claims against the defendant;
(2) A decree for *punitive damages* in an amount sufficient to deter the defendant Union Carbide and other multinational corporations involved in similar business activities from wilful, malicious and wanton disregard of the rights and safety of the citizens of India." (*emphasis added*)[16]

Initially the District Judge made a proposal to parties for substantial reconciliatory interim relief. Though both the Union of India and UCC responded positively to work out an overall settlement, yet they made no headway. Therefore, Judge DEO, guided by the need for paramount justice in the case, made a *suo moto* proposal[17] for grant of interim relief. In the interest of justice and fair play, the judge heard the parties on the matter. The defendant submitted that the Court should not assume the robe of an advocate and should not descend into the arena. The counsel for UCC opposed any role for the Court, as there was:

(a) lack of jurisdiction to order interim relief;
(b) lack of provision and power under the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, for grant of interim relief;
(c) lack of material on record in the nature of quality and quantity to permit the Court to undertake such a venture;
(d) the assertion of the State of Madhya Pradesh and the Union of India in providing interim relief.

The District Judge, refuting the contention of the UCC counsel that he should not allow his vision to be clouded with the dust of conflict, quoted Lord DENNING that "a Judge is not a mere umpire".[19] The Judge viewed that the

15 Ibid, pp.3–4.
16 Ibid, pp.4–5.
17 See Order in *Union of India* v *Union Carbide Corporation* by District Judge, Bhopal, M.W. DEO, dated 17 December 1987, p.2.
18 Ibid, pp.3–4.
19 *John* v *National Coal Board*, 1957 (Vol.III) All ER 155.

object is to find out the truth and to do justice according to law. The Attorney General of India argued that under the provisions of section 94(e),[20] coupled with section 151[21] of the Civil Procedure Code, the Court had ample powers to make such an order in the interest of justice.

Explaining the inherent powers of the Court to make orders necessary for the ends of justice, the Judge said that these powers have not been conferred upon the Courts, but were inherent in the Court, by virtue of its duty to do justice between the parties, as:

> "Inherent powers are born with the creation of the Court, like the pulsating life coming with a child born into this world. Without inherent powers, the Court would be like a still-born child. The powers invested in the Court after its creation are like many other acquisitions of faculties which the child acquires after birth during its life. Thus inherent powers are of primordial nature. They are almost plenary except for the restriction that they shall not be exercised in conflict with any express provision to the contrary.[22]

Judge DEO was at pains to emphasize that section 94 of the Civil Procedure Code provides for making an interlocutory order as may appear to be just and convenient and he did not see any express or implied provision prohibiting such an order in a suit for money. The fact that no such order had been shown to have been made in a suit by a civil Court did not deter him from making one, as the judge felt that law must grow to meet the problems raised by changing circumstances.[23] Therefore, the judge held that in a tort action the Civil Court has jurisdiction to grant interim compensation, which has been statutorily recognized of late as well as judicially upheld and laid down as law by the Supreme Court in *M.C. Mehta.*[24]

The District judge categorically stated in his Order that he drew upon the *M.C. Mehta* case "for the limited principle that in action for tortious liability a

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20 Section 94, Civil Procedure Code (CPC), 1976, provides for making such interlocutory order as may be just and convenient.

21 Section 151, CPC, provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make orders necessary for the ends of justice.

22 *Supra* n.17 at p.7.

23 In support of his view, Judge DEO has quoted in his *Order, supra* n.17 at p.15, Lord DENNING's following observation in *Packer* v *Packer*:

> "What is the argument on the other side? Only this, that no case has been found in which it has been done before. This argument does not appeal to me in the least. *If we never do anything which has not been done before, we shall never get anywhere. The law will stand still, whilst the rest of the world goes on and that will be bad for both.*" (emphasis in Judge DEO's Order).

Also see, Lord DENNING, *The Discipline of Law* (1979), on the opening page.

24 *M.C. Mehta* v *Union of India*, A.I.R. 1987 Supreme Court (SC) 965, as modified by order dated 10 March 1986 (A.I.R. 1987 SC 982) and reviewed in unanimous judgment of the five-judge Constitution Bench dated 20 December 1986 (A.I.R. 1987 SC 1086).

grant of interim compensation is permissible". He regarded *M.C. Mehta* as not only binding on all courts but also a source of law, innovative in nature to meet an unprecedented new situation.

Recognizing the paramount need for immediate relief to the gas victims, Judge DEO observed:

> "Can the gas victims survive till the time all the tangible data with meticulous exactitude is collected and proved and adjudicated in fine forensic style for working out final amounts of compensation with precision of quality and quantity? Will it not be prudent to order payment of a relative sum bearing in mind all the progress in the case so far, the facts and figures (though not undisputed) which have come on record and the material furnished during settlement efforts made by Judge Keenan? After all, interim relief is never and can never be exact like final adjudication in its very nature.[25]

Though conceding that such an attempt was not made in the past, the judge said the law will not stand still. Accordingly, the District Judge ordered that the defendant UCC would deposit in the Court a sum of 350,000,000 million rupees (about US$270 million) for payment of substantial interim compensation and welfare measures for the gas victims.[26]

4. MADHYA PRADESH HIGH COURT

Aggrieved by the order for interim compensation of the District Judge, the defendant UCC filed a civil revision petition before the Madhya Pradesh High Court.[27] In his detailed order, Justice SETH partly allowed the revision and reduced the amount of interim compensation decided by the District Judge, Bhopal. Significantly, however, the High Court fixed the liability of the defendant to pay interim compensation, holding that more than a *prima facie* case had been made out for the purpose.[28] Justice SETH, while listing the course the litigation had taken in the US before being dismissed on the ground of *forum non conveniens*, expressed shock over the manner in which the plaintiff Union of India underrated its own judiciary and made it a subject matter of ridicule so publicly before a foreign court.

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25 *Supra* n.17 at p.15.

26 Ibid, p.16.

27 *Union Carbide Corporation* v *Union of India* in the Madhya Pradesh High Court, Jabalpur; Civil Revision No.26 of 1988.

28 Ibid, see Order by Justice S.K. SETH dated 4 April 1988, p.15.

The High Court took into account certain facts[29] stated by the sole defendant UCC in its written statement and as such were not disputed by it in the suit. In addition to 50.9 per cent shares of the Indian company (UCIL) held by UCC, Justice SETH also examined the Design Transfer Agreement and the Technical Service Agreement, which revealed a close relationship of the defendant UCC with the Indian company.

The High Court examined the impugned order of interim payment made by the District Court: the question was whether under the substantive law, i.e., the general law of torts, it was permissible for the Court to pass an order of interim payment. Justice SETH rejected the argument of UCC that the suit was not properly constituted. It was apparent that the District Judge had relied upon section 151 of the Civil Procedure Code to derive statutory basis for the award of interim compensation in the suit. After an examination of the case law on the point, Justice SETH categorically observed:

> "The Supreme Court's decision in *Padam Sen* and *Manohar Lal* settles the law that howsoever wide the ambit of inherent powers of the Court under section 151, CPC may be, the said powers relate to the procedure to be followed by the Court in deciding the cause before it and they are not powers over the substantive rights which any litigant possesses."[30]

Accordingly, Justice SETH inferred as settled that howsoever wide the ambit of inherent powers of the Court under section 151 of the Civil Procedure Code may be, these powers relate to the procedure to be followed by the Court in deciding the cause before it. He felt that they were not powers over the substantive rights which any litigant possessed. And specific powers have to be conferred on the Court for passing such orders which would affect the rights of a party.[31]

Justice SETH answered the question whether under the substantive law of torts it was permissible for the Court to grant relief of interim payment, by reference to the history of the development of the law of torts in India. He held that though the District Judge did not elaborate on the point, he had clearly stated in his order that it would be consistent with the law of torts to contemplate jurisdiction of the civil Court hearing the suit to grant the relief of interim payment. In fact, he has categorically stated that it could not be said

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29 The relevant facts stated by the defendant UCC in its written statement were as follows: "The chemical plant from which the lethal MIC gas escaped on the fateful night resulting in the disaster, belonged to a corporate entity named 'Union Carbide India Limited' (Indian company). It is a public company registered under the Indian Companies Act. Till the year 1977–78, 60 per cent of the equity ownership of the defendant UCC was reduced to 50.9 per cent but even then it continued to have more than half of the said ownership."

30 *Supra* n.27 at p.62.

31 The Supreme Court of India affirmed the *ratio* of its earlier decision in *Padam Sen* and *Manoharlal* recently in *Commissioner of Income Tax, Delhi* v *Bansidhar and Sons* (A.I.R. 1986 S.C. 421).

that there was no substantive right with the gas victims for such payment. The liability in the tort law was considered as settled with the culmination in the principle of strict and absolute liability without exception laid down by the Supreme Court in the *M.C. Mehta* case.[32]

The High Court went into the question of "lifting of the corporate veil"[33] in order to hold the parent company, UCC, liable. The Court took the view that the defendant had real control over the enterprise, which was engaged in carrying on a hazardous and inherently dangerous industry at the Bhopal plant. This was inferred by the Court as "more than *prima facie* established" and hence UCC was held to be absolutely liable (without any exceptions) to the victims.[34] One of the objections raised by UCC to the impugned order of interim payment passed by the District Judge, pertained to his *suo moto* proposal. The High Court rejected this argument and observed that in view of the horrendous event, it was immaterial whether the proposal for interim payment came from the Court or from the plaintiff Union of India.

Accordingly, the High Court proceeded to determine the quantum of interim compensation. For this the Court relied upon the figures of affected[35] people

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32 The five-judge Constitution Bench of the Supreme Court of India unanimously held that:

"Where an enterprise is engaged in an hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-à-vis* the rule in *Rylands* v *Fletcher* [(1861–1873) 1 All E.R. 146 (HL)] ... [T]he measure of compensation must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise".

See *M.C. Mehta* v *Union of India*, A.I.R. 1987 SC 1099.

33 The concept of lifting the veil or piercing the veil was first held in *Saloman* v *Saloman and Co* (1897 A.C. 22) as an absolute principle that a corporation or company has a legal and separate entity of its own.

In a recent decision, the Supreme Court of India has observed:

"Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented or a taxing statute or a benevolent statute ought to be evaded or where associated companies are inextricably connected as to be in reality part of one concern. It is neither necessary nor desirable to enumerate the class of cases where the lifting the veil is permissible, since, that must necessarily depend on the relevant statutory or other provisions, the objects sought to be achieved, the impugned conduct, the involvement of the element of public interests, the effect on parties who may be affected" *etc.*

See *Life Insurance Corporation of India* v *Escorts Ltd*, A.I.R. 1986 SC 1370.

34 *Supra* n.27 at p.93.

35 It was stated by the Union of India that a total number of 2,660 persons suffered agonising and excruciating death and between 39,000 and 40,000 sustained serious injuries as a result of the disaster.

furnished by the plaintiff in its amended plaint. The Court took into account categories of claims relating to death and personal injuries under the scheme[36] framed under the Bhopal Gas Leak Disaster Act, which formed the basis for its determination of interim relief in respect of each of such categories. In fixing the measure of damages payable by the tortfeasor, the Court specifically bore in mind the criteria of "magnitude and capacity of enterprise" laid down by the Supreme Court in *M.C. Mehta*,[37] so that such compensation could have a deterrent effect. Since UCC was a financially sound corporation, the court, taking into account all relevant factors, fixed its liability to pay interim compensation at Rs 2,500 million[38] as final and conclusive. Thus the High Court reduced the amount of interim payment from Rs 3,500 million fixed by the District Judge, Bhopal. Nevertheless, instead of making it merely a humanitarian gesture, the Court held UCC legally liable, as it held that a *prima facie* case had been made out in favour of the Union of India.

5. THE SETTLEMENT

Aggrieved by the order passed by the Madhya Pradesh High Court, UCC preferred an appeal before the Supreme Court of India. Even as the hearing was taking place, the apex Court on 14 February 1989 suddenly made an order for settlement[39] between UCC and the Union of India in the case. The Supreme Court regarded its order of settlement as an exercise to fulfil a compelling duty, both judicial and humane, to secure immediate relief to the victims. The Court, taking into consideration the facts and circumstances of the case and the offers and counter-offers made between the parties at different stages during the various proceedings, among other things, viewed the case pre-eminently fit for an overall settlement. Terming it as just, equitable and reasonable, the five-judge Bench of the Court, headed by the then Chief Justice, R.S. PATHAK, made the following order:

> "1. The *Union Carbide Corporation shall pay a sum of US Dollars 470 million* ... to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster.
> 2. The aforesaid sum shall be paid by the Union Carbide Corporation to the Union of India on or before 31 March 1989.
> 3. To enable the effectuation of the settlement, *all civil proceedings related to and*

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36 The scheme had divided the categories of claims as: (a) death; (b) total disablement resulting in permanent disability; (c) permanent partial disablement; and (d) temporary partial disablement.

37 *Loc. cit. supra* n.32.

38 *Supra* n.27 at p.98.

39 *Union Carbide Corporation* v *Union of India and others* in C.A. Nos. 3187 and 3188 of 1988 with S.L.P. (Civil) No.13080 of 1988; A.I.R. 1990 SC 273.

> *arising out of the Bhopal Gas disaster shall hereby stand transferred to this Court and shall stand concluded* in terms of the settlement, and *all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending.*" (emphasis added)[40]

As directed by the Supreme Court in this order, both parties filed on the next day (15 February 1989) a memorandum containing Terms of Settlement. The terms were sweeping in nature, exonerating the UCC completely from the clutches of the law:

> "This settlement *shall finally dispose of all past, present and future claims, causes of action and civil and criminal proceedings* (of any nature whatsoever pending) by all Indian citizens and all public and private entities with respect to all past, present and future deaths, personal injuries, health effects, compensation, losses, damages and civil and criminal complaints of any nature whatsoever ... all such civil proceedings in India are hereby transferred to this Court and are dismissed with prejudice, and all such criminal proceedings including contempt proceedings stand quashed and accused deemed to be acquitted." (emphasis added)[41]

Both orders passed by the Supreme Court (on 14 and 15 February 1989) for settlement in the case did not assign any reasons. It led to many speculations and an outcry from the gas victims.

Therefore, as suddenly as its earlier order of settlement, the Supreme Court, as if to clear its judicial conscience, decided on 4 May 1989 to give detailed reasons[42] which had persuaded the Court to make the original order. Significantly, the Court stressed that it was not putting forward reasons "with any sense of finality as to the infallibility of the decisions".[43] It admitted to have an open mind as regards review of the decision on the ground of any tenable and compelling legal or factual infirmities. The Court was, in fact, referring to the review[44] petitions already pending before it.

The court's reasoned order explained as to how it arrived at the sum of $470

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40 Ibid, p.275.

41 A.I.R. 1990 SC 276. In a stinging criticism of the Bhopal Award in a centre-page article in *The Times of India* (16 February 1989), Professor UPENDRA BAXI described it as yet "another calamitous event" for the gas victims. He stated that if the escape of the MIC gas from the Union Carbide plant in Bhopal was so lethal, it is no less hurtful than when institutions of justice themselves become instruments of injustice.

42 A.I.R. 1990 SC 277.

43 Ibid.

44 Under Article 137 of the Constitution of India. It provides: "Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."

million for an overall settlement. Terming the law's delays[45] as proverbial, the Court stated that considerations of excellence and niceties of legal principles were greatly overshadowed by the compelling need for urgent relief for a large number of gas victims. For arriving at the figure of $470 million,[46] the apex Court disclosed the range of 426 million dollars, which UCC was prepared to concede and 500 million dollars, regarded by the Union of India as the minimum amount within which it could strike a settlement. This was also premised upon acceptance of the *parens patriae* role of the Union of India under the Bhopal Act (1985).[47] As for the reasonableness of the amount of damages, the Court construed it as a broad and general estimate in the context of a settlement of the dispute and not on the basis of an accurate assessment by adjudication.[48] The Court revealed its susceptibility to the criticism received by the settlement order, to the question whether it lost the opportunity to give the law a new direction in laying down principles of liability of monolithic multinational companies operating with inherently dangerous technologies in developing countries. Ironically, instead of explaining that it was not a case of "lost opportunity", the Court skirted the issue by saying, "this was eminently an appropriate case for a careful assessment of the legal and constitutional safeguards".[49]

6. VALIDITY OF THE BHOPAL ACT

In the detailed reasons provided by the Supreme Court, it tried to justify the settlement order. Yet, the Court soon faced another challenge as regards the constitutional validity of the Bhopal Act, on the basis of which the Union of India acted as *parens patriae* in the litigation as well as party to the settlement

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45 The Court, as matter of factly, admitted that even after four years of litigations in the Bhopal gas leak disaster, basic questions of the fundamentals of the law as to liability of UCC and the quantum of damages were yet being debated.

46 In arriving at this figure, the Court kept in mind, among others, the prospect of delays inherent in the judicial process in India and thereafter in the matter of domestication of the decree in the US for the purpose of execution. It calculated that the amount of $470 million, which upon immediate payment and with interest over a reasonable period—pending actual distribution amongst the claimants—would aggregate very nearly to $500 million (about Rs 750 crores), was acceptable to the Union of India.

47 In spite of the fact that petitions challenging the *vires* of the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, were pending, the Supreme Court went ahead on the basis of the assumption of validity of the law. In doing so, the Court undertook considerable risk in the event of the Act subsequently being struck down by it. This step was also laden with the potential of casting shadow even as regards pending petitions for review of the settlement, which actually did happen later.

48 See *supra* n.42 at p.280.

49 Ibid, p.283.

reached with the UCC. In a sense it represented a paradox too. The Court heard this matter after providing its reasoned order for the settlement. As such, in the eventuality of the Court striking down the Bhopal Act, it would have torpedoed the settlement, as the Union of India's legal authority in the case flowed from that Act (section 3). The challenge to the Act was made on the ground that the victims had not been given the right to be heard before the settlement by virtue of section 4[50] of the Act.

The five-judge Constitution Bench, headed by Chief Justice S. MUKHARJI, which upheld the validity of the Act in its judgment of 22 December 1989,[51] emphasized the right of the victims to be heard before the settlement. It observed:

> "The Act, as we have construed, requires notice, to be given in what form and in what manner, it need not be spelled out, before entering into any settlement. ... It further appears that type of notice which is required to be given had not been given. The question, therefore, is what is to be done and what is the consequence? *The Act would be bad if it is not construed in the light that notice before any settlement under section 4 of the Act was required to be given.*" (emphasis added)[52]

though the apex Court did admit that "entering into a settlement without the required notice is wrong", yet it offered a surprising logic as "to do a great right" after all, it is permissible sometimes "to do a little wrong".[53] Therefore, since it affected the vital interest of the victims, they should have had pre-decisional hearing.[54] However, the Court now felt that granting a post-decisional hearing to the victims would not serve any purpose and consequently the infirmity was allowed to persist. The Court, apparently, insisted that in doing this it was guided by the paramount consideration of urgent relief to the victims rather than to depend upon the uncertain promise of law.

7. REVIEW OF THE SETTLEMENT

The settlement order made by the Supreme Court was followed by public

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50 Section 4 of the Bhopal Act provides:
"Notwithstanding anything contained in section 3, in representing, and acting in place of, any person in relation to any claim, the Central Government shall have regard to any matters which such person may require to be urged with respect to his claim and shall, if such person so desires, permit at the expense of such person, a legal practitioner of his choice to be associated in the conduct of any suit or other proceeding relating to his claim."

51 *Charanlal Sahu* v *Union of India* (1990) 1 Supreme Court Cases 613 in writ petition Nos.268 of 1989, 164 of 1986, 281 of 1989 and 1551 of 1986.

52 (1990) 1 SCC 703.

53 Ibid, p.705.

outrage and criticism in the media. Therefore, several review petitions were soon filed before the Court under Article 137 of the Constitution of India. In fact, in its order of 4 May 1989 providing reasons[55] for the settlement, the Court did hint at its open mind on the issue since, as with all other human institutions, the Court was also "human and fallible" and those who trust it "will not have cause for despair".[56]

The apex Court took up review proceedings as regards challenge to the settlement order. With the change in the government at the centre, the Union of India decided to support review petitions pending before the Court instead of filing a separate one of its own. The Constitution Bench, headed by Chief Justice S. MUKHARJI, heard the matter for 18 days. Justice MUKHARJI's sudden death necessitated the reconstitution of the Bench, consequently the five-judge Bench headed by the new Chief Justice RANGANATH MISRA gave the judgment on 3 October 1991.[57] One of the judges, Justice A.M. AHMADI disagreed with the majority which upheld the settlement except the quashing of criminal proceedings, as regards a direction to the Union of India to make good any shortfall in the settlement fund.

Chief Justice MISRA in fact conceded that there has been no final adjudication in a mass tort action anywhere and even an adjudication would only be an attempt at approximation. However, he expressed anguish at the tirade carried on by the media and the mud-slinging against the Court following the settlement order. The Chief Justice, in his separate and concurring opinion, tried to defend the quantum of compensation. While quoting the Court's judgment in *M.C. Mehta*, which laid down the principle of strict and absolute liability, MISRA, C.J., contended that no compensation was awarded by the Court in that case and what was said was essentially *obiter*.[58] He expressed apprehension that if the Court was to follow the *ratio* in the *Mehta* case and determined compensation on the basis of strict liability (as compared to *Rylands* v. *Fletcher*), a foundation different from the accepted basis in the United States, the decree may not be executable. MISRA, C.J. justified the Court not giving the judgment on merit, at the risk of ultimately

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54 The Court observed that in entering upon the settlement, in view of s 4 of the Act, regard must be had to the views of the victims and for the purpose of giving regard to these appropriate notices before arriving at any settlement were necessary.

55 See *supra*, n.42.

56 Ibid, p.284.

57 *Union Carbide Corporation* ... v *Union of India* in C.M.P. Nos.2977-A/88, 7942-43/89, 16039/89, 17965/89; Review Petitions Nos. 229 & 623-24 of 1989 in C.A. Nos.3187-88 of 1988 with W.P. Nos.257, 297, 345, 379, 293, 399, 420/89, 231, 300, 378, 382/89, I.A. Nos.1-3 (In C.A. No.3/87-88/89) & I.A. No.1/90 (In W.P. No.281/89) & W.P. Nos.741/90, 3461/89. See 1991 (2) *SCALE* 675.

58 As *per* MISRA, CJ, the Court did not award any compensation as it could not reach the conclusion that Shriram (the delinquent company) came within the meaning of "State" in Article 12, so as to be liable to the discipline of Article 21 (Right to Life and Liberty) and to be subjected to a proceeding under Article 32 (Judicial Review) of the Constitution of India.

losing the legal battle! Therefore, he did not find any reason to review the decree obtained on consent terms for compensation.

Among the various contentions placed before it, challenging the settlement order and calling for its review, the Constitution Bench took a rather cautious approach. This may be partly because it was a *fait accompli.* Prior to taking up the review petitions, the Court had already upheld the Bhopal Act (1985).[59] Moreover, in the *Charanlal Sahu* case the Court did admit that there was a violation of the principles of natural justice, as the victims were not heard for the settlement order, yet it did not vitiate the same.[60] The Court was also not prepared to go into the question of adequacy of the quantum of settlement and decide the issue on merit applying the strict liability principle. Therefore, what was left was the question of termination of pending criminal proceedings as well as conferment of immunity from future criminal proceedings contained in the settlement order. On both these counts, the Court set aside all relevant portions of the settlement orders (dated 14 and 15 February 1989).

The Court elaborated its power under Article 142[61] of the Constitution to do "complete justice" in any cause or matter. It took the view that it would take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The Court emphatically stated that the proposition did not relate to its powers under Article 142, but only to what was or was not complete justice of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power.

Consequential to this order, the Court set aside the immunity from future criminal proceedings granted in the settlement order.[62] The Court left untouched the quantum of settlement (US$470 million). It also directed the Union of India to bear the shortfall, if any, in the settlement fund. Justice AHMADI, however, dissented from the majority on the ground that this would be tantamount to imposing an additional term on the Union of India in the settlement, without its consent as well as without even holding it liable as a tort feasor.[63]

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59 See *supra* n.51, p.681.

60 Ibid, p.702.

61 Article 142(1) provides:

"The Supreme Court of India in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament, and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

See *supra,* n.57 at p.698.

63 Ibid, p.737.

8. CRIMINAL PROCEEDINGS

Since the judgment of the Supreme Court in the review petitions, the criminal proceedings against the Union Carbide have been revived.[64]

The District Additional Sessions Judge, Bhopal, Mr WAJAHAT ALI SHAH, has now framed charges[65] against nine persons, including the former chairman of the UCIL, for, among others, culpable homicide not amounting to murder. The judge also declared the former UCC Chairman Mr WARREN ANDERSON, the UCC and the Union Carbide (Eastern) Hong Kong, as absconders. The judge has fixed 12 May 1993 for recording evidence of all the witnesses in the case.

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64 A criminal case regarding the leakage of MIC gas from the Bhopal plant of the UCIL was registered with the Hanumanganj police station of Bhopal on 3 December 1984, under s 304-A of the Indian Penal Code. The then UCC Chairman, Mr WARREN ANDERSON, the UCIL Chairman Mr KESHUB MAHINDRA and the UCIL Managing Director, Mr VIJAY GOKHALE, had been arrested in Bhopal on 7 December 1984. The case was handed over to the Central Bureau of Investigation (CBI) on 6 December 1984.

The CBI filed a charge-sheet in the Court of the Chief Judicial Magistrate, Bhopal on 1 December 1987. This proceeding was quashed, following the overall settlement reached between the Union of India and the UCC on 14 February 1989 (A.I.R. 1990 SC 273).

65 *The Times of India* (New Delhi), 9 April 1993.

LEGAL MATERIALS

STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

INDIA

JUDICIAL DECISIONS

Under international law a merchant ship, upon entering the waters of a State other than the flag State, subjects itself to the jurisdiction of the coastal State as a manifestation of the latter's sovereignty; Admiralty jurisdiction of Indian courts; High Courts in India, as a superior Court of record have inherent jurisdiction over the foreign ship and can order its arrest; The Brussels Conventions on matters of maritime law are to be regarded as the international law or transnational law as rooted in and evolved out of the general principles of national laws and as such can be regarded as part of the common law of India; Effect of Article 372 of the Indian Constitution (according to which Colonial statutes continue to remain in force) on the subsequent growth of the law.

Supreme Court, 26 February 1992

JT 1992 (2) S.C.65**
Dr. T.K. THOMMEN and R.M. SAHAI, JJ.

M.V. ELISABETH & OTHERS v. HARWAN INVESTMENT & TRADING PVT. LTD

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* Edited by Ko Swan Sik, General Editor

** Courtesy of Dr. T. Kochu Thommen, New Delhi. Not long after receiving Judge Kochu Thommen's contribution the Editors were saddened to hear that Judge Thommen had passed away in his home state of Kerala, India, in December 1993.

Asian Yearbook of International Law, Volume 3 (Ko Swan Sik *et al.*, eds.; 0-7923-2708-X; © 1994 Kluwer Academic Publishers; printed in Great Britain), pp. 183–219

The facts

The Appellant-defendants in "breach of duty" left the port of Marmagao on 8.2.84 and delivered the goods to the consignee in breach of the plaintiff's directions to the contrary, thereby committing conversion of the goods entrusted with them. The Respondent-plaintiff instituted the suit in Andhra Pradesh High Court invoking its admiralty jurisdiction by means of an action in rem. The vessel was arrested when it entered the Port of Vishakhapatnam on 13.4.84 after returning from foreign ports. The defendants moved an application in the High Court raising a preliminary objection to the jurisdiction of that Court. They contended that the plaintiff's suit against a foreign ship owned by a foreign company not having a place of residence or business in India was not liable to be proceeded against on the admiralty side of the High Court by an action in rem in respect of a cause of action alleged to have arisen by reason of a tort or a breach of obligation arising from the carriage of goods from a port in India to a foreign port. Their sole contention on the question of jurisdiction was as regards the lack of admiralty jurisdiction of any Court in Andhra Pradesh or any other State in India to proceed in rem against the ship on the alleged cause of action concerning carriage of goods from an Indian port to a foreign port. The preliminary objection was overruled by the learned Single Judge and his order was confirmed by the learned Judges of the Division Bench.

Counsel for appellants (defendants) argued, *inter alia*, (1) that the power of the High Court on the admiralty side is contained in and confined to the provisions of the [British] Admiralty Court Act, 1861 (24 & 25 Victoriae, Ch.10) which were made applicable to India by the Colonial Courts of Admiralty Act, 1890; (2) that the extent of admiralty jurisdiction and the judicial power peculiar to that jurisdiction, as conferred on the Indian High Courts, remained frozen as of the date of the Admiralty Court Act, 1861; (3) that since the only provision of the 1861 Act respecting cargo, i.e. section 6, is confined to *inward* cargo, consequently the Indian High Court exercising admiralty jurisdiction has no power to deal with any claim concerning *outward* cargo.

Counsel for the respondent-plaintiff submitted, *inter alia*, that what the High Court has stated is based on a realistic appreciation of the need for liberal construction of the statutes so as to support assumption of jurisdiction to render justice where justice is required to be done rather than resorting to a technical or narrow or pedantic construction resulting in a state of helplessness.

THOMMEN, J:

...

6. The crucial question for our consideration is, therefore, the dispute about jurisdiction ...

...

13. In a number of decisions of the Calcutta and Bombay High Courts, the admiralty jurisdiction of the High Courts in India has been historically traced ... The view taken in these decisions is that the admiralty jurisdiction of the High Court in India does not extend beyond the ambit of the provisions of the (English) Admiralty Court Act, 1961 ...

...

15. This restrictive construction is, in our view, not warranted by the provisions of the Constitution. The fact that the High Court continues to enjoy the same jurisdiction as it had immediately before the commencement of the Constitution, as stated in Article 225, does not mean that a matter which is covered by the Admiralty Court Act, 1861 cannot be otherwise dealt with by the High Court, subject to its own Rules, in exercise of its manifold jurisdiction, which is, unless barred, unlimited. To the extent not barred expressly or by necessary implication, the judicial sovereignty of this country is manifested in the jurisdiction vested in the High Courts as superior courts.

...

18. It is true that the Colonial statutes continue to remain in force by reason of Article 372 of the Constitution of India, but that does not stultify the growth of law or blinker its vision or fetter its arms. Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice.

19. We do not accept the reasoning of the High Courts in the decisions cited above on the question of jurisdiction, whatever be the correctness of their decisions on the peculiar facts of those cases in regard to which we express no view. But the narrow view adopted in those decisions on the source and ambit of the admiralty jurisdiction of the High Courts is, in our opinion, not warranted.

...

27. Assuming that the admiralty powers of the High Courts in India are limited to what had been derived from the Colonial Courts of Admiralty Act, 1890, that Act, having equated certain Indian High Courts to the High Court of England in regard to admiralty jurisdiction, must be considered to have conferred on the former all such powers which the latter enjoyed in 1890 and thereafter during the period preceding the Indian Independence Act, 1947 ...

...

65. In tracing the history of admiralty law in India, it is likewise misleading and incorrect to confine it to statutes. Statutes have been codifications of rules of law as developed by usage, practice and custom ...

66. Where statutes are silent and remedy has to be sought by recourse to basic principles, it is the duty of the Court to devise procedural rules by analogy and expediency ...

67. It is likewise within the competence of the appropriate Indian Courts to deal, in accordance with the general principles of maritime law and the applicable provisions of statutory law, with all persons and things found within their jurisdiction. The power of the Court is plenary and unlimited unless it is expressly or by necessary implication curtailed. Absent such curtailment of jurisdiction, all remedies which are available to the courts to administer justice are available to a claimant against a foreign ship and its owner found within the jurisdiction of the concerned High Court. This power of the Court to render justice must necessarily include the power to make interlocutory orders for arrest and attachment before judgment.

68. The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers. (See *Naresh Shridhar Mirajkar and Ors.* v. *State of Maharashtra and Anr.*, [(1966) 3 SCR 744]. As stated in Halsbury's Laws of England, 4th edition, Vol.10, para 713:

> "Prima facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court."

...

73. It is well recognised in international law that a merchant ship, though generally governed by the laws of the flag State, subjects itself to the jurisdiction of a foreign State as it enters its waters. The Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958 and the Law of the Sea Convention, 1982 affirm that the sovereignty of a State extends over its internal and territorial waters.[11]

...

76. All foreign merchant ships and persons thereon fall under the jurisdiction of a coastal State as they enter its waters. Subject to the right of "innocent passage", the coastal State is free to exercise jurisdiction over such ships in respect of matters the consequences of which extend beyond the ships. Such ships are subject to the local jurisdiction in criminal, civil and administrative matters. This jurisdiction is, however, assumed only when, in the opinion of the local authorities, the peace or tranquillity of the port is disturbed, when strangers to the vessel are involved or when the local authorities are appealed to. Questions which affect only the internal order and economy of the ship are generally left to the authorities of the flag State. Coastal States are entitled to assume jurisdiction in respect of maritime claims against foreign merchant ships lying in their waters. These ships are liable to be arrested and detained for the enforcement of maritime claims. The courts of the country in which a foreign ship has been arrested may determine the cases according to merits, provided they are empowered to do so by the domestic law of the country or in any of the cases recognised by the International Convention relating to the Arrest of Seagoing Ships, Brussels, 1952.[12] The maritime claims in respect of which the power of arrest is recognised in law include claims relating to damage caused by any ship either in collision or otherwise; claims relating to carriage of goods in any ship whether by charterparty or otherwise, loss of or damage to goods etc. These principles of international law, as generally recognised by nations, leave no doubt that, subject to the local laws regulating the competence of courts, all foreign ships lying within the waters of a State, including waters in ports, harbours, roadsteads, and territorial waters, subject themselves to the jurisdiction of the local authorities in respect of maritime claims and they are liable to be arrested for the enforcement of such claims.

...

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11 See Nagendra Singh, International Maritime Law Conventions, British Shipping Laws, Vols.I to IV.

12 See also the International Conventions for the Unification of Certain Rules relating to Maritime Liens and Mortgages of 10th April, 1926 and May 27 1967).

79. The Merchant Shipping Act, 1958 contains various provisions to enforce territorial jurisdiction ...

80. The detention of a foreign ship is authorized in terms of sections 443 and 444 ...

...

82. The Indian Carriage of Goods by Sea Act, 1925 applies to carriage of goods by sea under bills of lading or similar documents of title from a port in India to any other port whether in or outside India. (See section 2) ...

83. The Merchant Shipping Act empowers the concerned High Court to arrest a ship in respect of a substantive right. A right conferred by the Indian Carriage of Goods by Sea Act, 1925 in respect of outward cargo is one of those rights which can be enforced by arrest and detention of the foreign ship in order to found jurisdiction over the vessel and its owners, just as it can be done in respect of inward cargo by reason of the substantive rights conferred by the Admiralty Court Act, 1861 read with the Colonial Courts of Admiralty Act, 1890, and other rules of law.... Viewed in this light, and by this reasoning, the Andhra Pradesh High Court, as a successor to the Madras High Court, does not lack admiralty jurisdiction in respect of claims relating to outward cargo.

84. The admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. This jurisdiction can be assumed by the concerned High Court, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action.

85. The Merchant Shipping Act, 1958 provides a detailed code of substantive and procedural rules regulating shipping as an industry and the control exercised over it by the competent authorities. ... Likewise, the substantive rules concerning transport of goods are contained in the Indian Bills of Lading Act, 1856 and the Indian Carriage of Goods by Sea Act, 1925. But the jurisdictional questions concerning arrest of foreign ships for enforcement of claims against the shipowner as a transporter of goods, which in England are regulated by the Supreme Court Act 1981, are in many respects left unregulated by Indian legislation. While the provisions of various international conventions concerning arrest of ships, civil and penal jurisdiction in matters of collision, maritime liens and mortgages etc. have been incorporated

into the municipal laws of many maritime States, India, as stated above, lags behind them in adopting these unified rules. By reason of this void, doubts about jurisdiction often arise, as in the present case, when substantive rights, such as those recognized by the Carriage of Goods by Sea Act, are sought to be enforced. The remedy lies, apart from enlightened judicial construction, in prompt legislative action to codify and clarify the admiralty laws of this country. This requires thorough research and investigation by a team of experts in admiralty law, comparative law, and public and private international law. Any attempt to codify without such investigation is bound to be futile.

86. ... Although India has not adopted the various Brussels Conventions, the provisions of these Conventions are the result of international unification and development of the maritime laws of the world, and can, therefore, be regarded as the international common law or transnational law rooted in and evolved out of the general principles of national laws, which, in the absence of specific statutory provisions, can be adopted and adapted by courts to supplement and complement national statutes on the subject. In the absence of a general maritime code, these principles aid the courts in filling up the lacunae in the Merchant Shipping Act and other enactments concerning shipping. ...

87. It is important to remember that the Brussels Convention on Arrest of Ships merely restricts or regulates the power of the coastal States and is not intended to confer power which they did not otherwise have as sovereign States. "Arrest" to which the convention refers is detention of a ship to secure a maritime claim, and not seizure of a ship in execution or satisfaction of judgment.

88. The judicial power of this country, which is an aspect of national sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access to Court which is an important right vested in every citizen implies the existence of the power of the Court to render justice according to law. Where statute is silent and judicial intervention is required, Courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience.

89. In the words of Chief Justice Marshall:

> "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself ..."

The Schooner Exchange v. *M'Faddon & Ors.* US Supreme Court Reports, Cranch 5–9, p. 114, 133 (3 L.ed.287).

90. Admiralty jurisdiction is an essential aspect of judicial sovereignty which under the Constitution and the laws is exercised by the High Court as a superior Court of record administering justice in relation to persons and things within its jurisdiction. Power to enforce claims against foreign ships is an essential attribute of admiralty jurisdiction and it is assumed over such ships while they are within the jurisdiction of the High Court by arresting and detaining them.

91. All persons and things within the waters of a State fall within its jurisdiction unless specifically curtailed or regulated by rules of international law. The power to arrest a foreign vessel, while in the waters of a coastal State, in respect of a maritime claim, wherever arising, is a demonstrable manifestation and an essential attribute of territorial sovereignty. This power is recognized by several international conventions. These conventions contain the unified rules of law drawn from different legal systems. Although many of these conventions have yet to be ratified by India, they embody principles of law recognized by the generality of maritime States, and can therefore be regarded as part of our common law. The want of ratification of these conventions is apparently not because of any policy disagreement, as is clear from active and fruitful Indian participation in the formulation of rules adopted by the conventions, but perhaps because of other circumstances, such as lack of an adequate and specialized machinery for implementation of the various international conventions by co-ordinating for the purpose the concerned Departments of the Government. Such a specialized body of legal and technical experts can facilitate adoption of internationally unified rules by national legislation. It is appropriate that sufficient attention is paid to this aspect of the matter by the concerned authorities. Perhaps the Law Commission of India, endowed as it ought to be with sufficient authority, status and independence, as is the position in England, can render valuable help in this regard. Delay in the adoption of international conventions which are intended to facilitate trade hinders the economic growth of the nation.

...

93. Admiralty jurisdiction, despite the peculiarities of its origin and growth—rooted as it is in history and nurtured by the growing demands of international trade—is nevertheless a part of the totality of jurisdiction vested in the High Court as a superior Court of record, and it is not a distinct and separate jurisdiction as was once the position in England before the unification of courts. The 1890 and 1891 Acts specifically conferred admiralty jurisdiction on the Indian High Courts by reason of their being courts of unlimited

jurisdiction. These Acts did not create any separate or distinct jurisdiction, but merely equated the Indian High Courts to the position of the English High Court (united and consolidated as that Court has been since 1875) for the exercise of admiralty powers within the jurisdiction of the former. The contrary view expressed in some of the decisions of the High Courts referred to earlier is clearly wrong.

94. Once a foreign ship is arrested in Indian waters by an order of the High Court, in exercise of the admiralty jurisdiction vested in it by statute, or inherent in it as a Court of record, in respect of any maritime claim against its owner, wherever the cause of action may have arisen, and whether or not the ship is subsequently released by the owner furnishing security, proceedings must continue against the owner as in any other suit ...

95. All foreign ships entering Indian waters are presumed to know that they fall within the jurisdiction of this country during their stay here. The vessel in question was lying in the Port of Vishakapatnam when she was arrested in respect of a cause of action relating to cargo. The sole contention of the defendants as regards jurisdiction was that no High Court in India was invested with admiralty jurisdiction to order the arrest of the vessel in respect of a cause of action relating to outward cargo because section 6 of the Admiralty Court Act, 1861 (read with the Colonial Courts of Admiralty Act, 1890) conferring admiralty jurisdiction on Indian High Courts confined it to "claims for damage to cargo imported". This contention, for the reasons we have stated, has no merits. The High Court, in our view, rightly assumed jurisdiction by the arrest of the vessel while it was lying in the port of Vishakapatnam.

96. The High Court of Andhra Pradesh undoubtedly possesses jurisdiction over claims relating to inward and outward cargo. In the circumstances, the preliminary objection to the jurisdiction of the Andhra Pradesh High Court was totally devoid of merits.

97. Accordingly, the appeal arising from SLP(C) No. 10542 of 1985 has to be dismissed...

R.M. SAHAI, J.: [concurring]

International commercial arbitration; The proper law of the contract [or an arbitration agreement] and its determination; To be distinguished from the law governing arbitration proceedings; Applicability of [section 9 of] the [Indian] Foreign Awards (Recognition and Enforcement) Act, 1961 or the [Indian] Arbitration Act, 1940 to an award made at London by a tribunal constituted by the International Court of Arbitration of the International Chamber of Commerce.

Supreme Court, 7 May 1992

JT 1992 (3) S.C. 198*
Dr. T. KOCHU THOMMEN and S.C. AGRAWAL, JJ.

NATIONAL THERMAL POWER CORPORATION v. THE SINGER COMPANY & OTHERS

THOMMEN, J.:

...

2. The National Thermal Power Corporation (the "NTPC") appeals from the judgment of the Delhi High Court in FAO (OS) No.102/90 dismissing the NTPC's application filed under sections 14, 30 and 33 of the Arbitration Act, 1940 (No. X of 1940) to set aside an interim award made at London by a tribunal constituted by the International Court of Arbitration of the International Chamber of Commerce (the "ICC Court") in terms of the contract made at New Delhi between the NTPC and the respondent—the Singer Company (the "Singer") for the supply of equipment, erection and commissioning of certain works in India. The High Court held that the award was not governed by the Arbitration Act, 1940; the arbitration agreement on which the award was made was not governed by the law of India; the award fell within the ambit of the Foreign Awards (Recognition and Enforcement) Act, 1961 (Act 45 of 1961) (the "Foreign Awards Act"); London being the seat of arbitration, English Courts alone had jurisdiction to set aside the award; and, the Delhi High Court had no jurisdiction to entertain the application filed under the Arbitration Act, 1940.

3. The NTPC and the Singer entered into two formal agreements dated 17.8.1982 at New Delhi. The General Terms and Conditions of Contract dated 14.2.81 (the "General Terms") are expressly incorporated in the agreements and they state:

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* Courtesy of Dr. T. Kochu Thommen, New Delhi.

> "the laws applicable to this Contract shall be the laws in force in India. The Courts of Delhi shall have exclusive jurisdiction in all matters arising under this contract." (7.2).

The General Terms deal with the special responsibilities of foreign contractors and Indian contractors. The Singer, being a foreign contractor, is governed by the provisions relating to the foreign contractors. The General Terms further provide for settlement of disputes by amicable settlement, failing which by arbitration.

4. Sub-clause 6 of clause 27 of the General Terms deals with arbitration in relation to an Indian contractor and sub-clause 7 of the said clause deals with arbitration in respect of a foreign contractor. The latter provision says:

> "27.7. In the event of foreign Contractor, the arbitration shall be conducted by three arbitrators, one each to be nominated by the Owner and the Contractor and the third to be named by the President of the International Chamber of Commerce, Paris. Save as above all Rules of Conciliation and Arbitration of the International Chamber of Commerce shall apply to such arbitrations. The arbitration shall be conducted at such places as the arbitrators may determine."

In respect of an Indian Contractor, sub-clause 6.2 of clause 27 says that the arbitration shall be conducted at New Delhi in accordance with the provisions of the Arbitration Act, 1940.

...

... The General Terms further provide:

> "the Contract shall in all respects be construed and governed according to Indian laws."(32.3).

The formal agreements which the parties executed on 17.8.82 contain a specific provision for settlement of disputes. Article 4.1 provides:

> "4.1. Settlement of Disputes: It is specifically agreed by and between the parties that all the differences or disputes arising out of the contract or touching the subject matter of the contract, shall be decided by process of settlement and arbitration as specified in clause 26.0 and 27.0 excluding 27.6.1 and 27.6.2., of the General Conditions of the Contract."

5. ...

6. Accordingly, the dispute which arose between the parties was referred to an Arbitral Tribunal constituted in terms of the rules of arbitration of the ICC Court ("the ICC Rules"). In accordance with Article 12 of those Rules the ICC Court chose London to be the place of arbitration.

...

7. The point for consideration is whether the High Court was right in rejecting the appellant's application filed under the provisions of the Arbitration Act, 1940 and in holding that the award which was made in London on an arbitration agreement was not governed by the law of India and that it was a foreign award within the meaning of the Foreign Awards Act and beyond the jurisdiction of the Indian Courts except for the purpose of recognition and enforcement under the latter Act.

8. The award was made in London as an interim award in an arbitration between the NTPC and a foreign contractor on a contract governed by the law of India and made in India for its performance solely in India. The fundamental question is whether the arbitration agreement contained in the contract is governed by the law of India so as to save it from the ambit of the Foreign Awards Act and attract the provisions of the Arbitration Act, 1940. Which is the law which governs the agreement on which the award has been made?

...

9. Mr. Shanti Bhushan, appearing for the NTPC, submits that admittedly the proper law of the contract is the law in force in India. The arbitration agreement is contained in a clause of that contract. In the absence of any stipulation to the contrary, the contract has to be seen as a whole and the parties must be deemed to have intended that the substantive law applicable to the arbitration agreement is exclusively the law which governs the main contract, although, in respect of procedural matters, the competent courts in England will also be, concurrently with the Indian courts, entitled to exercise jurisdiction over the conduct of arbitration. But occasions for interference by the courts in England would indeed be rare and probably unnecessary in view of the elaborate provisions contained in the ICC Rules by which the parties have agreed to abide. The substantive law governing arbitration, which concerns questions like capacity, validity, effect and interpretation of the contract etc., is Indian law and the competent courts in such matters are the Indian courts. Even in respect of procedural matters, the concurrent jurisdiction of the courts of the place of arbitration does not exclude the jurisdiction of the Indian courts.

10. Mr. S.K. Dholakia appearing for the Singer, on the other hand, submits that the arbitration agreement is a separate and distinct contract, and collateral to the main contract. Although the main contract is governed by the laws in force in India, as stated in the General Terms, there is no express statement as regards the law governing the arbitration agreement. In the circumstances, the

law governing the arbitration agreement is not the same law which governs the contract, but it is the law which is in force in the country in which the arbitration is being conducted. Counsel accordingly submits that the Delhi High Court is right in saying that the saving clause in section 9 of the Foreign Awards Act has no application to the award in question made in London by an Arbitral Tribunal constituted in accordance with the ICC Rules. Counsel submits that the High Court has rightly held that the impugned award falls under the Foreign Awards Act and it is not liable to be challenged on the alleged grounds falling under sections 14, 30 and 33 of the Arbitration Act, 1940.

11. Counsel says that the award, having been made in London in terms of the ICC Rules to which the parties have submitted, is governed by the provisions of the New York Convention, as incorporated in the Foreign Awards Act, and its enforceability in India can be resisted only in the circumstances postulated under that Act, and the Delhi High Court has rightly rejected the petition invoking the jurisdiction of that Court in terms of the Arbitration Act, 1940.

12. Mr. Dholakia does not dispute that the substantive rights of the parties under the Contract are governed by the law of India. His contention, however, is that while the main contract is governed by Indian law, as expressly stated by the parties, arbitration being a collateral contract and procedural in nature, it is not necessarily bound by the proper law of the contract, but the law applicable to it must be determined with reference to other factors. The place of arbitration is an important factor. London having been chosen in accordance with the ICC Rules to be the seat of arbitration, English law is the proper law of arbitration, and all proceedings connected with it are governed by that law and exclusively within the jurisdiction of the English courts. He denies that the Indian courts have any jurisdiction in matters connected with the arbitration, except to the extent permitted by the Foreign Awards Act for recognition and enforcement of the award.

13. Dicey & Morris in *The Conflict of Laws*, 11th edn., Vol. II ("Dicey") refer to the "proper law of a contract" thus:

...

The expression "proper law of a contract" refers to the legal system by which the parties to the contract intended their contract to be governed. If their intention is expressly stated or if it can be clearly inferred from the contract itself or its surrounding circumstances, such intention determines the proper law of the contract. In the words of Lord HERCHELL L.C....

...

Where, however, the intention of the parties is not expressly stated and no inference about it can be drawn, their intention as such has no relevance. In that event, the courts endeavour to impute an intention by identifying the legal system with which the transaction has its closest and most real connection.

14. The expressed intention of the parties is generally decisive in determining the proper law of the contract. The only limitation on this rule is that the intention of the parties must be expressed bona fide and it should not be opposed to public policy. In the words of Lord WRIGHT: ...

...

15. In the absence of an express statement about the governing law, the inferred intention of the parties determines that law. The true intention of the parties, in the absence of an express selection, has to be discovered by applying "sound ideas of business, convenience and sense to the language of the contract itself". *Jacobs Marcus & Co.* v. *The Credit Lyonnais* (1884) 12 Q.B.D. 589, 601 (C.A.). In such a case, selection of courts of a particular country as having jurisdiction in matters arising under the contract is usually, but not invariably, by an indication of the intention of the parties that the system of law followed ... those courts is the proper law by which they intend their contract to be governed. However, the mere selection of a particular place for submission to the jurisdiction of the courts or for the conduct of arbitration will not, in the absence of any other relevant connecting factor with that place, be sufficient to draw an inference as to the intention of the parties to be governed by the system of law prevalent in that place. This is specially so in the case of arbitration, for the selection of the place of arbitration may have little significance where it is chosen, as is often the case, without regard to any relevant or significant link with the place. This is particularly true when the place of arbitration is not chosen by the parties themselves, but by the arbitrators or by an outside body, and that too for reasons unconnected with the contract. Choice of place for submission to jurisdiction of courts or for arbitration may thus prove to have little relevance for drawing an inference as to the governing law of the contract, unless supported in that respect by the rest of the contract and the surrounding circumstances. Any such clause must necessarily give way to stronger indications in regard to the intention of the parties. See *The Fehmarn*, (1958) 1 All E.R. 333.

16. Where the parties have not expressly or impliedly selected the proper law, the courts impute an intention by applying the objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their minds to the question. The judge has to determine the proper law for the parties in such circumstances by putting himself in the place of a "reasonable man". He has to determine the intention

of the parties by asking himself "how a just and reasonable person would have regarded the problem", *The Assunzione* (1954) P. 150, 176 (C.A.); *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.* (1938) A.C. 224, 240 (P.C.).

17. For this purpose the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction and such other links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection.

18. The position in these respects is summarized by the Privy Council in *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Limited,* (1938) A.C. 224 at 240: ...

...

It must, however, be clarified that the expression "proper law" refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws rules. The law of contract is not affected by the doctrine of renvoi. See Dicey, Vol. II, p. 1164.

20. In a case such as the present, there is no need to draw any inference about the intention of the parties or to impute any intention to them, for they have clearly and categorically stipulated that their contract, made in India to be performed in India, is to be governed by the "laws in force in India" and the courts in Delhi are to "have exclusive jurisdiction in all matters arising under this contract" (cl.7). The cardinal test suggested by Dicey in rule 180 is thus fully satisfied.

21. As regards the governing law of arbitration, Dicey says:

> "Rule 58.—(1) The validity, effect and interpretation of an arbitration agreement are governed by its proper law.
> (2) The law governing arbitration proceedings is the law chosen by the parties, or, in the absence of agreement, the law of the country in which the arbitration is held." (Vol. I, Pages 534–535).

22. The principle in rule 58, as formulated by Dicey, has two aspects—(a) the law governing the arbitration agreement, namely, its proper law; and (b) the law governing the conduct of the arbitration, namely, its procedural law.

23. The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where,

however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebutable presumption. See Dicey, Vol. I, p. 539; see the observation in *Whitworth Street Estates (Manchester) Ltd.* v. *James Miller & Partners Ltd.*, 1970 AC 583, 607, 612 and 616).

24. The validity, effect and interpretation of the arbitration agreement are governed by its proper law. Such law will decide whether the arbitration clause is wide enough to cover the dispute between the parties. Such law will also ordinarily decide whether the arbitration clause binds the parties even when one of them alleges that the contract is void, or voidable or illegal or that such contract has been discharged by breach or frustration. See *Heymann & Anr.* v. *Darwins, Ltd.*, 1942 (1) All E.R. 337. The proper law of arbitration will also decide whether the arbitration clause would equally apply to a different contract between the same parties or between one of those parties and a third party.

25. The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or by implication. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract.

26. Whereas, as stated above, the proper law of arbitration (i.e., the substantive law governing arbitration) determines the validity, effect and interpretation of the arbitration agreement, the arbitration proceedings are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitration proceedings will be conducted in accordance with that law so long as it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of arbitration (as

distinguished from the substantive agreement to arbitrate) will be determined by the law of the place or seat of arbitration. Where, however, the parties have, as in the instant case, stipulated that the arbitration between them will be conducted in accordance with the ICC Rules, those rules, being in many respects self-contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration. See the observation of Kerr, L.J. in *Bank Mellat* v. *Helliniki Techniki SA*, (1983) 3 All E.R. 428; See also *Craig, Park and Paulsson, International Chamber of Commerce Arbitration*, 2nd ed. (1990). To such an extent the appropriate courts of the seat of arbitration, which in the present case are the competent English courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. See Mustil & Boyd, *Commercial Arbitration*, 2nd ed.; Allen Redfern and Martin Hunter, *Law & Practice of International Commercial Arbitration*, 1986; Russel on Arbitration, Twentieth ed., 1982; Cheshire & North's *Private International Law*, eleventh ed. (1987).

27. The proper law of the contract in the present case being expressly stipulated to be the laws in force in India and the exclusive jurisdiction of the courts in Delhi in all matters arising under the contract having been specifically accepted, and the parties not having chosen expressly or by implication a law different from the Indian law in regard to the agreement contained in the arbitration clause, the proper law governing the arbitration agreement is indeed the law in force in India, and the competent courts of this country must necessarily have jurisdiction over all matters concerning arbitration. Neither the rules of procedure for the conduct of arbitration contractually chosen by the parties (the ICC Rules) nor the mandatory requirements of the procedure followed in the courts of the country in which the arbitration is held can in any manner supersede the overriding jurisdiction and control of the Indian law and the Indian courts.

28. This means, questions such as the jurisdiction of the arbitrator to decide a particular issue or the continuance of an arbitration or the frustration of the arbitration agreement, its validity, effect and interpretation are determined exclusively by the proper law of the arbitration agreement, which, in the present case, is Indian Law. The procedural powers and duties of the

arbitrators, as for example, whether they must hear oral evidence, whether the evidence of one party should be recorded necessarily in the presence of the other party, whether there is a right of cross-examination of witnesses, the special requirements of notice, the remedies available to a party in respect of security for costs or for discovery etc. are matters regulated in accordance with the rules chosen by the parties to the extent that those rules are applicable and sufficient and are not repugnant to the requirements of the procedural law and practice of the seat of arbitration. The concept of party autonomy in international contracts is respected by all systems of law so far as it is not incompatible with the proper law of the contract or the mandatory procedural rules of the place where the arbitration is agreed to be conducted or any overriding public policy.

29. The arbitration agreement contained in the arbitration clause in a contract is often referred to as a collateral or ancillary contract in relation to the main contract of which it forms a part. The repudiation or breach of the main contract may not put an end to the arbitration clause which might still survive for measuring the claims arising out of the breach and for determining the mode of their settlement. See *Heyman & Anr.* v. *Darwins, Ltd.*, 1942 (1) All E.R. 337; *Bremer Vulkan Schiffbau Und Maschinenfabrik* v. *South India Shipping Corpn.*, 1981(1) All E.R. 289. See also Mustil & Boyd, *Commercial Arbitration*, 2nd ed. (1989).

30. The arbitration agreement may provide that all disputes which may arise between the parties will be referred to arbitration or it may provide that a particular dispute between the parties will be submitted to the jurisdiction of a particular arbitrator. The arbitration clause may identify the arbitrator or arbitrators and the place of arbitration or it may leave such matters to be determined by recourse to the machinery of an institutional arbitration, such as the ICC, or the London Court of International Arbitration or the American Arbitration Association or similar institutions.

...

33. An international commercial arbitration necessarily involves a foreign element giving rise to questions as to the choice of law and the jurisdiction of courts. Unlike in the case of persons belonging to the same legal system, contractual relationships between persons belonging to different legal systems may give rise to various private international law questions such as the identity of the applicable law and the competent forum. An award rendered in the territory of a foreign State may be regarded as a domestic award in India where it is sought to be enforced by reason of Indian law being the proper law governing the arbitration agreement in terms of which the award was made. The Foreign Awards Act, incorporating the New York Convention, leaves no

room for doubt on the point.

...

35. The difference between an ad hoc arbitration and an institutional arbitration is not a difference between one system of law and another; for whichever is the proper law which governs either proceeding, it is merely a difference in the method of appointment and conduct of arbitration. Either method is applicable to an international arbitration, but neither is determinative of the character of the resultant award, namely, whether or not it is a foreign award as defined under the Foreign Awards Act, 1961.

36. Where the ICC Rules apply, there is generally little need to invoke the procedural machinery of any legal system in the actual conduct of arbitration.

...

37. A 'foreign award', as defined under the Foreign Awards Act, 1961 means an award made on or after 11.10.1960 on differences arising between persons out of legal relationships, whether contractual or not, which are considered to be commercial under the law in force in India. To qualify as a foreign award under the Act, the award should have been made in pursuance of an agreement in writing for arbitration to be governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and not to be governed by the law of India. Furthermore such an award should have been made outside India in the territory of a foreign State notified by the Government of India as having made reciprocal provisions for enforcement of the Convention. These are the conditions which must be satisfied to qualify an award as a "foreign award" (S.2 read with S.9).

38. An award is "foreign" not merely because it is made in the territory of a foreign State, but because it is made in such a territory on an arbitration agreement not governed by the law of India. An award made on an arbitration agreement governed by the law of India, though rendered outside India, is attracted by the saving clause in S.9 of the Foreign Awards Act and is, therefore, not treated in India as a "foreign award".

39. A "foreign award" is (subject to section 7) recognized and enforceable in India "as if it were an award made on a matter referred to arbitration in India" (S.4). Such an award will be ordered to be filed by a competent Court in India which will pronounce judgment according to the award (S.6).

40. Section 7 of the Foreign Awards Act, in consonance with Art. V of the New York Convention which is scheduled to the Act, specifies the conditions under which recognition and enforcement of a foreign award will be refused at

the request of a party against whom it is invoked.

41. A foreign award will not be enforced in India if it is proved by the party against whom it is sought to be enforced that the parties to the agreement were, under the law applicable to them, under some incapacity, or, the agreement was not valid under the law to which the parties have subjected it, or, in the absence of any indication thereon, under the law of the place of arbitration; or there was no due compliance with the rules of fair hearing; or the award exceeded the scope of the submission to arbitration; or the composition of the arbitral authority or its procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the place of arbitration; or "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". The award will not be enforced by a Court in India if it is satisfied that the subject matter of the award is not capable of settlement by arbitration under Indian law or the enforcement of the award is contrary to the public policy.

42. The Foreign Awards Act contains a specific provision to exclude its operation to what may be regarded as a "domestic award" in the sense of the award having been made on an arbitration agreement governed by the law of India, although the dispute was with a foreigner and the arbitration was held and the award was made in a foreign State.

43. Section 9 of this Act says:-

"Nothing in this Act shall —
(a) .....
(b) apply to any award made on an arbitration agreement governed by the law of India."

Such an award necessarily falls under the Arbitration Act, 1940, and is amenable to the jurisdiction of the Indian Courts and controlled by the Indian system of law just as in the case of any other domestic award, except that the proceedings held abroad and leading to the award were in certain respects amenable to be controlled by the public policy and the mandatory requirements of the law of the place of arbitration and the competent courts of that place.

44. It is important to recall that in the instant case the parties have expressly stated that the laws applicable to the contract would be the laws in force in India and that the courts of Delhi would have exclusive jurisdiction "in all matters arising under this contract". They have further stated that the "Contract shall in all respects be construed and governed according to Indian

laws". These words are wide enough to engulf every question arising under the contract including the disputes between the parties and the mode of settlement. It was in Delhi that the agreement was executed. The form of the agreement is closely related to the system of law in India. Various Indian enactments are specifically mentioned in the agreement as applicable to it in many respects. The contract is to be performed in India with the aid of Indian workmen whose conditions of service are regulated by Indian laws. One of the parties to the contract is a public sector undertaking. The contract has in every respect the closest and most real connection with the Indian system of law and it is by that law that the parties have expressly evinced their intention to be bound in all respects. The arbitration agreement is contained in one of the clauses of the contract, and not in a separate agreement. In the absence of any indication to the contrary, the governing law of the contract (i.e., in the words of Dicey, the proper law of the contract) being Indian law, it is that system of law which must necessarily govern matters concerning arbitration, although in certain respects the law of the place of arbitration may have its relevance in regard to procedural matters.

45. It is true that an arbitration agreement may be regarded as a collateral or ancillary contract in the sense that it survives to determine the claims of the parties and the mode of settlement of their disputes even after the breach or repudiation of the main contract. But is it not an independent contract, and it has no meaningful existence except in relation to the rights and liabilities of the parties under the main contract. It is a procedural machinery which is activated when disputes arise between parties regarding their rights and liabilities. The law governing such rights and liabilities is the proper law of the contract, and unless otherwise provided, such law governs the whole contract including the arbitration agreement, and particularly so when the latter is contained not in a separate agreement, but, as in the present case, in one of the clauses of the main contract.

46. Significantly, London was chosen as the place of arbitration by reason of Article 12 of the ICC Rules which reads:

> "The place of arbitration shall be fixed by the International Court of Arbitration, unless agreed upon by the parties."

The parties had never expressed their intention to choose London as the arbitral forum, but, in the absence of any agreement on the question, London was chosen by the ICC Court as the place of arbitration. London has no significant connection with the contract or the parties except that it is a neutral place and the Chairman of the Arbitral Tribunal is a resident there, the other two members being nationals of the United States and India respectively.

47. The decisions relied on by counsel for the Singer do not support his

contention that the mere fact of London being the place of arbitration excluded the operation of the Arbitration Act, 1940 and the jurisdiction of the courts in India. ...

...

The observations contained in [*James Miller & Partners Ltd* v. *Whitworth Street Estates (Manchester) Ltd.* (1970) A.C. 583] do not support the contention urged on behalf of the Singer that merely because London was designated to be the place of arbitration, the law which governed arbitration was different from the law expressly chosen by the parties as the proper law of the contract.

48. It is true that the procedural law of the place of arbitration and the courts of that place cannot be altogether excluded, particularly in respect of matters affecting public policy and other mandatory requirements of the legal system of that place. But in a proceeding such as the present which is intended to be controlled by a set of contractual rules which are self-sufficient and designed to cover every step of the proceeding, the need to have recourse to the municipal system of law and the courts of the place of arbitration is reduced to the minimum and the courts of that place are unlikely to interfere with the arbitral proceedings except in cases which shock the judicial conscience. See the observations of Kerr LJ in *Bank Mellat* v. *Helliniki Techniki SA*, (1983) 3 All E.R. 428.

49. Courts would give effect to the choice of a procedural law other than the proper law of the contract only where the parties had agreed that matters of procedure should be governed by a different system of law. If the parties had agreed that the proper law of the contract should be the law in force in India, but had also provided for arbitration in a foreign country, the laws of India would undoubtedly govern the validity, interpretation and effect of all clauses including the arbitration clause in the contract as well as the scope of the arbitrators' jurisdiction. It is Indian law which governs the contract, including the arbitration clause, although in certain respects regarding the conduct of the arbitration proceedings the foreign procedural law and the competent courts of that country may have a certain measure of control. See the principle stated by Lord Denning, M.R. in *International Tank and Pipe SAK* v. *Kuwait Aviation Fueling Co. KSC*, (1975) 1 All E.R. 242.

50. The arbitration clause must be considered together with the rest of the contract and the relevant surrounding circumstances. In the present case, as seen above, the choice of the place of arbitration was, as far as the parties are concerned, merely accidental in so far as they had not expressed any intention in regard to it and the choice was made by the ICC Court for reasons totally unconnected with either party to the contract. On the other hand, apart from the expressly stated intention of the parties, the contract itself, including the

arbitration agreement contained in one of its clauses, is redolent of India and matters Indian. The disputes between the parties under the contract have no connection with anything English, and they have the closest connection with Indian laws, rules and regulations. In the circumstances, the mere fact that the venue chosen by the ICC Court for the conduct of arbitration is London does not support the case of the Singer on the point. Any attempt to exclude the jurisdiction of the competent courts and the laws in force in India is totally inconsistent with the agreement between the parties.

51. In sum, it may be stated that the law expressly chosen by the parties in respect of all matters arising under their contract, which must necessarily include the agreement contained in the arbitration clause, being Indian law and the exclusive jurisdiction of the courts in Delhi having been expressly recognized by the parties to the contract in all matters arising under it, and the contract being most intimately associated with India, the proper law of arbitration and the competent courts are both exclusively Indian, while matters of procedure connected with the conduct of arbitration are left to be regulated by the contractually chosen rules of the ICC to the extent that such rules are not in conflict with the public policy and the mandatory requirements of the proper law and of the law of the place of arbitration. The Foreign Awards Act, 1961 has no application to the award in question which has been made on an arbitration agreement governed by the law of India.

52. The Tribunal has rightly held that the "substantive law of the contract is Indian law". The Tribunal has further held "the laws of England govern procedural matters in the arbitration".

53. All substantive rights arising under the agreement including that which is contained in the arbitration clause are, in our view, governed by the laws of India. In respect of the actual conduct of arbitration, the procedural law of England may be applicable to the extent that the ICC Rules are insufficient or repugnant to the public policy or other mandatory provisions of the laws in force in England. Nevertheless, the jurisdiction exercisable by the English courts and the applicability of the laws of that country in procedural matters must be viewed as concurrent and consistent with the jurisdiction of the competent Indian courts and the operation of Indian laws in all matters concerning arbitration in so far as the main contract as well as that which is contained in the arbitration clause are governed by the laws of India.

54. The Delhi High Court was wrong in treating the award in question as a foreign award. The Foreign Awards Act has no application to the award by reason of the specific exclusion contained in section 9 of that Act. The award is governed by the laws in force in India, including the Arbitration Act, 1940. Accordingly, we set aside the impugned judgment of the Delhi High Court and

direct that Court to consider the appellant's application on the merits in regard to which we express no views whatsoever. The appeal is allowed in the above terms. We do not, however, make any order as to costs.

PAKISTAN

JUDICIAL DECISIONS

Rules of international law are incorporated into national law and considered to be part of the national law unless they are in conflict with an Act of Parliament; National courts being organs of the national state and not organs of international law, must perforce apply national law if international law conflicts with it; obligation to interpret the municipal statute as to avoid confrontation with the comity of nations or the well-established principles of international law; Restrictions on free transit of goods through Pakistan into Afghanistan in light of the Pakistan-Afghanistan Transit Trade Agreement of 2 March 1965.

High Court, Karachi, 9 September 1992

PLD 1993 Karachi 93*
SYED HAIDER ALI PIRZADA and SHAUKAT HUSSAIN ZUBEDI, JJ.

MESSRS NAJIB ZARAB LIMITED—Petitioner v. GOVERNMENT OF PAKISTAN THROUGH THE SECRETARY, MINISTRY OF FINANCE, ISLAMABAD AND 4 OTHERS—Respondents

Facts

The petitioners in the course of their business placed orders for import of tyres of Indian origin. About 18 consignments reached Karachi port on various dates between 1 January and 27 March 1990. The consignments were imported for use in Afghanistan and were notified as goods in transit. According to the petitioners the Customs Authorities at Karachi refused clearance of the said consignments on the basis of a letter, dated 19th December 1989 allegedly received at the Customs House, Karachi on 1-1-1990 whereby the transit

* Courtesy of Mr. Jamshed A. Hamid, Islamabad.

facility in respect of tyres for which letters of credit were opened on or before 15-12-1988 but had subsequently been amended, was discontinued. The letter dated 19-12-1989 was apparently issued in order to give effect to an earlier letter dated 14-1-1989 of the Central Board of Revenue purportedly issued in order to stop smuggling back to Pakistan of tyres and tubes going to Afghanistan in transit. The petitioners prayed to quash the letter/orders dated 14-1-1989 and 19-12-1989.

On behalf of the respondents it was contended that in respect of the balance quantity of tyres ready for shipment abroad transit facility could not be allowed in view of public notice issued by the Customs House, Karachi, dated 27(23?)-7-1990 in pursuance of a letter of the Central Board of Revenue of 18-7-1990. The Government after considering the misuse of Afghan transit goods smuggled from Afghanistan into Pakistan, imposed the said condition of withdrawing transit facility of tyres.

The Court by judgment of 24-3-1992 allowed the petition and quashed the impugned letters/orders of 14-1-1989 and 19-12-1989. The Government of Pakistan and 3 others being aggrieved against the judgment, filed petition for Leave to Appeal, later converted to regular appeal, before the Supreme Court.

The Supreme Court held that the High Court had neither examined the merits of the case in the light of section 129 of the Customs Act nor considered the effect of the Pakistan-Afghanistan Transit Trade Agreement of 2-3-1965. The order of the High Court of 24-3-1992 was set aside and the case was remanded with the direction that the petition may be re-heard and disposed of in terms of the above observations.

SYED HAIDER ALI PIRZADA, J.:

...

We shall first examine if there is any mandate of international law or if the rules of international law afford us any guidance and if such mandate or guidance is preceptive under Pakistan Law. Two questions arise for our consideration. Firstly, whether international law is, of its own force, drawn into the law of the land without the aid of a municipal law and, secondly, whether so drawn, it overrides municipal law in case of conflict. It has been said in England that there are two schools of thought, one school of thought propounding the doctrine of incorporation and the other, the doctrine of transformation (per Lord Denning M.R. in Trendtex Trading Corpn. v. Central Bank of Nigeria ((1977) 1 AER 881). According to the one, rules of international law are incorporated into the law of the land automatically and considered to be part of the law of the land unless in conflict with an Act of Parliament. According to the other, rules of international law are not part of the law of the land unless already so by an Act of Parliament, judicial decision or long established custom. According to the one, whenever the rules of International law changed, they would result in change of the law of the land

along with them, without the aid of an Act of Parliament. According to the other, no such change would occur unless those principles are accepted and adopted by the domestic law.

...

We are of the view that nations must march with the international community and the municipal law must respect rules of international law, even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted Legislatures in making laws, may not be subjected to external rules except to the extent legitimately accepted by the constituted Legislatures themselves. The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament, comity of nations and municipal law must prevail in case of conflict. National Courts cannot say "yes" if Parliament has said "no" to a principle of international law. National Courts will endorse international law but not if it conflicts with national Law. National Courts being organs of the National State and not organs of international law, must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within the legitimate limits, so to interpret the municipal statute as to avoid confrontation with the comity of nations or the well-established principles of international law. But if conflict is inevitable, the latter must yield.

The proposition has been well established. ...

...

In Halsbury's Laws of England (4th Edition), Volume 44, para.908 at page 559, it is stated that "there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations, and, provided their language admits, statutes are to be interpreted so as not to be inconsistent with the comity of nations or with the established principles of international law". But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. It is further stated that "if statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or international law".

...

It appears that "the leading authorities on International Law have expressed

divergent views on the question of the transit rights of land-locked countries. While one group of writers such as Sibert, Scelle and others have held the view that these countries have an inherent right of transit across neighbouring countries, other equally eminent authorities, such as McNair and Hyde have held the view that these rights are not principles recognized by International Law but arrangements made by Sovereign States".

The result of the lack of unanimity has been that the land-locked countries have to rely on bilateral, regional or multilateral agreements for the recognition of their rights. The very existence of innumerable bilateral treaties, while on the one hand it raises a presumption of the existence of a customary right of transit, on the other, it indicates the dependence of the right on agreement. The discontenting situation led to attempts by nations to codify the rules relating to transit trade. The earliest attempt was the Convention on the Freedom of Transit known generally as the Barcelona Convention. The second attempt was the Convention on the High Seas, 1958. The third was the 1965 Convention on Transit Trade of Land-locked States. The most recent is The United Nations Convention on the Law of [the] Sea signed at Montiago Bay on [*sic*] 10th December, 1982.

The 1965 Convention on Transit Trade of Land-locked States is the Convention on the subject and as both Pakistan and Afghanistan have signed the convention, it may be useful to refer to it in some detail. ...

...

... Article 2 prescribes that freedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport. Traffic in transit is to be facilitated on routes in use mutually acceptable for transit to the contracting States concerned. No discrimination is to be exercised based on the place of origin, departure, entry, exit or destination or any circumstances relating to the ownership of the goods or the ownership, place of registration or flag of vessels, land, vehicles or other means of transport used. Article 3 provides for exemption of Traffic in transit from Customs Duties or import or export taxes or other charges except charges levied for specific services rendered in connection with such traffic. Article 4 refers to means of transport and tariff. Article 5 refers to methods and documentation in regard to customs transport etc. facilities. Article 8 refers to free zones or other custom facilities. Article 9 refers to provision of greater facilities. Article 10 refers to relation to most-favoured nation clause. Article 6 refers to storage of goods in transit. Article 7 refers to delays or difficulties in traffic in transit.

We have now to take a look at the Afghan Transit Trade Agreement, 1965. The Agreement was executed between the Government of [the] Islamic Republic of Pakistan and the Government of the Kingdom of Afghanistan for regulation of traffic in transit on the 2nd March, 1965. ... Article I stipulates

that the contracting parties undertake in accordance with the provisions of this agreement to grant and guarantee to each other the freedom of transit to and from their territories. It further provides that no distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination or any other circumstances relating to the ownership of goods, of vessels or other means of transport. Article II stipulates that goods including baggage, and vessels and other means of transport shall be deemed to be in transit across the territory of a contracting party, when the passage across such territory with or without transhipment, warehousing, breaking bulk or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the Contracting Party across whose territory the traffic passes—traffic of this nature is termed in this Agreement "Traffic in Transit". According to Article III, the transit routes shall be (1) Peshawar-Torkhum and vice versa and (2) Chaman-Spin Baldak and vice versa. The additional routes may be agreed between the Contracting Parties from time to time. Goods moving via these routes shall be entered at the proper Customs posts prescribed by each party. Adequate transit and other facilities shall be provided by the Contracting Party concerned at these posts. Article IV provides that no customs duties, taxes, dues or charges of any kind whether national, provincial or municipal shall regardless of their name and purpose, shall be levied on traffic in transit except charges for transportation or those commensurate with the administrative expenses entailed by traffic in transit or with the cost of services rendered. It further provides that with a view to achieving simplification of existing customs practices and procedures, the Contracting Parties agree to adopt at points of entry and exit the procedures laid down in the Annexure to the Agreement. Article V provides that without prejudice to the generality of the provisions contained in Article III, the Government of [the] Islamic Republic of Pakistan shall earmark sheds and open spaces in the Karachi Port Area to be known as Afghan Transit Area, for the goods in transit to and from Afghanistan. For hazardous and awkward goods separate arrangements for storage will be made as indicated in the Annexure. Article VI provides that the two Contracting Parties, recognizing the importance of the Kabul-Torkham Peshawar transit route, have decided to examine all matters pertinent to the development of this route, including consideration of the extension of the railway from Landi Khana to Torkham, Article VII provides that the Government of the Islamic Republic of Pakistan undertake to meet in full the requirement of wagons for transit traffic on both Karachi-Spin Baldak and Peshawar-Karachi routes. Article VIII enjoins on each Contracting Party to appoint liaison officers to look into the working of this Agreement and to refer, for expeditious solution, to the appropriate authorities of their own country, and to the liaison officer of the other country, any question arising from the operation of this Agreement. The liaison officers will meet as often as necessary and in any case not less than once in six months and the Contracting Parties shall provide them with the necessary facilities.

Article IX provides that the Contracting Parties agree that railway freight, port and other dues shall be subject to the most sympathetic consideration and shall be no less favourable than those imposed by either party on goods owned by its own nationals. Article X specifically provides that nothing in this Agreement shall be construed to prevent the adoption and enforcement by either party of measures necessary to protect public morals, human, animal or plant life or health and for the security of its own territory. Article XI provides that the Contracting Parties shall meet and consult each other once a year to review the working of this Agreement. Article XII provides that the Contracting Parties agree to resolve any difference relating to the interpretation of this Agreement by negotiation and in the event of failure to reach a settlement, to refer the matter to an arbitrator acceptable to both parties, whose decision shall be binding. Article XIII provides that nothing in this Agreement or its Annexures will affect in any way the political stand of the two countries or the political difference existing between them, and the Contracting Parties fully reserve their rights with regard to these subjects. Article XIV provides that this Agreement shall be ratified and the Instruments of Ratification shall be exchanged at Rawalpindi. The Agreement shall come into force from the date of the exchange of the Instruments of Ratification and shall remain in force for five years from the date it comes into force. Unless notice of termination is given in writing by either Contracting Party to the other six months before the expiration of the five years period, the Agreement shall be automatically renewed for a further period of five years. It can thereafter be terminated by either Party at any time provided six months notice of termination is given by either party. Article XV provides that the present Agreement is drawn in duplicate in [the] English and Dari Languages, both texts being equally valid.

The protocol annexed to [the] Transit Agreement contains a detailed procedure for the transit of goods across the territory of Pakistan en route from the Port of Karachi to the Afghanistan destination. The protocol contains detailed provisions to ensure the goods reaching Afghanistan and to prevent the contingency of the goods escaping into the Pakistan market while on the way to Afghanistan. The protocol contains detailed provisions for granting transporters multiple entry visas, freight, driving licences and certificates of fitness in respect of transport vehicles covered by this protocol. Article 8 of the protocol provides that the two Governments shall consult each other with a view to adopting necessary measures to facilitate the flow of traffic between the two countries and shall seek all possible means within their power to remove any factors which may damage the normal accomplishment of the operation foreseen in the protocol.

...

... In the payment of Customs Duties, taxes, dues or charges of any kind, the

Transit Agreement grants exemption from such payment. The Transit Agreement contains reservations. There is a reservation enabling the imposition of such restrictions as are necessary for the purpose of protecting public morals, human, animal and plant life or health and for the security of its own country.

...

The question for consideration is that the imposition of restriction on tyres and trucks would be for the purpose of protecting public morals and/or for the security of its own territory. The case of the respondents Nos.1 to 3, as set out in the parawise comments, is that in view of the mounting complaints of smuggling back, the respondents Nos.2 and 3 have banned the import of tyres and tubes as envisaged under section 129 of the Customs Act, 1969 read with Pak-Afghan Transit Trade Agreement. ... The case of the respondents is that the sole intention was that import of subject goods was considered detrimental to the economic security in terms of Article X of the Pak-Afghan Transit Trade Agreement. It is further stated in the comments that the Government allowing the facility of transit have every right to protect their own interest and sovereignty, if their legitimate interests are threatened.

...

The grievance of respondents seems to have been that the goods are being imported under the guise of import to Afghanistan and these were finding their way back across the Afghanistan-Pakistan border into [the] Pakistan market to the gross prejudice to the Government. If the goods which were trans-shipped through Pakistan or were in transit or are in transit re-entered into Pakistan by violation of law or treaty, the Customs Law would be broken.

...

... [I]n our opinion, it would be wrong to say that the moment the goods crossed the custom[s] barrier or entered into the Pakistan territorial waters as defined in the Customs Act, they should be construed to have been imported into Pakistan under the Customs Act and the other provisions relating to importation would be applicable for importation of these goods. Looking at it from another point of view, if we accept the contention of the respondents advanced in this case, then that would mean all goods which are prohibited in Pakistan but which are not prohibited in Afghanistan could not have transit as such through Pakistan. That, in our opinion, would not be a reasonable construction to make specially keeping in view the background of the treaty and the protocol which we have mentioned hereinbefore. If the grievance of the respondents was, as it seems to have been, that the tyres and tubes after entering into Afghanistan illegally re-entered into Pakistan and are mixed up with the mass of other tyres and tubes, then other remedies might be open to the respondents. ... We are, however, of the view that the provisions of [the]

Customs Act and Import and Export Control Order dealt with different kinds of situation, i.e. after being imported into Pakistan and imported in Afghanistan. The provisions of [the] Customs Act do not deal with goods in transit which were not really imported into Pakistan.

In the result, the petition succeeds and is allowed. The letters/orders dated 14-1-1989 and 19-12-1989 are quashed. The respondents Nos.3 to 5 are directed to perform their functions in respect of Afghan transit goods in terms of the treaty and protocol and in disregard to letters dated 14-1-1989 and 19-12-1989. We direct the respondents to clear the stock involved in the petition for immediate transit to Afghanistan. We also direct the respondent No.4 to issue [a] delay detention certificate. In the circumstances of the case, the parties are directed to bear their own costs.

Petition accepted.

THE PHILIPPINES

(Prepared and contributed by R.P.M. LOTILLA, director, Institute of International Legal Studies, University of the Philippines)

JUDICIAL DECISIONS

Immunity of international organizations from jurisdiction

SOUTHEAST ASIAN FISHERIES DEVELOPMENT CENTER-AQUACULTURE DEPARTMENT v. NATIONAL LABOUR RELATIONS COMMISSION
(February 14, 1992 206 SCRA 283)

JUVENAL LAZAGA, a Research Associate of SEAFDEC-AQD, had filed a complaint for non-payment of separation benefits with the Arbitration Branch of the National Labor Relations Commission (NLRC). SEAFDEC-AQD is

the Aquaculture Department of an international organization, the Southeast Asian Fisheries Development Centre, organized through an agreement entered into in Bangkok, Thailand on 28 December 1967 by the Governments of Malaysia, Singapore, Thailand, Vietnam, Indonesia and the Philippines, with Japan as the sponsoring agency. In the answer filed by SEAFDEC-AQD, it alleged that the NLRC had no jurisdiction over the case in as much as the SEAFDEC-AQD is an international organization. The Labor Arbiter dismissed this contention of SEAFDEC-AQD and ruled in favour of LAZAGA, ordering in the process the SEAFDEC-AQD to pay LASAGA's claims in full. SEAFDEC brought this case on *certiorari* to the Supreme Court.

The Supreme Court reversed the ruling of the NLRC saying that SEAFDEC-AQD, being an intergovernmental organization, enjoys functional independence and freedom from control of the State on whose territory its office is located. The Court quoted with approval the Minister of Justice Opinion No. 139, Series of 1984:

> "4. One of the basic immunities of an international organization is immunity from local jurisdiction, i.e., that it is immune from the legal writs and processes issued by the tribunals of the country where it is found. (See Jenks, [International Immunities], pp 37–44.) The obvious reason for this is that the subjection of such an organization to the authority of the local courts would afford a convenient medium thru which the host government may interfere in its operations or even influence or control the policies and decisions of the organization; besides, such subjection to local jurisdiction would impair the capacity of such body to discharge its responsibilities impartially on behalf of its member-States. In the case at bar, for instance, the entertainment by the National Labor Relations Commission of Mr. Madamba's reinstatement case would amount to interference by the Philippine Government in the management of decisions of the SEARCA governing board; even worse, it could compromise the desired impartiality of the organization since it will have to suit its actuations to the requirements of the Philippine law, which may not necessarily coincide with the interests of the other member-States. It is precisely to forestall these possibilities that in cases where the extent of the immunity is specified in the enabling instruments of international organizations, jurisdictional immunity from the host country is invariably among the first accorded. (See Jenks, Id; See also Bowett, The Law of International Institutions, pp. 284–285)."

Anent another issue raised by LAZAGA, the Court also rejected LAZAGA's invocation of estoppel with respect to the issue of jurisdiction as estoppel does not apply to confer jurisdiction to a tribunal that has none over a cause of action. Jurisdiction is conferred by law, the Court added. And where there is none, no agreement of the parties can provide one.

OPINIONS OF THE SECRETARY OF JUSTICE

Validity and effectiveness of foreign Court decisions in penal matters.

OPINION No. 2 Series 1992—Regarding the request for official guidelines on the desire of certain Filipinos to serve their sentence in the Philippines after deportation from Canada.

The Secretary of Foreign Affairs requested an opinion regarding official guidelines on the desire of certain Filipinos to serve their sentence in the Philippines after deportation from Canada. Four Filipinos were found guilty of contempt of Court for refusing to testify during the hearing of their co-accused and were each meted a jail sentence of four months. They asked the Philippine Embassy in Ottawa that they be deported to and serve their sentence in the Philippines instead of Canada.

The Secretary, in ruling that there is no sufficient legal basis for the four Filipinos to serve their sentence in the Philippines quoted with approval its previous Opinion on the same subject:

"...

> ... there is no sufficient legal basis for the Philippine Government to accept the ... transfer. This would in effect require the Philippine Government, not only to recognize, but also to enforce in the Philippines, the judgment of a [foreign] Court in a criminal case. ... we are not aware of any provision in Philippine law authorizing the recognition and enforcement of foreign judgment[s] in criminal proceedings. Under the Revised Rules of Court, only judgments of foreign courts in civil cases, particularly those involving a person or specific thing, may be given effect in the country {Sec. 50, Rule 39} ... It (was) concluded that the Philippines would have to pass domestic legislation allowing for prisoners convicted abroad to be transferred to the Philippines to serve sentence and that an agreement would have to be signed to enable such transfers to take place." (Op. No. 80, s. 1986)

SINGAPORE

LEGISLATION

Privileges and Immunities

*The International Organizations (Immunities and Privileges) (APEC Secretariat) Order 1993**

["APEC" (Asia Pacific Economic Cooperation) was formed on 5 November 1989. Its objective is to identify and remove obstacles to trade and investment among participating countries consistent with the multilateral framework of the General Agreement on Tariffs and Trade. The following countries are participants: ASEAN countries (Brunei, Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand), Australia, Canada, Japan, New Zealand, South Korea and United States. China, Hongkong and Taiwan joined in 1991.

There is an annual Ministerial meeting. At the fourth Ministerial Meeting held at Bangkok, 10–11 September 1992, it was decided to form an APEC Secretariat to be based in Singapore. The Secretariat serves as a support mechanism to facilitate and coordinate APEC activities, provide logistical and technical services and administer APEC financial affairs under the direction of the APEC Senior Officials Meeting (SOM). It will be empowered to act on behalf of member countries under the direction of ministers as communicated through the SOM.]

On 12 February 1993, the President of Singapore acting under section 2 of The International Organisations (Immunities and Privileges) Act (Chapter 145) published by order (Gazette Notification No. S25/93) The International Organisations (Immunities and Privileges) Order. This Order confers legal capacity on the Secretariat (Article 3). It will enjoy inviolability of official archives and premises, provided that the Secretariat shall not permit its premises to be used as a refuge in order to avoid due process of law in Singapore, or in any manner incompatible with the purposes of the Secretariat (Article 4). It shall enjoy certain tax reliefs, other than taxes on the importation of goods, but it will not be able to claim exemption from taxes which are charges for public service (Article 5). However, no charges will be levied on the importation of goods used for official purposes (Article 6).

The Executive Director and staff enjoy, while within the territory of Singapore, immunity from personal arrest and from legal process in relation to

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* Courtesy of Mr. Foo Kim Boon, Attorney-General's Chambers, Singapore.

acts done in their official capacity, and while exercising their functions, the like exemption or relief from taxes as will be accorded to an envoy of a sovereign power accredited to Singapore. Such immunity and privileges however do not extend to Singapore citizens or permanent residents working in the Secretariat (Article 8).

THAILAND

NOTES AND STATEMENTS

Military exercises in the maritime zones of another state

Note from the Government of Thailand to the Government of Malaysia, 20–21 November 1992*

[The note is in response to Malaysia's announcement of missile live firing exercises in a specified maritime area that intruded into Thailand's maritime zones. The Malaysian authorities immediately apologized, stating that a genuine error had been made concerning the geographical coordinates of the area in question. The correct coordinates were announced, confining the area to Malaysia's own maritime zones, and the date of the exercises changed from 22–29 November 1992 to 25–27 November 1992.

Nevertheless, the present note by the Thai Ministry of Foreign Affairs sets out Thailand's international legal position regarding the controversial issue of military exercises in the maritime zones of another State.]

With reference to the Notice by the Hydrographic Directorate, Royal Malaysian Navy, Number N/S 6163, dated 14 November 1992, stating that missile live firing exercises will be conducted from 22 November to 29 November 1992 in an area bounded by specified coordinates, and that vessels navigating in the vicinity are advised to keep clear of the area, the Ministry of Foreign Affairs wishes to inform the Malaysian side as follows:

1. Since no universally accepted rule of international law specifically prohibits the use by one State of another State's exclusive economic zone for

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* Courtesy of Dr. KRIANGSAK KITTICHAISAREE, Ministry of Foreign Affairs, Bangkok.

military exercises or weapon testing purposes, it might be presumed that such use is not unlawful. But as two-thirds of the area in question are within Thailand's exclusive economic zone, the Thai side would have appreciated being consulted well in advance. The area is not a part of the high seas, but a part of the maritime zone of Thailand and is, moreover, adjacent to the Straits of Malacca, where maritime traffic is particularly dense. The Thai authorities therefore regret this lack of prior consultation.

2. The Thai authorities also regret being informed at such short notice, barely a few days before the intended military exercises.

3. Bearing in mind other lawful uses of the sea in the area, the duration of the scheduled exercises appears to be excessive and unreasonable and would likely cause undue interference with other lawful uses of the sea. According to international practice, missile live firing exercises usually last half a day or, at most, one day. Therefore, the Malaysian authorities are requested to consider reducing the duration of the exercises to the absolute minimum so that other lawful uses of the sea in the area would not be unduly affected.

4. In any case, the Malaysian Navy should take extra care and precaution before and during the exercises so as not to endanger other lawful users of the area.

5. It is the understanding of the Thai Government that should the Royal Thai Navy wish to conduct military exercises in Malaysia's exclusive economic zone at some future time, the Royal Thai Navy would be accorded the same treatment on the basis of reciprocity.

6. It should be noted that part of the northeastern sector of the area encroaches into Thailand's territorial sea and contiguous zone. It is a well-established rule of international law that one State cannot conduct military exercises in the territorial sea of another State without the latter's consent. Therefore, notwithstanding paragraphs 1–5 above, the Malaysian authorities are requested to confine the area of military exercises to the maritime area lying beyond Thailand's territorial sea and contiguous zone.

Rights of passage and freedom of navigation

*Statement of the Ministry of Foreign Affairs of Thailand**

It has been brought to the attention of the Ministry of Foreign Affairs that several States have now enacted laws and regulations, the effect of which is to

* UN Doc. A/48/90 Annex (22 Feb. 1993).

restrict the rights of passage and the freedom of navigation of foreign ships in their maritime zones. The Ministry of Foreign Affairs wishes to make known the position of the Royal Thai Government on this matter as follows:

1. According to the well-established rules of customary international law and State practice as recognized and codified by the 1982 United Nations Convention on the Law of the Sea, ships of all States have the right of innocent passage in the territorial sea, the right of transit passage in the straits used for international navigation and the freedom of navigation in the exclusive economic zone of another State.
2. All foreign ships, including warships, merchant ships and fishing vessels, can exercise such rights and freedom without having to give prior notification to, or obtain prior permission, approval or consent from the coastal State concerned regarding their intended passage.
3. Therefore, any laws and regulations which tend to restrict the aforesaid rights and freedom are contrary to the rules of customary international law and are, moreover, incompatible with the obligations assumed by the States concerned when they signed the 1982 Convention.
4. For these reasons, the Royal Thai Government feels obliged to declare that Thailand does not consider herself bound by the laws and regulations in question. In the meantime, it is hoped that States which have enacted such laws and regulations will not actually carry out any measure to impede or interfere in any way with the legitimate exercise by foreign ships of the right of innocent passage in their territorial seas, the right of transit passage in their straits used for international navigation or the freedom of navigation in their exclusive economic zones.

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 worldwide 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 re-included.

For the purposes 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.

In Volumes 1 and 2 the various categories of treaties were ordered according to their assumed conceptual place in the field of international law. This system is abandoned in the present Volume and replaced by an alphabetical order of the headings signifying the different categories of treaties.

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 1992.* (ST/LEG/SER.E/11)
– No indication is given of reservations and declarations made.
– Sig. = signature; Cons. = Consent to be bound; TIF = Treaties in Force (US Dept. of State); Eif = Entry into Force.

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* Edited by Ko Swan Sik, General Editor

Asian Yearbook of International Law, Volume 3 (Ko Swan Sik *et al.*, eds.; 0-7923-2708-X; © 1994 Kluwer Academic Publishers; printed in Great Britain), pp. 221–256

COMMERCIAL ARBITRATION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
(Cont'd from Vol.1 p.184)

State	*Cons.*
Bangladesh	6 May 92

CULTURAL MATTERS

Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character
New York, 15 July 1949
Entry into force: 12 Aug 1954

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	29 Dec 49		Pakistan		16 Feb 50
Cambodia		20 Feb 52	Philippines	31 Dec 49	13 Nov 52
Iran	31 Dec 49	30 Dec 59			

Agreement on the Importation of Educational, Scientific and Cultural Materials
New York, 22 Nov. 1950
Entry into force: 21 May 1952
(Status also included in UNESCO Doc.Cl/3280)

State	*Sig.*	*Cons.*(deposit)	*State*	*Sig.*	*Cons.*
Afghanistan	8 Oct 51	19 Mar 58	Pakistan	9 May 51	17 Jan 52
Cambodia		5 Nov 51	Philippines	22 Nov 50	30 Aug 52
Iran	9 Feb 51	7 Jan 66	Singapore		11 Jul 69
Japan		17 Jun 70	Sri Lanka		8 Jan 52
Laos		28 Feb 52	Thailand	22 Nov 50	18 Jun 51
Malaysia		29 Jun 59			

Convention concerning the International Exchange of Publications
Paris, 3 Dec. 1958
Entry into force: 23 Nov. 1961
(Status as included in UNESCO Doc.CL/3280)

State	*Cons.*(deposit)	*State*	*Cons.*
Brunei	25 Jan 85	Japan	29 May 84
Indonesia	10 Jan 67		

Convention concerning the Exchange of Official Publications and Government Documents between States
Paris, 3 Dec. 1958
Entry into force: 30 May 1961
(Status as included in UNESCO Doc.Cl/3280)

State	*Cons.*(deposit)	*State*	*Cons.*(deposit)
Brunei	25 Jan 85	Japan	29 May 84
Indonesia	10 Jan 67	Sri Lanka	7 Dec 59

International Agreement for the Establishment of the University for Peace
New York, UNGA Res. 35/55 (5 Dec. 1980)
Entry into force: 7 Apr. 1981

State	*Sig.*	*Sig.*(defin.)	*State*	*Sig.*	*Sig.*(defin.)
Bangladesh		8 Apr 81	Pakistan		30 Mar 81
Cambodia		10 Apr 81	Philippines	20 Mar 84	
India		3 Dec 81	Sri Lanka		10 Aug 81

Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific
Bangkok, 16 Dec. 1983
Entry into force: 23 Oct. 1985
(Status as included in UNESCO Doc.CL/3280)

State	*Sig.*	*Cons.*(deposit)	*State*	*Sig.*	*Cons.*(deposit)
China		25 Sep 84	Mongolia		19 Oct 91
Korea (DPR)		26 Apr 89	Nepal		2 Nov 89
Korea (Rep.)		29 Aug 89	Sri Lanka		10 Jan 86
Maldives		14 May 90	Tajikistan		28 Oct 92

CULTURAL PROPERTY

Convention for the Protection of Cultural Property in the Event of Armed Conflict

The Hague, 14 May 1954
Entry into force: 7 Aug. 1956
(Status as included in UNESCO Doc.CL/3280)

State	*Cons.*(deposit)	*State*	*Cons.*(deposit)
Cambodia	4 Apr 62	Mongolia	4 Nov 64
India	16 Jun 58	Myanmar	10 Feb 56
Indonesia	10 Jan 67	Pakistan	27 Mar 59
Iran	22 Jun 59	Tajikistan	11 Aug 92
Malaysia	12 Dec 60	Thailand	2 May 58

Protocol for the Protection of Cultural Property in the Event of Armed Conflict

The Hague, 14 May 1954
Entry into force: 7 Aug. 1956
(Status as included in UNESCO Doc.CL/3280)

State	*Cons.*(deposit)	*State*	*Cons.*(deposit)
India	16 Jun 58	Myanmar	10 Feb 56
Indonesia	26 Jul 67	Pakistan	27 Mar 59
Iran	22 Jun 59	Thailand	2 May 58
Malaysia	12 Dec 60		

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970

(Cont'd from Vol.2 p.192)
(Status as provided by UNESCO)

State	*Cons.*(deposit)
Tajikistan	11 Aug 92

Convention concerning the Protection of the World Cultural and Natural Heritage
Paris, 16 Nov. 1972
Entry into force: 17 Dec. 1975
(Status as included in UNESCO Doc.CL/3280)

State	*Cons.*(deposit)	*State*	*Cons.*(deposit)
Afghanistan	20 Mar 79	Malaysia	7 Dec 88
Bangladesh	3 Aug 83	Maldives	22 May 86
Cambodia	28 Nov 91	Mongolia	2 Feb 90
China	12 Dec 85	Uzbekistan	18 Dec 92
India	14 Nov 77	Pakistan	23 Jul 76
Indonesia	6 Jul 89	Philippines	19 Sep 85
Iran	26 Feb 75	Sri Lanka	6 Jun 80
Japan	30 Jun 92	Tajikistan	28 Aug 92
Korea (Rep.)	14 Sep 88	Thailand	17 Sep 87
Laos	20 Mar 87	Vietnam	19 Oct 87

DEVELOPMENT MATTERS

Charter of the Asian and Pacific Development Centre
ESCAP, Bangkok, 1 April 1982
Entry into force: 1 July 1983

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh		9 Sep 82	Malaysia		9 Sep 82
Brunei		14 Feb 85	Maldives		25 Apr 83
China		18 Feb 83	Nepal		25 Apr 83
India		25 Apr 83	Pakistan		9 Sep 82
Indonesia		7 Jan 83	Philippines		15 Dec 82
Japan		9 Sep 82	Sri Lanka	9 Sep 82	
Korea (Rep.)		9 Sep 82	Thailand		27 Jun 83
Laos		9 Sep 82	Vietnam		9 Sep 82

DISPUTE SETTLEMENT

Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Washington, 18 March 1965
Entry into force: 14 Oct. 1966

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	30 Sep 66	25 Jun 68	Pakistan	6 Jul 65	15 Sep 66
Bangladesh	20 Nov 79	27 Mar 80	Papua New Guinea	20 Oct 78	20 Oct 78
China	9 Feb 90	7 Jan 93	Philippines	26 Sep 78	17 Nov 78
Indonesia	16 Feb 68	28 Sep 68	Singapore	2 Feb 68	14 Oct 68
Japan	23 Sep 65	17 Aug 67	Sri Lanka	30 Aug 67	12 Oct 67
Korea (Rep.)	18 Apr 66	21 Feb 67	Thailand	6 Dec 85	
Malaysia	22 Oct 65	8 Aug 66			
Nepal	28 Sep 65	7 Jan 67			

ENVIRONMENT, FAUNA AND FLORA

International Convention for the Prevention of Pollution of the Sea by Oil, as amended
London, 12 May 1954
Entry into force: 26 Jul. 1958
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	28 Sep 81	28 Dec 81	Papua New Guinea	12 Mar 80	12 Jun 80
India	4 Mar 74	4 Jun 74	Philippines	19 Nov 63	19 Feb 64
Korea (Rep.)	31 Jul 78	31 Oct 78	Sri Lanka	30 Aug 83	30 Nov 83
Maldives	17 May 82	17 Aug 82			

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties
Brussels, 29 Nov. 1969
Entry into force: 6 May 1975
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	6 Nov 81	4 Feb 82	Papua New Guinea	12 Mar 80	10 Jun 80
China	23 Feb 90	24 May 90	Sri Lanka	12 Apr 83	11 Jul 83
Japan	6 Apr 71	6 May 75			

Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil
London, 2 Nov. 1973
Entry into force: 30 March 1983
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*
China	23 Feb 90	24 May 90

International Convention on Civil Liability for Oil Pollution Damage
Brussels, 29 Nov. 1969
Entry into force: 19 June 1975
(Status as included in IMO Doc. J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Brunei	29 Sep 92	28 Dec 92	Maldives	16 Mar 81	14 Jun 81
China	30 Jan 80	29 Apr 80	Papua New Guinea	12 Mar 80	10 Jun 80
India	1 May 87	30 Jul 87	Singapore	16 Sep 81	15 Dec 81
Indonesia	1 Sep 78	30 Nov 78	Sri Lanka	12 Apr 83	11 Jul 83
Japan	3 Jun 76	1 Sep 76			
Korea (Rep.)	18 Dec 78	18 Mar 79			

Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969
London, 19 Nov. 1976
Entry into force: 8 Apr. 1981
(Status as included in IMO Doc. J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Brunei	29 Sep 92	28 Dec 92	Korea (Rep.)	8 Dec 92	8 Mar 93
China	29 Sep 86	28 Dec 86	Maldives	14 Jun 81	12 Sep 81
India	1 May 87	30 Jul 87	Singapore	15 Dec 81	15 Mar 82

Convention on Wetlands of International Importance especially as Waterfowl Habitat
Ramsar, 2 Feb. 1971
Entry into force: 21 Dec. 1975
(Status as included in UNESCO Doc.CL/3280)

State	*Cons.* (deposit)	*State*	*Cons.* (deposit)
Bangladesh	21 May 92	Japan	17 Jun 80
China	31 Mar 92	Pakistan	23 Jul 76
India	1 Oct 81	Sri Lanka	15 Jun 90
Indonesia	8 Apr 92	Vietnam	20 Sep 88
Iran	23 Jun 75		

Protocol to amend the Convention on Wetlands of International Importance especially as Waterfowl Habitat
Paris, 3 Dec. 1982
Entry into force: 1 Oct. 1986
(Status as included in UNESCO Doc.CL/3280)

State	*Cons.* (deposit)	*State*	*Cons.* (deposit)
India	9 Mar 84	Japan	26 Jun 87
Iran	29 Apr 86	Pakistan	13 Aug 85

Amendments to Articles 6 and 7 of the Convention on Wetlands of International Importance especially as Waterfowl Habitat
Regina, 28 May 1987
Entry into force: [Not in force]
(Status as included in UNESCO Doc.Cl/3280)

State	*Cons.*(deposit)	*State*	*Cons.* (deposit)
Bangladesh	21 May 92	Japan	2 Jun 88
Indonesia	8 Apr 92	Pakistan	20 Sep 88

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

Brussels, 18 Dec. 1971

Entry into force: 16 Oct. 1978

(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Brunei	29 Sep 92	28 Dec 92	Maldives	16 Mar 81	14 Jun 81
India	10 Jul 90	8 Oct 90	Papua New Guinea	12 Mar 80	10 Jun 80
Indonesia	1 Sep 78	30 Nov 78	Sri Lanka	12 Apr 83	11 Jul 83
Japan	7 Jul 76	16 Oct 78			
Korea (Rep.)	8 Dec 92	8 Mar 93			

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, as amended

London, Mexico City, Moscow, Washington, 29 Dec. 1972

Entry into force: 30 Aug. 1975

(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Afghanistan	2 Apr 75	30 Aug 75	Papua New Guinea	10 Mar 80	9 Apr 80
China	14 Nov 85	14 Dec 85	Philippines	10 Aug 73	30 Aug 75
Japan	15 Oct 80	14 Nov 80			

Protocol Relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended

London, 17 Feb. 1978

Entry into force: 2 Oct. 1983

(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*Excepted annexes*	*State*	*Cons.*	*Excepted annexes*
Brunei	23 Oct 86	III, IV and V	Japan	9 Jun 83	
China	1 Jul 83	III, IV and V	Korea (DPR)	1 May 85	
	Annex V: 21 Nov 88		Korea (Rep.)	23 Jul 84	III, IV and V
			Myanmar	4 May 88	III, IV and V
India	24 Sep 86	III, IV and V	Singapore	1 Nov 90	III, IV and V
Indonesia	21 Oct 86	III, IV and V	Vietnam	29 May 91	III, IV and V

Convention for the Protection of the Ozone Layer, 1985
(Cont'd from Vol.1 p.185)

State	*Cons.*	*State*	*Cons.*
Indonesia	26 Jun 92	Papua New Guinea	27 Oct 92
Korea (Rep.)	27 Feb 92		
Pakistan	18 Dec 92		

Protocol on Substances that Deplete the Ozone Layer, 1987
(Cont'd from Vol.1 p.186, Vol. 2 p.186)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India		19 Jun 92	Pakistan		18 Dec 92
Indonesia	21 Jul 88	26 Jun 92	Papua New Guinea	27 Oct 92	
Korea (Rep.)		27 Feb 92			

Amendment to the Montreal Protocol, 1990
(Cont'd from Vol.1 p.186, Vol.2 p.186)

State	*Cons.*	*State*	*Cons.*
India	19 Jun 92	Pakistan	18 Dec 92
Indonesia	26 Jun 92	Thailand	25 Jun 92
Korea (Rep.)	10 Dec 92		

Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989
(Cont'd from Vol.2 p.186)

State	*Sig.*	*Cons.*	*State*	*Cons.*
China	22 Mar 90	17 Dec 91	Maldives	28 Apr 92
India	15 Mar 90	24 Jun 92	Sri Lanka	28 Aug 92

FAMILY MATTERS

Convention on the Recovery Abroad of Maintenance, 1956: *see* Vol. 2 p. 191.
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962: *see* Vol. 2 p. 191.

Convention on the Law Applicable to Maintenance Obligations Towards Children
The Hague, 24 Oct. 1956
Entry into force: 1 Jan. 1962
(Status on 1 Feb. 1993 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*
Japan	10 Feb 77	22 Jul 77

Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions
The Hague, 5 Oct. 1961
Entry into force: 5 Jan. 1964
(Status on 1 Feb. 1993 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Brunei		10 May 88	Japan	30 Jan 64	3 Jun 64

Convention on the Law Applicable to Maintenance Obligations
The Hague, 2 Oct. 1973
Entry into force: 1 Oct. 1977
(Status on 1 Feb. 1993 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*
Japan	28 Feb 86	5 Jun 86

FINANCE

Convention Establishing the Multilateral Investment Guarantee Agency
Seoul, 11 Oct. 1985
Entry into force: 12 Apr. 1988
(Information furnished by the World Bank Group)

State	*Sig.*	*Cons.*(deposit)	*State*	*Sig.*	*Cons.*(deposit)
Bangladesh	13 Mar 87	13 Mar 87	Nepal	23 Sep 92	
China	28 Apr 88	30 Apr 88	Pakistan	7 Jul 86	1 Dec 86
India	13 Apr 92		Papua New Guinea	9 May 90	29 Oct 90
Indonesia	26 Jun 86	26 Sep 86	Philippines	15 Sep 86	
Japan	12 Sep 86	5 Jun 87	Sri Lanka	3 Oct 86	27 May 88
Korea (Rep.)	11 Oct 85	24 Nov 87			
Malaysia	2 Jul 91	2 Aug 91			

HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

Convention on the Political Rights of Women, 1953: *see* Vol.1 p. 188.

International Convention on the Elimination of all Forms of Racial Discrimination, 1966: *see* Vol.1 p.186.

Convention Against Discrimination in Education
Paris, 14 Dec. 1960
Entry into force: 22 May 1962
(Status as included in UNESCO Doc.CL/3280)

State	*Cons.(deposit)*	*State*	*Cons.(deposit)*
Brunei	25 Jan 85	Mongolia	4 Nov 64
Indonesia	10 Jan 67	Philippines	19 Nov 64
Iran	17 Jul 68	Sri Lanka	11 Aug 83

International Covenant on Economic, Social and Cultural Rights, 1966
(Cont'd from Vol.1 p.187, Vol.2 p.189)

State	*Sig.*	*Cons.*
Cambodia	17 Oct 80	26 May 92

International Covenant on Civil and Political Rights, 1966
(Cont'd from Vol.1 p.187, Vol.2 p.189)

State	*Sig.*	*Cons.*
Cambodia	17 Oct 80	26 May 92

Convention on the Elimination of All Forms of Discrimination against Women, 1979
(Cont'd from Vol.1 p.188)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia	17 Oct 80	15 Oct 92	Nepal	5 Feb 91	22 Apr 91

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
(Cont'd from Vol.1 p.187, Vol. 2 p.189)

State	*Cons.*
Cambodia	15 Oct 92

International Convention Against Apartheid in Sports
UNGA, New York, 10 Dec. 1985
Entry into force: 3 Apr. 1988

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China	21 Oct 87		Maldives	3 Oct 86	
India		12 Sep 90	Mongolia	16 May 86	16 Dec 87
Indonesia	16 May 86		Nepal	24 Jun 86	1 Mar 89
Iran	16 May 86	12 Jan 88	Philippines	16 May 86	27 Jul 87
Malaysia	16 May 86				

Convention on the Rights of the Child, 1989
(Cont'd from Vol.1 p.189)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Cambodia		15 Oct 92	Iran	5 Sep 91	
China	29 Aug 90	2 Mar 92	Thailand		27 Mar 92
India		11 Dec 92			

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I–IV, 1949

(Cont'd from Vol.1 p. 190)

(Status as included in ICRC Doc.DDM/JUR 93/940-CPS/11)

State	*Cons.*	*State*	*Cons.*
Brunei	14 Oct 91	Myanmar	25 Aug 92
Kazakhstan	5 May 92	Tajikistan	13 Jan 93
Kyrgyzstan	18 Sep 92	Turkmenistan	10 Apr 92
Maldives	18 Jun 91		

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 p.190, Vol. 2 p.197)

(Status as included in ICRC Doc.DDM/JUR 93/940-CPS/11 and A/INF/40/3)

State	*Cons.*	*State*	*Cons.*
Brunei	14 Oct 91	Maldives	3 Sep 91
Kazakhstan	5 May 92	Tajikistan	13 Jan 93
Kyrgyzstan	18 Sep 92	Turkmenistan	10 Apr 92

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977

(Cont'd from Vol.1 p.191, Vol.2 p.197)

(Status is included in ICRC Doc.DDM/JUR 93/940-CPS/11)

State	*Cons.*	*State*	*Cons.*
Kazakhstan	5 May 92	Tajikistan	13 Jan 93
Kyrgyzstan	18 Sep 92	Turkmenistan	10 Apr 92

INTELLECTUAL PROPERTY

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971: *see* Vol.2 p.192

Convention for the Protection of Industrial Property
Paris, 1883, most recently revised Stockholm, 1967 and amended 1979
(Status as included in WIPO Doc.423(E) of 1 May 1993)

State	*Party*	*Latest Act to which State is party*	*State*	*Party*	*Latest Act to which State is party*
Bangladesh	3 Mar 91	Stockholm	Malaysia	1 Jan 89	id.
China	19 Mar 85	id.	Mongolia	21 Apr 85	id.
Indonesia	24 Dec 50	London (1950), Stockholm	Philippines	27 Sep 65	Lisbon (1958), Stockholm
Iran	16 Dec 59	Lisbon (1958)	Sri Lanka	29 Dec 52	London (1950), Stockholm
Japan	15 Jul 1899	Stockholm			
Kazakhstan	25 Dec 91	id.			
Korea (DPR)	10 Jun 80	id.	Uzbekistan	25 Dec 91	Stockholm
Korea (Rep.)	4 May 80	id.	Vietnam	8 Mar 49	Stockholm

Convention for the Protection of Literary and Artistic Works
Berne, 1886, most recently revised at Paris, 1971 and amended 1979
(Status as included in WIPO Doc.423(E) of 1 May 1993)

State	*Party*	*Latest Act to which State is party*	*State*	*Party*	*Latest Act to which State is party*
China	15 Oct 92	Paris	Philippines	1 Aug 51	Brussels (1948), Paris
India	1 Apr 28	id.			
Japan	15 Jul 1899	id.	Sri Lanka	20 Jul 59	Rome (1928), Paris
Malaysia	1 Oct 90	id.			
Pakistan	5 Jul 48	(Rome (1928), Stockholm (1967)	Thailand	17 Jul 31	Berlin (1908), Paris

Universal Copyright Convention
Geneva, 6 September 1952 (revised Paris, 24 July 1971)
Entry into force: 16 September 1955 (Revision: 10 July 1974)
(Status as included in UNESCO Doc.CL/3280)

State	*Cons.* (deposit)	*Cons.* (Revision)	*State*	*Cons.* (deposit)	*Cons.* (Revision)
Bangladesh	5 May 75	5 May 75	Korea (Rep.)	1 Jul 87	1 Jul 87
Cambodia	3 Aug 53		Laos	19 Aug 54	
China	30 Jul 92	30 Jul 92	Pakistan	28 Apr 54	
India	21 Oct 57	7 Jan 88	Philippines	19 Aug 55 (withdrawn)	
Japan	28 Jan 56	21 Jul 77	Sri Lanka	25 Oct 83	25 Oct 83
Kazakhstan	16 Jul 92				

Protocol 1 annexed to the Universal Copyright Convention concerning the application of that Convention to the works of stateless persons and refugees
Geneva, 6 September 1952 (revised Paris, 24 July 1971)
Entry into force: 16 September 1955 (Revision: 10 July 1974)
(Status as included in UNESCO Doc.CL/3280)

State	*Cons.* (deposit)	*Cons.* (Revision)	*State*	*Cons.* (deposit)	*Cons.* (Revision)
Bangladesh	5 May 75	5 May 75	Laos	19 Aug 54	
Cambodia	3 Aug 53		Pakistan	28 Apr 54	
India	21 Oct 57	7 Jan 88	Philippines	19 Aug 55 (withdrawn)	
Japan	28 Jan 56	21 Jul 77	Sri Lanka	27 Jul 88	27 Jul 88
Korea (Rep.)	1 Jul 87	1 Jul 87			

Protocol 2 annexed to the Universal Copyright Convention concerning the application of that Convention to the works of certain international organizations
Geneva, 6 September 1952 (revised Paris, 24 July 1971)
Entry into force: 16 September 1955 (Revision: 20 July 1974)
(Status as included in UNESCO Doc.CL/3280)

State	*Cons.* (deposit)	*Cons.* (Revision)	*State*	*Cons.* (deposit)	*Cons.* (Revision)
Bangladesh		5 May 75	Laos	19 Aug 54	
Cambodia	3 Aug 53		Pakistan	28 Apr 54	
India	21 Oct 57	7 Jan 88	Philippines	19 Aug 55 (withdrawn)	
Japan	28 Jan 56	21 Jul 77	Sri Lanka	27 Jul 88	27 Jul 88
Korea (Rep.)		1 Jul 87			

Protocol 3 annexed to the Universal Copyright Convention concerning the effective date of instruments of ratification or acceptance of, or accession to, that Convention

Geneva, 6 September 1952

Entry into force: 7 August 1956

(Status as included in UNESCO Doc.CL/3280)

State	*Cons.*(deposit)	*State*	*Cons.*(deposit)
Cambodia	3 Aug 53	Pakistan	28 Apr 54
India	21 Oct 57	Philippines	19 Aug 55 (withdrawn)
Japan	28 Jan 56	Sri Lanka	27 Jul 88
Laos	19 Aug 54		

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

Rome, 26 October 1961

Entry into force: 18 May 1964

(Status as included in UNESCO Doc.CL/3280 and WIPO Doc.432(E) of 15 Oct. 1993)

State	*Cons.*(deposit)	*State*	*Cons.*(deposit)
Japan	26 Jul 89	Philippines	25 Jun 84

Convention Establishing the World Intellectual Property Organization

Stockholm, 14 July 1967

(Status as included in WIPO Doc.423(E) of 1 May 1993)

State	*Membership*	*State*	*Membership*
Bangladesh	11 May 85	Mongolia	28 Feb 79
China	3 Jun 80	Pakistan	6 Jan 77
India	1 May 75	Philippines	14 Jul 80
Indonesia	18 Dec 79	Singapore	10 Dec 90
Japan	20 Apr 75	Sri Lanka	20 Sep 78
Kazakhstan	25 Dec 91	Thailand	26 Apr 70
Korea (DPR)	17 Aug 74	Uzbekistan	25 Dec 91
Korea (Rep.)	1 Mar 79	Vietnam	2 Jul 76
Malaysia	1 Jan 89		

INTERNATIONAL CRIMES

Slavery Convention, 1926, as amended: *see* Vol.2 p.195.
Convention on the Prevention and Punishment of the Crime of Genocide, 1948: *see* Vol.1 p.191.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956: *see* Vol.2 p.196.
Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963: *see* Vol.1 p.191.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: *see* Vol.2 p.196.
Convention for the Suppression of Unlawful Seizure of Aircraft, 1970: *see* Vol.1 p.192.
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971: *see* Vol.1 p.192, Vol.2 p.196.
International Convention Against the Taking of Hostages, 1979: *see* Vol.1 p.193, Vol.2 p.196.
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988: *see* Vol.1 p.193.
Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988: *see* Vol.1 p.193.
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 p.194.
International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 1989: *see* Vol.2 p.197.
Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991: *see* Vol.1 p.194, Vol.2 p.197

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents
UNGA, New York, 14 Dec. 1973
Entry into force: 20 Feb. 1977

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bhutan		16 Jan 89	Maldives		14 Mar 77
China		2 Nov 77	Mongolia	23 Aug 74	8 Aug 75
India		11 Apr 78	Nepal		9 Mar 90
Iran		12 Jul 78	Pakistan		29 Mar 76
Japan		8 Jun 87	Philippines		26 Nov 76
Korea (DPR)		1 Dec 82	Sri Lanka		27 Feb 91
Korea (Rep.)		25 May 83			

INTERNATIONAL TRADE

Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol.1 p. 184

United Nations Convention on Contracts for the International Sale of Goods, 1980: *see* Vol.1 p. 185

Convention on Transit Trade of Land-locked States
New York, 8 July 1965
Entry into force: 9 June 1967

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	8 Jul 65		Mongolia		26 Jul 66
Laos	8 Jul 65	29 Dec 67	Nepal	9 Jul 65	22 Aug 66

JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention Relating to Civil Procedure
The Hague, 1 Mar. 1954
Entry into force: 12 Apr. 1957
(Status on 1 Feb. 1993 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*
Japan	12 Mar 70	28 May 70

Convention Abolishing the Requirement of Legalization for Foreign Public Documents
The Hague, 5 Oct. 1961
Entry into force: 24 Jan. 1965
(Status on 1 Feb. 1993 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Brunei		23 Feb 87	Japan	12 Mar 70	28 May 70

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

The Hague, 15 Nov. 1965

Entry into force: 10 Feb. 1969

(Status on 1 Feb. 1993 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
China		1 Dec 91	Pakistan		7 Dec 88
Japan	12 Mar 70	28 May 70			

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

The Hague, 18 Mar. 1970

Entry into force: 7 Oct. 1972

(Status on 1 Feb. 1993 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*	*Cons.*
Singapore		27 Oct 78

LABOUR

Forced Labour Convention, 1930 (ILO Conv.29)

Entry into force: 1 May 1932

(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Bangladesh	22 Jun 72	Myanmar	4 Mar 55
Cambodia	24 Feb 69	Pakistan	23 Dec 57
India	30 Nov 54	Papua New Guinea	1 May 76
Indonesia	12 Jun 50	Singapore	25 Oct 65
Iran	10 Jun 57	Sri Lanka	5 Apr 50
Japan	21 Nov 32	Thailand	26 Feb 69
Laos	23 Jan 64	Vietnam	6 Jun 53
Malaysia	11 Nov 57		

Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv.87)

Entry into force: 4 July 1950

(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Bangladesh	22 Jun 72	Myanmar	4 Mar 55
Japan	14 Jun 65	Pakistan	14 Feb 51
Mongolia	3 Jun 69	Philippines	29 Dec 53

Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv.98)

Entry into force: 18 July 1951

(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Bangladesh	22 Jun 72	Papua New Guinea	1 May 76
Indonesia	15 Jul 57	Philippines	29 Dec 53
Japan	20 Oct 53	Singapore	25 Oct 65
Malaysia	5 Jun 61	Sri Lanka	13 Dec 72
Mongolia	3 Jun 69	Vietnam	6 Jan 64
Pakistan	26 May 52		

Equal Remuneration Convention, 1951 (ILO Conv.100)

Entry into force: 23 May 1953

(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Afghanistan	22 Aug 69	Japan	24 Aug 67
China	2 Nov 90	Mongolia	3 Jun 69
India	25 Sep 58	Nepal	10 Jun 76
Indonesia	11 Aug 58	Philippines	29 Dec 53
Iran	10 Jun 72		

Abolition of Forced Labour Convention, 1957 (ILO Conv.105)
Entry into force: 17 Jan. 1959
(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Afghanistan	16 May 63	Papua New Guinea	1 May 76
Bangladesh	22 Jun 72	Philippines	17 Nov 60
Iran	13 Apr 59	Thailand	2 Dec 69
Pakistan	15 Feb 60		

Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv.111)
Entry into force: 15 June 1960
(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Afghanistan	1 Oct 69	Nepal	19 Sep 74
Bangladesh	22 Jun 72	Pakistan	24 Jan 61
India	3 Jun 60	Philippines	17 Nov 60
Iran	30 Jun 64	Vietnam	6 Jan 64
Mongolia	3 Jun 69		

Employment Policy Convention, 1964 (ILO Conv.122)
Entry into force: 15 July 1966
(Information furnished by the International Labour Office)

State	*Ratif. registered*	*State*	*Ratif. registered*
Cambodia	28 Sep 71	Papua New Guinea	1 May 76
Iran	10 Jun 72	Philippines	13 Jan 76
Japan	10 Jun 86	Thailand	26 Feb 69
Korea (Rep.)	9 Dec 92	Vietnam	7 Dec 70
Mongolia	24 Nov 76		

NARCOTIC DRUGS

International Opium Convention, 1925, as amended: *see* Vol.2 p.193.
Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931 as amended: *see* Vol.2 p.193.
Protocol Bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended: *see* Vol.2 p.193.
Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, as amended: *see* Vol.1 p.194.
Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953: *see* Vol.2 p.194.
Single Convention on Narcotic drugs, 1961: *see* Vol.1 p.195, Vol.2 p.194.
Protocol Amending the Single Convention on Narcotic Drugs, 197–2: *see* Vol.2 p.194.
Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol, 1975: *see* Vol.1 p.195, Vol.2 p.194.
Convention on Psychotropic Substances, 1971: *see* Vol.2 p.195.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

(Cont'd from Vol.1 p.195, Vol.2 p.195)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	20 Dec 88	14 Feb 92	Japan	19 Dec 89	12 Jun 92
Iran	20 Dec 88	7 Dec 92			

NATIONALITY AND STATELESSNESS

Convention Relating to the Status of Stateless Persons, 1954: *see* Vol.2 p.190.
Convention on the Nationality of Married Women, 1957: *see* Vol.1 p.188.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961: *see* Vol.2 p.190.
Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963: *see* Vol.2 p.190.

NUCLEAR MATERIAL

Convention on the Physical Protection of Nuclear Material, 1980: *see* Vol.1 p. 196

Convention on Civil Liability for Nuclear Damage
Vienna, 21 May 1963
Entry into force: 12 Nov. 1977
(Information furnished by IAEA Secretariat)

State	*Cons.* (deposit)	*E.i.f.*
Philippines	15 Nov 65	12 Nov 77

Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy, 29 July 1960 as amended)
Vienna, 21 Sep. 1988
Entry into force: 27 Apr. 1992
(Information furnished by IAEA Secretariat)

State	*Sig.*
Philippines	21 Sep 88

Convention on Early Notification of a Nuclear Accident
Vienna, 26 Sep. 1986
Entry into force: 27 Oct. 1986
(Information furnished by IAEA Secretariat)

State	*Sig.*	*Cons.*(deposit)	*State*	*Sig.*	*Cons.*(deposit)
Afghanistan	26 Sep 86		Korea (Rep.)		8 Jun 90
Bangladesh		7 Jan 88	Malaysia	1 Sep 87	1 Sep 87
China	26 Sep 86	10 Sep 87	Mongolia	8 Jan 87	11 Jun 87
India	29 Sep 86	28 Jan 88	Pakistan		11 Sep 89
Indonesia	26 Sep 86		Sri Lanka		11 Jan 91
Iran	26 Sep 86		Thailand	25 Sep 87	21 Mar 89
Japan	6 Mar 87	9 Jun 87	Vietnam		29 Sep 87
Korea (DPR)	29 Sep 86				

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency
Vienna, 26 Sep. 1986
Entry into force: 26 Feb. 1987
(Information furnished by IAEA Secretariat)

State	*Sig.*	*Cons.*(deposit)	*State*	*Sig.*	*Cons.*(deposit)
Afghanistan	26 Sep 86		Korea (Rep.)		8 Jun 90
Bangladesh		7 Jan 88	Malaysia	1 Sep 87	1 Sep 87
China	26 Sep 86	10 Sep 87	Mongolia	8 Jan 87	11 Jun 87
India	29 Sep 86	28 Jan 88	Pakistan		11 Sep 89
Indonesia	26 Sep 86		Sri Lanka		11 Jan 91
Iran	26 Sep 86		Thailand	25 Sep 87	21 Mar 89
Japan	6 Mar 87	9 Jun 87	Vietnam		29 Sep 87
Korea (DPR)	29 Sep 86				

OUTER SPACE

Convention on Registration of Objects Launched into Outer Space, 1974: *see* Vol.2. p.185
Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979: *see* Vol.2. p. 185

Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies
London, Moscow, Washington, 27 Jan. 1967
Entry into force: 10 Oct. 1967
(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	yes	yes	Myanmar	yes	yes
Bangladesh		"	Nepal	"	"
China		"	Pakistan	"	"
India	"	"	Papua New Guinea		"
Indonesia	"		Philippines	"	
Iran	"		Singapore		"
Japan	"	"	Sri Lanka	"	"
Korea (Rep.)	"	"	Thailand	"	"
Laos	"	"	Vietnam		"
Malaysia	"				
Mongolia	"	"			

PRIVILEGES AND IMMUNITIES

Convention on Diplomatic Relations, 1961: *see* Vol.2 p.187.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 1961: *see* Vol.2 p.187.
Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963: *see* Vol. 2 p.188.

Convention on the Privileges and Immunities of the United Nations, 1946

(Cont'd from Vol.2 p.186)

State	*Cons.*
Korea (Rep.)	9 Apr 92

Vienna Convention on Consular Relations, 1963

(Cont'd from Vol.2 p.188)

State	*Sig.*	*Cons.*
Vietnam		8 Sep 92

Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes

UNGA, New York, 8 Dec. 1969
Entry into force: 21 June 1985

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Iran		5 Jun 75	Philippines	16 Dec 69	26 Nov 76

REFUGEES

Convention relating to the Status of Refugees, 1951

(Cont'd from Vol.1 p.189)

State	*Cons.*	*State*	*Cons.*
Cambodia	15 Oct 92	Korea (Rep.)	3 Dec 92

Protocol relating to the Status of Refugees, 1967

(Cont'd from Vol.1 p.189)

State	*Cons.*	*State*	*Cons.*
Cambodia	15 Oct 92	Korea (Rep.)	3 Dec 92

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic

Vienna, 8 Nov. 1968
Entry into force: 21 May 1977

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Indonesia	8 Nov 68		Pakistan		19 Mar 86
Iran	8 Nov 68	21 May 76	Philippines	8 Nov 68	27 Dec 73
Korea (Rep.)	29 Dec 69		Thailand	8 Nov 68	

Convention on Road Signs and Signals

Vienna, 8 Nov. 1968
Entry into force: 6 June 1978

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
India		10 Mar 80	Pakistan		14 Jan 80
Indonesia	8 Nov 68		Philippines	8 Nov 68	27 Dec 73
Iran	8 Nov 68	21 May 76	Thailand	8 Nov 68	
Korea (Rep.)	29 Dec 69				

SEA

Convention on the Territorial Sea and the Contiguous Zone, 1958; *see* Vol.2 p.184.
Convention on the High Seas, 1958: *see* Vol.2 p.184.
Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol.2 p.184.
Convention on the Continental Shelf, 1958: *see* Vol.2 p.185.
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol.2 p.185.
United Nations Convention on the Law of the Sea, 1982: *see* Vol.1 p.184.

SEA TRAFFIC AND TRANSPORT

Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol.2 p.192.
United Nations Convention on Carriage of Goods by Sea, 1978: *see* Vol.1 p.185.

International Convention for the Safety of Life at Sea
London, 17 July 1960
Entry into force: 26 May 1965
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	10 May 78	10 Aug 78	Maldives	29 Jan 68	29 Apr 68
Cambodia	24 Nov 70	24 Feb 71	Myanmar	12 Jul 65	12 Oct 65
China	5 Oct 73	5 Jan 74	Pakistan	24 Feb 66	24 May 66
India	28 Feb 66	28 May 66	Papua New Guinea	18 May 76	18 Aug 76
Indonesia	26 Oct 66	26 Jan 67	Philippines	11 Aug 65	11 Nov 65
Iran	31 May 66	31 Aug 66	Singapore	12 Feb 69	12 May 69
Japan	23 Apr 63	26 May 65	Sri Lanka	10 May 74	10 Aug 74
Korea (Rep.)	21 May 65	26 May 65	Vietnam	8 Jan 62	26 May 65
Malaysia	16 Aug 65	16 Nov 65			

Convention on Facilitation of International Maritime Traffic, as amended
London, 9 Apr. 1965
Entry into force: 5 Mar. 1967
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
India	25 May 76	24 Jul 76	Singapore	3 Apr 76	2 Jun 76
Korea (DPR)	24 Apr 92	23 Jun 92	Thailand	28 Nov 91	27 Jan 92

International Convention on Load Lines
London, 5 Apr. 1966
Entry into force: 21 July 1968
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	10 May 78	10 Aug 78	Malaysia	12 Jan 71	12 Apr 71
Brunei				Amendm.1979:	
Darussalam	6 Mar 87	6 Jun 87		4 Mar 83	
China	5 Oct 73	5 Jan 74	Maldives	29 Jan 68	21 Jul 68
	Amendm.1971:			Amendm.1979:	
	1 Aug 80			11 Mar 80	
	Amendm.1975:			Amendm.1983:	
	1 Aug 80			25 Apr 84	
	Amendm.1979:		Myanmar	11 Nov 87	11 Feb 88
	1 Aug 80			Amendm.1971:	
	Amendm.1983:			11 Nov 87	
	9 Sep 86		Pakistan	5 Dec 68	5 Mar 69
India	19 Apr 68	21 Jul 68	Papua New		
	Amendm.1975:		Guinea	18 May 76	18 Aug 76
	31 Jan 77		Philippines	4 Mar 69	4 Jun 69
	Amendm.1979:			Amendm.1971:	
	23 May 88			1 Feb 73	
Indonesia	17 Jan 77	17 Apr 77	Singapore	21 Sep 71	21 Dec 71
Iran	5 Oct 73	5 Jan 74	Sri Lanka	10 May 74	10 Aug 74
Japan	15 May 68	15 Aug 68		Amendm.1979:	
Korea (DPR)	18 Oct 89	18 Jan 90		27 Nov 80	
Korea (Rep.)	10 Jul 69	10 Oct 69	Thailand	30 Dec 92	30 Mar 93
			Vietnam	18 Dec 90	18 Mar 91

International Convention on Tonnage Measurement of Ships
London, 23 June 1969
Entry into force: 18 July 1982
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	6 Nov 81	18 Jul 82	Korea (Rep.)	18 Jan 80	18 Jul 82
Brunei	23 Oct 86	23 Jan 87	Malaysia	24 Apr 84	24 Jul 84
China	8 Apr 80	18 Jul 82	Maldives	2 Jun 83	2 Sep 83
India	26 May 77	18 Jul 82	Myanmar	4 May 88	4 Aug 88
Indonesia	14 Mar 89	14 Jun 89	Philippines	6 Sep 78	18 Jul 82
Iran	28 Dec 73	18 Jul 82	Singapore	6 Jun 85	6 Sep 85
Japan	17 Jul 80	18 Jul 82	Sri Lanka	11 Mar 92	11 Jun 92
Korea (DPR)	18 Oct 89	18 Jan 90	Vietnam	18 Dec 90	18 Mar 91

Special Trade Passenger Ships Agreement
London, 6 Oct. 1971
Entry into force: 2 Jan. 1974
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	10 Aug 78	10 Nov 78	Philippines	2 Jul 73	2 Jan 74
India	1 Sep 76	1 Dec 76	Sri Lanka	10 Dec 81	10 Mar 82
Indonesia	13 Apr 73	2 Jan 74			

Protocol on Space Requirements for Special Trade Passenger Ships
London, 13 July 1973
Entry into force: 2 June 1977
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	10 Nov 78	10 Feb 79	Indonesia	10 Oct 79	10 Jan 80
India	1 Dec 76	2 Jun 77	Sri Lanka	10 Mar 82	10 Jun 82

Convention on the International Regulations for Preventing Collisions at Sea, as amended
London, 20 October 1972
Entry into force: 15 July 1977
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons. and E.i.f.*	*State*	*Cons. and E.i.f.*
Bangladesh	10 May 78	Maldives	14 Jan 81
China	7 Jan 80	Myanmar	11 Nov 87
India	30 May 73 (e.i.f. 15 Jul 77)	Pakistan	14 Dec 77
Indonesia	13 Nov 79	Papua New Guinea	18 May 76 (e.i.f. 15 Jul 77)
Iran	17 Jan 89	Singapore	29 Apr 77 (e.i.f. 15 Jul 77)
Japan	21 Jun 77 (e.i.f. 15 Jul 77)	Sri Lanka	4 Jan 78
Korea (DPR)	1 May 85	Thailand	6 Aug 79
Korea (Rep.)	29 Jul 77	Vietnam	18 Dec 90
Malaysia	23 Dec 80		

International Convention for Safe Containers, as amended
Geneva, 2 Dec. 1972
Entry into force: 6 Sep. 1977
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Afghanistan	24 Jun 87	24 Jun 88	Japan	12 Jun 78	12 Jun 79
China	23 Sep 80	23 Sep 81	Korea (DPR)	18 Oct 89	18 Oct 90
India	27 Jan 78	27 Jan 79	Korea (Rep.)	18 Dec 78	18 Dec 79
Indonesia	25 Sep 89	25 Sep 90	Pakistan	10 Apr 85	10 Apr 86

International Convention for the Safety of Life at Sea, as amended
London, 1 Nov. 1974
Entry into force: 25 May 1980
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Bangladesh	6 Nov 81	6 Feb 82	Japan	15 May 80	25 May 80
Brunei	23 Oct 86	23 Jan 87	Korea (DPR)	1 May 85	1 Aug 85
China	7 Jan 80	25 May 80	Korea (Rep.)	31 Dec 80	31 Mar 81
India	16 Jun 76	25 May 80	Malaysia	19 Oct 83	19 Jan 84
Indonesia	17 Feb 81	17 May 81	Maldives	14 Jan 81	14 Apr 81

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Myanmar	11 Nov 87	11 Feb 88	Singapore	16 Mar 81	16 Jun 81
Pakistan	10 Apr 85	10 Jul 85	Sri Lanka	30 Aug 83	30 Nov 83
Papua New Guinea	12 Nov 80	12 Feb 81	Thailand	18 Dec 84	18 Mar 85
Philippines	15 Dec 81	15 Mar 82	Vietnam	18 Dec 90	18 Mar 91

Protocol Relating to the International Convention for the Safety of Life at Sea, 1974, as amended

London, 17 Feb. 1978
Entry into force: 1 May 1981
(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Brunei	23 Oct 86	23 Jan 87	Korea (Rep.)	2 Dec 82	2 Mar 83
China	17 Dec 82	17 Mar 83	Malaysia	19 Oct 83	19 Jan 84
India	3 Apr 86	3 Jul 86	Myanmar	11 Nov 87	11 Feb 88
Indonesia	23 Aug 88	23 Nov 88	Pakistan	10 Apr 85	10 Jul 85
Japan	15 May 80	1 May 81	Singapore	11 Jun 84	1 Sep 84
Korea (DPR)	1 May 85	1 Aug 85	Vietnam	12 Oct 92	12 Jan 93

United Nations Convention on Carriage of Goods by Sea, 1978

(Cont'd from Vol.1 p.185)
Entry into force: 1 Nov. 1992

TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity

ESCAP, Bangkok, 27 March 1976
Entry into force: 25 Feb. 1979

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	12 Jan 77	17 May 77	Japan	22 Mar 77	25 Nov 77
Bangladesh	1 Apr 76	22 Oct 76	Korea (Rep.)	8 Jul 77	8 Jul 77
Brunei		27 Mar 86	Laos		20 Oct 89
China	25 Oct 76	2 Jun 77	Malaysia	23 Jun 77	23 Jun 77
India	28 Oct 76	26 Nov 76	Maldives		17 Mar 80
Indonesia		29 Apr 85	Mongolia		14 Aug 91
Iran	15 Sep 76	3 Mar 80	Myanmar	20 Oct 76	9 Dec 76

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Nepal	15 Sep 76	12 May 77	Singapore	23 Jun 77	6 Oct 77
Pakistan	25 Jan 77	1 Jul 77	Sri Lanka		3 Oct 79
Papua New Guinea	29 Sep 76	17 Dec 92	Thailand	15 Sep 76	26 Jan 79
Philippines	28 Oct 76	17 Jun 77	Vietnam		11 Sep 79

Convention on the International Maritime Satellite Organization (INMARSAT), as amended

London, 3 Sep. 1976

Entry into force: 16 July 1979

(Status as included in IMO Doc.J/2735/Rev.7)

State	*Cons.*	*Cons. Amendm.1985*	*State*	*Cons.*	*Cons. Amendm.1985*
China	13 Jul 79	15 May 86	Malaysia	12 Jun 86	
India	6 Jun 78		Pakistan	6 Feb 85	
Indonesia	9 Oct 86		Philippines	30 Mar 81	17 Aug 87
Iran	12 Oct 84		Singapore	29 Jun 79	6 Oct 88
Japan	25 Nov 77		Sri Lanka	15 Dec 81	10 Jun 86
Korea (Rep.)	16 Sep 85				

Agreement establishing the Asia-Pacific Institute for Broadcasting Development

Kuala Lumpur, 12 Aug. 1977

Entry into force: 6 March 1981

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	23 Aug 78		Nepal	15 May 80	11 Sep 80
Bangladesh	14 Sep 77	11 Aug 81	Pakistan	10 Apr 78	7 Jul 81
Brunei		6 Dec 88	Papua New Guinea	9 Mar 78	1 May 80
China		5 Feb 88	Philippines	12 Sep 77	
India	20 May 80	25 Feb 86	Singapore		29 Jun 82
Indonesia	12 Aug 78	31 Aug 89	Sri Lanka	15 Sep 78	7 Nov 88
Korea (Rep.)	11 Oct 78	6 Mar 81	Thailand	25 Apr 81	
Laos		12 Sep 86	Vietnam	8 Sep 78	23 Feb 81
Malaysia	11 Oct 78	10 Nov 80			
Maldives		25 Jun 85			

TREATIES

Convention on the Law of Treaties: *see* Vol.1 p.183.

WEAPONS, DISARMAMENT

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1976: *see* Vol.2 p.198.
Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980: *see* Vol.2 p.198.

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Warfare
Geneva, 17 Jun. 1925
Entry into force: 8 Feb. 1928
(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan		yes	Malaysia		yes
Bangladesh		"	Maldives		"
Bhutan		"	Mongolia		"
Cambodia		"	Nepal		"
China		"	Pakistan		"
India	yes	"	Papua New Guinea		"
Indonesia		"	Philippines		"
Iran		"	Sri Lanka		"
Japan	yes	"	Thailand	yes	"
Korea (DPR)		"	Vietnam		"
Korea (Rep.)		"			
Laos		"			

Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water

Moscow, 5 Aug. 1963

Entry into force: 10 Oct. 1963

(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	yes	yes	Mongolia	yes	yes
Bangladesh		"	Myanmar	"	"
Bhutan		"	Nepal	"	"
India	yes	"	Pakistan	"	"
Indonesia	"	"	Papua New Guinea		"
Iran	"	"	Philippines	"	"
Japan	"	"	Singapore		"
Korea (Rep.)	"	"	Sri Lanka	"	"
Laos	"	"	Thailand	"	"
Malaysia	"	"			

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction

London, Moscow, Washington, 10 Apr. 1972

Entry into force: 26 Mar. 1975

(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	yes	yes	Malaysia	yes	
Bangladesh		"	Mongolia	"	yes
Brunei		"	Myanmar	"	
Cambodia	"	"	Nepal	"	
China		"	Pakistan	"	"
India	"	"	Papua New Guinea		"
Indonesia	"		Philippines	"	"
Iran	"	"	Singapore	"	"
Japan	"	"	Sri Lanka	"	"
Korea (DPR)		"	Thailand	"	"
Korea (Rep.)	"	"	Vietnam		"
Laos	"	"			

Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof
London, Moscow, Washington, 11 Feb. 1971
Entry into force: 18 May 1972
(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	yes	yes	Korea (Rep.)	"	"
Cambodia	"		Laos	"	"
China		"	Malaysia	"	"
India		"	Mongolia	"	"
Iran	"	"	Myanmar	"	
Japan	"	"	Singapore	"	"
			Vietnam		"

Treaty on the Non-Proliferation of Nuclear Weapons
London, Moscow, Washington, 1 July 1968
Entry into force: 5 Mar. 1970
(Status as included in A/46/604 and TIF)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan	yes	yes	Malaysia	"	"
Bangladesh		"	Mongolia	"	"
Brunei		"	Nepal	"	"
Cambodia		"	Papua New Guinea		"
Indonesia	"	"	Philippines	"	"
Iran	"	"	Singapore	"	"
Japan	"	"	Sri Lanka	"	"
Korea (DPR)		"	Thailand		"
Korea (Rep.)	"	"	Vietnam		"
Laos	"	"			

ASIA AND INTERNATIONAL ORGANIZATIONS

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE ANNUAL SURVEY OF ACTIVITIES 1992–1993, INCLUDING THE WORK OF ITS THIRTY-SECOND SESSION HELD IN KAMPALA, 1–6 FEBRUARY 1993*

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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 connections with the Committee's thirty-first session, has been adapted from the Secretariat's *Report of the Thirty-Second Report* (*Report*)

Asian Yearbook of International Law, Volume 3 (Ko Swan Sik *et al.*, eds.; 0-7923-2708-X; © 1994 Kluwer Academic Publishers; printed in Great Britain), pp. 259–301

1. MEMBERSHIP AND ORGANIZATION

1. Myanmar having been re-admitted to membership, there were forty-three Members of the Committee on 1 February 1993: 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, Myanmar, 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 is an Associate Member. The account of the main activities of the Committee, and the main views expressed during or in connection with the Committee's Thirty-second Session has been adapted from the Secretariat's *Report of the Thirty-second Session* ("*Report*").

2. The Thirty-second Session of the Committee was held at Kampala from 1–6 February 1993 at the invitation of the Government of Uganda. His Excellency YOWERI KAGUTA MUSEVENI President of the Republic of Uganda, delivered the inaugural address. Mr. A.B. MAYANJA, Third Deputy Prime Minister, Minister of Justice and Attorney General of Uganda was elected *President* and Mr. MIRZA GULAM HAFIZ, Minister for Law, Justice and Parliamentary Affairs of Bangladesh was elected *Vice-President*. Mr. MIRZA ASADUZZAMAN AL-FAROUQI (Bangladesh) was elected Chairman of the *Sub-Committee on International Trade Law Matters*, and Mr. DONALD NYAKAIRU (Uganda) was elected Rapporteur of the Sub-Committee. The open-ended *Working Group on Human Rights* (with a core membership of Egypt, China, India, Japan, Iran, Kenya, Tanzania and Uganda) elected Mr. L.T. TIBARUHA (Uganda) as its Chairman. 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 Japan to hold its Thirty-third Session in Tokyo. In response to an offer by the Government of Qatar to act as host to the Committee, and a proposal that the Committee's Headquarters be moved from New Delhi to Doha, the Committee, after due deliberation (*Report*, pp. 140–7) adopted the following resolution (*Report*, pp. 216–7):

RESOLUTION ON THE PROPOSED RELOCATION OF THE HEADQUARTERS OF AALCC FROM INDIA TO QATAR ADOPTED AT THE SIXTH PLENARY MEETING HELD ON 4 FEBRUARY, 1993.

THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

Recalling its resolution dated 1 February 1992 adopted at the Thirty First session in Islamabad, Pakistan regarding Headquarters Agreement;

Having considered a report by the Secretary-General contained in Document No.AALCC\XXXII\Kampala\93\20;

Noting the historic role of the Government of India as one of the founders of the Non-Aligned Movement;

Noting with appreciation the contribution of the Government of India to the spirit and aspirations of the Non-Aligned Movement by hosting AALCC since its foundation;

Noting with satisfaction that the unfailing back-up of the Indian Government to the AALCC's activities has helped it to flourish and expand on both regional and international levels, and thus to contribute in sharing international law developments and its codification;

Noting with great satisfaction the Indian representative's assurance that the Indian Government will continue its full-fledged commitment to the AALCC's principles, purposes and activities;

Decides:

(1) To express its deep appreciation and esteem to the Government of India for the tremendous efforts and sincere support rendered to the AALCC for more than three decades during which the AALCC was based in New Delhi.

(2) To express its thanks to the Government of the State of Qatar for its generous offer to host the Headquarters of the AALCC in Doha which it accepts, unless the Indian Government would make a better offer in one month after the conclusion of the Thirty-Second Session of the AALCC, in which case the President would hold an Inter-sessional Meeting at Ambassadorial level in New Delhi.

(3) To request the Secretary-General of the AALCC and the President of the Thirty-Second Session to hold consultations with the Government of Qatar to consider and finalize the relevant details as soon as possible.

(4) To request the Secretary-General to report on this matter, at the earliest possible convenience, to the Liaison Officers in New Delhi.

(5) To request the Secretary-General to report also on the financial implications involved in the moving of the Headquarters and the necessary staff from New Delhi to Doha; and

(6) To report on the progress in the implementation of this decision to the Thirty-Third Session of the AALCC.

2. QUESTIONS UNDER CONSIDERATION BY THE INTERNATIONAL LAW COMMISSION (*Report*, pp. 104, 134–9, 223–4)

4. The Committee had before it a Secretariat document entitled *Report on the Work of the International Law Commission at its Forty-fourth Session* (Doc. No. AALCC/XXXII/KAMPALA/93/1) containing surveys of the Commission's work on three topics, viz. Draft Code of Crimes against the Peace and Security of Mankind: the establishment of an International Criminal Court; International liability for injurious consequences arising out of acts not prohibited by international law; and State responsibility. On another topic

dealt with by the Commission, viz. Non-navigational uses of international watercourses, the Committee had before it a Secretariat document entitled *The Law of International Rivers: a Preliminary Study relating to River System Agreements* (Doc. No. AALCC/XXXII/KAMPALA/93/6) prepared for use in connection with the Committee's consideration of a separate item 'International Rivers' (reported on below, paragraphs 26–28) and containing references to the work of the International Law Commission on international watercourses.

2.1. Draft Code of Crimes against the Peace and Security of Mankind: the establishment of an International Criminal Court

5. The delegate of *China* said that the establishment of an International Criminal Court would strengthen international cooperation to curb and combat international and transnational crime, and would forestall international disputes that could arise due to the existence of a diversity of national criminal jurisdictions. Noting, that there were several issues concerning establishment of such a court, including the need to uphold the principles of the Charter of the United Nations, he urged the Commission to study all aspects of the subject before drafting the statute of the proposed court. The delegate of *Japan* said that he favoured the General Assembly's mandate to the Commission to draft the statute of the proposed court, and urged that the Commission ensure that the procedure followed by the court would be characterized by due process, independence and impartiality. The delegate of *Tanzania* said that the issue of the establishment of an international criminal court required consideration of some basic principles of criminal justice, such as violation of a specific law, maintenance of peace and preservation of law and order, the rules relating to procedure and evidence, the right to defence and, very importantly, questions relating to original and appellate jurisdictions.

6. The delegate of *Kenya* said that questions relating to such matters as the jurisdiction and competence of the proposed court could be resolved only after certain political considerations had been addressed, among them the universal acceptance and applicability of the jurisdiction of the court. The delegate of the *Democratic People's Republic of Korea* said that any mechanism established to deal with criminal acts should have a universal character.

7. The delegate of *Cyprus* said that the proposed Draft Code should clearly define crimes such as aggression, ethnic cleansing, demographic alteration, and illegal transfer of populations. If the proposed international criminal court were to be vested with compulsory jurisdiction, it would, in this view, reflect the will of the community that there should be uniform application of international law.
8. The delegate of the *Libyan Arab Jamahiriya* expressed reservations regarding

the proposal to establish an international criminal court.

2.2. State responsibility

9. On the subject of 'counter measures', which had been considered by the Commission in some detail, the delegate of *Japan* expressed the view that countermeasures would remain an effective instrument in dealing with internationally wrongful acts in the absence of an enforcement mechanism under international law. In his opinion, it would be appropriate to regulate such countermeasures, rather than shy away from considering them. The extent to which countermeasures might be allowed to be resorted to, would be related to the dispute settlement regime. He expressed the hope that the Commission would expedite the drafting process on this topic.

10. The delegate of *China* said that in as much as countermeasures could be used as a tool of power politics, that aspect of the subject needed further consideration.

11. The delegate of *India* said that the Commission in its work on the topic should focus on the role of peaceful settlement of disputes, the proportionality test, relevance of interim measures of protection, and the powers and functions of multilateral instruments and bodies in the maintenance of international peace and security.

2.3. International liability for injurious consequences arising out of acts not prohibited by international law

12. The delegate of *Japan*, noted the Commission's decision to give precedence to issues of prevention over questions of remedial measures when considering this topic. While he recognized the importance of prevention, he believed that provisions relating to remedial measures should form the core of the topic. The delegate of *India* said that the Commission should exercise due care in delimiting the scope of the topic.

2.4. Other matters

13. The delegate of *Syria*, recalling that the topic 'Non-navigational uses of international watercourses' on the Commission's agenda had not been taken up for detailed consideration at its Forty-fourth Session, emphasized the concern he had expressed during the Islamabad session of AALCC regarding the Commission's draft articles on 'Obligation not to cause appreciable harm',

'Obligation to cooperate' and 'Regular exchange of data and information', adopted on first reading.

14. Inviting the Commission to place greater emphasis on the progressive development of international law rather than the codification of customary international law, and to address newly emerging legal issues, the delegate of *Japan* recalled that AALCC had, at its Islamabad session, requested 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)'.

Decision

15. In an essentially procedural decision adopted (*Report*, pp. 223–4) following discussion of the item (*Report*, pp. 104, 134–9), the Committee, *inter alia*, expressed appreciation for "the progress made on the question of the Establishment of an International Criminal Court".

3. LEGAL PROBLEMS REFERRED TO THE COMMITTEE BY PARTICIPATING STATES

3.1. Status and treatment of refugees

16. The Committee had before it the following documents prepared by the Secretariat: *Status and treatment of refugees: AALCC's model legislation on refugees: a preliminary study* (Doc. No. AALCC/XXXII/KAMPALA/93/3); and *Status and treatment of refugees: establishment of a 'safety zone' for the displaced person in the country of origin* (Doc. No. AALCC/XXXII/KAMPALA/93/4).

17. Document No. KAMPALA/93/3 notes inadequacies in the protective scope of international legal instruments such as the 1951 UN Convention relating to the Status of Refugees, and its 1967 Protocol. Citing progressive developments reflected in later regional arrangements such as the 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration concerning refugee problems in Latin America, as well as in AALCC's 1966 Bangkok Principles, the Secretariat, in accordance with the mandate given to it at AALCC's Thirty-first Session, proposes the formulation of "model legislation" on refugees having the following structure, to be elaborated after further research if approved by the Committee:

The draft structure of the Model Legislation

(1) Preamble;
(2) Decision should be made on the definition of 'refugee', should it be maintained as it is in the 1951 Convention and the 1967 Protocol or should it be enlarged in accordance with the foregoing discussion? It is proposed that the definition should at least reflect the enlarged definitions provided for in the 1969 OAU Convention, 1984 Cartagena Declaration and 1966 Bangkok principles which would facilitate states to adapt it to their particular requirements;
(3) Procedure for "refugee" status determination;
(4) Principle of family unity and dependency status;
(5) It is proposed to incorporate the following basic principles of refugee law:
  (i) State Sovereignty;
  (ii) Non-refoulement;
  (iii) Non-discrimination;
  (iv) Standards of treatment;
(6) Administrative measures;
(7) Rights of refugees;
(8) Duties of refugees;
(9) Assistance to refugees;
(10) Burden sharing;
(11) International monetary assistance to the country of origin while taking back its citizens;
(12) Punishment for violation of local laws;
(13) Association;
(14) Exclusion clauses;
(15) Miscellaneous clauses.

18. Document No. KAMPALA/93/4 contains the following proposals relating to the possible establishment of 'safety zones' for 'internally displaced people' or '... people who are uprooted from their homes [but] do not cross national borders to become recognized refugees', within their country of origin:

VI. THE STATUS OF SAFETY ZONE

A Safety Zone which is established within the country of origin and with the consent of the country of origin, could be similar to a "neutralized zone" or a "demilitarized zone" as envisaged in Article 15 of the Geneva Convention (1949) and expanded by Article 60 of its Protocol I. The establishment of a Safety Zone during armed conflict could provide a parallel to the "Safety Zones" as envisaged by the Asian African Legal Consultative Committee. During the Twenty-eighth Session (Nairobi 1989) the AALCC presented 13 principles which provided a framework for the establishment of Safety Zone in the country of origin. For ready reference the principles are as follows:

"(i) The Safety Zone shall be established with the consent of the State of origin, through a resolution or recommendation of the United Nations;
(ii) The Safety Zone should be akin to a demilitarized zone or a neutral zone immune from hostile activities and a specified geographical area could be demarcated as such by a government notification;

(iii) The Zone should be under international supervision, control and management to provide among others international protection to the persons residing therein;
(iv) The United Nations may designate and authorize an international organization or agency for administration and supervision of the Safety Zone;
(v) The State of origin and the neighbouring State which might receive the mass exodus could also be associated with the designated international organization or agencies in the supervision of the Safety Zone;
(vi) The designated international organization or agency shall be responsible for coordination and supervision of supply and distribution of food and other essential items and ensure facilties like drinking water, civic amenities and medical care. The cost of operations can be met through voluntary contributions by States, governmental and non-governmental humanitarian organizations;
(vii) The armed forces of the State of origin should withdraw from the Safety Zone and the status of the zone shall be respected by civilian as well as military machinery of the State of origin;
(viii) The authority in control of the Safety Zone shall provide international assistance/ protection to the individuals therin seeking asylum;
(ix) The United Nations may provide a multinational security force for the purpose of maintaining law and order within the Safety Zone.
(x) Persons seeking asylum in the Safety Zone shall be disarmed and will not be permitted to participate in any military activity or guerilla warfare against any State. Similarly asylum seekers shall not be a military target for any State;
(xi) The individuals residing in the Safety Zone shall be provided with the facility to seek and enjoy asylum in any other country;
(xii) If normalization is restored in the State of origin and the international organization or agency in charge of the Safety Zone is satisfied that the conditions are favourable and conducive to return, the persons residing in such zones shall be provided with all facilities to return to their permanent place of residence.
(xiii) The Safety Zone thus established shall be of temporary nature."

It is imperative in our view that such Safety Zones should be mandated by the Security Council whose decisions all the Member States have undertaken to accept and carry out in Article 25 of the Charter.

19. Introducing the topic, the *Deputy Secretary-General* emphasized the need for expansion of the scope of the term 'refugee' as defined in universal international legal instruments like the 1951 UN Convention to take account of contemporary developments, as well as for particular attention to be paid to categories of refugees specially vulnerable to the hardships arising from displacement, such as women and children. Referring to the difficulties faced by 'internally displaced persons' who were normally denied the status of 'refugees', he observed that the establishment of 'safety zones' could be among measures needed to alleviate their plight.

20. The *Representative of the UN High Commissioner for Refugees (UNHCR)* said that incorporation in national law of international standards for the treatment of refugees, as was contemplated in the proposal for 'model

legislation' on the subject, was the most appropriate method, and sometimes the only method, of making those standards effective. Observing that no international organization had been entrusted with the responsibility of caring for 'internally displaced persons', and that no international legal instrument dealt comprehensively with their problems, he said that the position of UNHCR regarding the proposal for the establishment of 'safety zones' was reflected in its view that the following main principles should be kept in mind:

1. The Safety Zone proposal undoubtly has a place as a further contribution to increasing important endeavour to avert new flows of refugees by responding to the problems within countries of origin.
2. Caution should remain concerning the proposal which should not undermine the institution of asylum or conflict with basic principles of refugee protection.
3. Fundamental principles of human rights, refugee and humanitarian law, as well as principles guiding sovereign States need to be taken into account and indeed reconciled in any serious elaboration of the Safety Zone.
4. There would seem to be greater scope for Safety Zones in relation to persons fleeing conflict and generalized violence than to persons fleeing persecution where the State is either unwilling or unable to provide protection.

21. The *Representative of the Organization of African Unity (OAU)* said that Africa was host to over six million refugees, as well as over 12 million displaced persons either within or outside the countries of their nationalities. Having described the measures adopted under the aegis of OAU to alleviate their suffering, he called on States to address the root causes of the refugee problem, and to ratify both the OAU Convention governing Specific Aspects of Refugee Problems in Africa, and the African Charter on Human and Peoples Rights as soon as possible.

22. The delegates of *China, Egypt, India, Iraq, Japan, Jordan, Republic of Korea, Kuwait, Nigeria, Tanzania and Thailand* described measures adopted for resolving the problems of refugees within their respective territories. The delegate of *Japan* emphasized the political nature of the issues involved and their potential to affect the peace and security of the region. The delegate of *Thailand* was of the view that international law only imposed stringent obligations on receiving States, whereas the root causes of such problems lay in the refugees' countries of origin.

23. On the subject of 'safety zones', the delegate of *Thailand* expressed support for the 13 principles endorsed by AALCC at its Twenty-eighth Session. He said that the establishment of safety zones by the country of origin could lessen the burden borne by neighbouring States, observing that such zones should only be created with the consent of the country of origin. The delegate of *Iraq* said he did not support the idea of 'safety zones' as it

amounted to the exercise of undue interference with the exercise of sovereignty by the country of origin. In his opinion, only the problems of 'refugees' properly so called, persons who had crossed an international border, should be considered, and the subject of safety zones should be removed from AALCC's agenda. The delegate of *Palestine* said that the rich countries saw in the establishment of safety zones the opportunity to interfere in the internal affairs of poor countries. Issues concerning the establishment of such zones were in his opinion, essentially political rather than legal.

24. The delegate of *India* inquired whether the phenomenon of 'internally displaced persons' was sufficiently widespread as to warrant study, and in any event, whether the role of law with respect to their creation was such as to justify its study by AALCC, which should concern itself with problems that were essentially legal. The delegate of *Egypt*, while acknowledging the humanitarian aspects of the safety zone concept, urged that the following unresolved legal aspects be taken into account in the course of any future study:

1. In the case of the absence of a Central Government, or a representative Central Government which could validly give State consent, how would such zones be established?
2. The criteria by which the Security Council should recommend the establishment of safety zones were unclear.
3. The concept of Safety Zones as an application of the International Humanitarian Law could be misused for not purely humanitarian reasons or at least be applied in a selective manner.

Decision

25. In the decision adopted (*Report*, pp. 225–6) following discussion of the item (*Report*, pp. 106–118), the Committee calls *inter alia* for (1) AALCC to continue with the study of model legislation on refugees, in close cooperation with UNHCR and the OAU, which would include study of legislation on refugees enacted by countries in Asia and Africa; and (2) further study of the concept of 'safety zones', as well as analysis of the role played by the United Nations in general, and UNHCR in particular in the recent past in that context.

3.2 Law of international rivers

26. The Committee had before it a document entitled *Law of international rivers: a preliminary study relating to river system agreement* (Doc. No.

AALCC/XXXII/KAMPALA/93/6) prepared by the Secretariat, describing and analyzing institutional and legal aspects of agreements for the sharing of the waters of rivers in Asia and Africa. The Document dealt with three subject areas addressed by the International Law Commission in its consideration of the topic 'Non-navigational uses of international watercourses', (a) the scope of the term 'international watercourse'; (b) equitable and reasonable utilization and participation; and (c) protection and preservation of eco-systems.

27. 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 non-navigational uses of international rivers, as well as (2) to assist member States to monitor and formulate their views concerning progress of the work of the Commission.

Decision

28. During discussion of this subject on the basis of the Secretariat's study and the draft articles under consideration by the International Law Commission, the delegate of *India* observed that the diversity and complexity of the factors involved were such as to suggest that consideration of the item might be deferred, and placed on the Committee's agenda after the Commission had completed the second reading of its draft articles. After further discussion (*Report*, pp. 151–3) and a ruling by the President the Committee decided, *inter alia*, to request the Secretary-General to examine other crucial areas relating to river system agreements, and member States to transmit to him comments and information to enable him to do so; and to request "the International Law Commission to finish as early as possible the second reading of the draft Convention on Non-navigational Uses of International Watercourses and to take all necessary measures in order to conclude...a Framework Convention" on the subject (*Report*, page 231).

3.3. Law of the sea

29. The Committee had before it a document entitled *Matters relatable to the work of the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea* (Doc. No. AALCC/XXXII/KAMPALA/93/7) prepared by the Secretariat, covering

the work of the Preparatory Commission during its summer 1992 session, and containing comment on the question of the continued functioning of the Preparatory Commission, and the complementary relationship that should subsist between the role of the Preparatory Commission and that of the UN Secretary-General's informal consultations in promoting universality of the UN Convention on the Law of the Sea; on the need to bring the Convention into force, even through ratification or accession largely by the developing countries; the significance of the Convention in the context of the "UNCED process", since it constitutes a basis and a framework for successful implementation of the relevant parts of Agenda 21; and the scope of possible action with respect to Part XI of the Convention, that would take into account recent fundamental political and economic changes in international relations.

Decision

30. In the decision adopted (*Report*, pp. 227–8) following discussion (*Report*, pp. 151–3) of issues addressed in the Secretariat's document, the Committee *inter alia*:

2. *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 the International Sea-bed Authority and for the International Tribunal of the Law of the Sea;
3. *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;
4. *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;
5. *While appreciating* the efforts for the universal acceptance of the Convention URGES the member States to safeguard the integrity of the Convention on the Law of the Sea;
....

3.4. Deportation of Palestinians in violation of international law, particularly the Fourth 1949 Geneva Convention, and the massive immigration and settlement of Jews in the Occupied Territories

31. The Committee had before it a document entitled *The Legal Aspects of the Palestinian Question* (Doc. No. AALCC/XXXII/KAMPALA/93/8) prepared by the Secretariat which contained *inter alia* a history of the problems dealt with, from their inception in the so-called Balfour Declaration of 2 November 1917, up to their consideration by organs of the United

Nations, and General Assembly Resolution 45/68 adopted on 6 December 1990 calling for the convening of an International Peace Conference on the Middle East under the auspices of the United Nations; as well as discussion of the scope of protection afforded by the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War; deportation of Palestinians from the Occupied Territories, and their rights as 'protected persons' to return there, and to receive compensation. Annexed to the document was a Report of a Seminar organized jointly by AALCC and the League of Arab States (New Delhi, November 1992) and a 'Resolution of Solidarity' adopted by the Seminar.

32. The *Assistant Secretary-General*, introducing the Secretariat documents, observed that the recent deportation of 415 Palestinians to the 'no-man's land' between Israel and Lebanon, Israel's refusal to abide by Security Council Resolution 799, and the failure of two Special Envoys of the Secretary-General of the United Nations to persuade Israel to allow all 415 persons deported to return, had brought into sharp focus the issues for discussion under this item.

Decision

33. In the decision adopted (*Report*, pp. 232–6) following discussion of the item (*Report*, pp. 157–161), the Committee *inter alia*:

1. *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, the right to return and the establishment of an independent State on their national soil;

....

4. *Supports* the just cause of the Palestinian people and their struggle for self-determination;

5. *Supports* the UN Security Council Resolution No. 799 of December 1992 and calls upon the Security Council member States to implement unreservedly its own resolution by using, if necessary, economic and diplomatic sanctions and calls the five Permanent Members of the Security Council to regard all the resolutions equally and not selectively, respected and enforced;

6. *Agrees* to hold an inter-sessional meeting, if still needed, on the deported Palestinians and to put this question on the agenda of the next AALCC meeting;

7. *Condemns the Israel's policy in the occupied territories and the deportation of Palestinian people and demands that the 415 Palestinians recently expelled to Lebanon be immediately allowed to return home in conformity with the decision of the Security Council in Resolution 799;*

8. *Strongly Condems* 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;

9. *Strongly Deplores* the recent decision taken by the Israeli Supreme Court which gave the political authority the right to violate International Law and the Fourth Geneva Convention of 1949 by legalizing the deportation of over 400 Palestinians;
10. *Demands* that Israel respects the principles of International Law and all International Conventions which have a bearing on the matter;
11. *Condemns* also Israel's policy of appropriation and illegal exploitation of the natural resources of occupied territories in contravention of the principles of permanent sovereignty over natural resources;
12. *Requests* the Secretary-General of the Committee to continue to monitor the events and developments in the occupied territories of Palestine;
....

3.5. Responsibility and accountability of former colonial powers

34. The Committee had before it a document entitled *Responsibility and accountability of former colonial powers* (Doc. No. AALCC/XXXII/KAMPALA/93/9) prepared by the Secretariat, recalling the background to the item, and describing existing legal arrangements relating to the return or restitution of cultural property to the countries of origin. Introducing the document, the *Secretary-General* invited the Committee's attention to the International Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted under the aegis of UNESCO in Paris on 14 November 1970, noting that some 26 member States of AALCC were already Parties to the Convention. He also referred to recent initiatives to strengthen implementation of the Convention through preparation of a model bilateral treaty for prevention of crimes against cultural heritage, and preparation (in cooperation with the International Institute for the Unification of Private Law (UNIDROIT)) of a draft convention on stolen or illegally exported cultural objects. The *Secretary-General* also noted that the OAU had an item on its agenda that closely resembled the item under discussion, and proposed that, if the Committee approved, he should work on the item in consultation with OAU.

35. During the discussion, the delegate of the *Libyan Arab Jamahiriya* referred to the decision by the Committee on this item at its Thirty-first Session and observed that many aspects of it were of concern to the developing countries. He recalled that the President of Uganda had himself, in the course of his inaugural address, emphasized the importance of this item, and had, in addition, noted that many people from Asia and Africa had been transported to other countries for use as slaves or to carry out forced labour. He was aware that Nigeria had requested the colonial powers to pay compensation for the enslavement of its people. The delegate of *Japan* recalling his delegation's

interventions at previous sessions of the Committee, expressed reservations regarding the item, indicating that it was, in his view, of a highly political nature and not appropriate to be dealt with in a multilateral forum like the Committee.

Decision

36. In the decision adopted (*Report*, p. 236) following discussion of the item (*Report*, p. 154–6), the Committee *inter alia*:

1. *Requests* the Secretary-General to hold consultations with the Organization of African Unity on the preparation of a joint study on issues concerning Responsibility and Liability of Former Colonial Powers.
2. *Calls upon* the Member Countries to provide relevant instructions to the Secretariat relating to their claims in regard to the restitution of their cultural property:
3. *Requests* the Secretariat to prepare an analytical study on the ongoing work in this field as well as the need for wider participation in the 1970 UNESCO Convention;
....

4. MATTERS OF COMMON CONCERN HAVING LEGAL IMPLICATIONS

4.1. The UN Conference on Environment and Development: outcome and follow-up (including Framework Convention on Climate Change and Convention on Biological Diversity

37. The Committee had before it a document entitled *United Nations Conference on Environment and Development: Rio de Janeiro, 3–14 June 1992* (Doc. No. AALCC/XXXII/KAMPALA/93/10) prepared by the Secretariat, containing studies of four documents adopted at UNCED: the *Rio Declaration on Environment and Development (Earth Charter)*; *Agenda 21*; the *UN Framework Convention on Climate Change*; and the *Convention on Biological Diversity*. The Secretariat examines each document from the perspective of the membership of AALCC as reflected in the "Statement of General Principles of International Environmental Law" endorsed by the Committee at its Thirty-first Session held at Islamabad. Each study contains introductory paragraphs, a review of the main provisions of the document concerned, and general observations. Excerpts from the introductory paragraphs and general observations in each study are reproduced below. [Note: The paragraphs of each study are *numbered individually*—Ed.]

RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT (EARTH CHARTER)

...

22. The Rio Declaration consists of a preamble and 27 principles (see Annex 3). The preamble indicates that the Declaration is built upon the 1972 Stockholm Declaration on Human Environment, and that its goal is to establish a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people. The 27 operational principles deal respectively with a wide range of various substantial elements:...

GENERAL OBSERVATIONS

...

34. Some countries, non-governmental organizations and people might not be fully satisfied with the description of certain principles contained in the Declaration, since the Declaration failed to make strong commitment concerning the provision of new, additional and adequate financial resources and transfer of environmentally sound technologies on preferential and concessional basis to developing countries, or because some principles that they were reluctant to accept were incorporated in the Declaration. Nevertheless, if the Declaration is considered as a whole and in a comprehensive and realistic perspective, the conclusion is that, taking into account that the Declaration was a compromise reached after prolonged, fierce debates and hard negotiations among States and State groups, particularly between the developing South and the developed North, the current text of the Declaration is the best reflection of the consensus among the States that could be reached at the present level of human understanding. It must be acknowledged that it constitutes a delicate balance among the different interest groups

...

35. As far as the form and formulation of the Rio Declaration is concerned, it is significant to note certain characteristics that the Declaration has:

(a) The use of the Rio Declaration on Environment and Development as the title of the instrument on elaborating principles of general rights and obligations of States in the field of environment and development aptly reflects the need for the integration of and the linkage between environment and development, as indicated by the General Assembly Resolution 44/228. It is also the title that the AALCC has proposed.

(b) The Rio Declaration is in its nature not legally binding as a multilateral Convention, but given the fact that it was adopted by over 100 world leaders at the Summit level, it would have very strong moral authority of international community.

(c) The text of the Declaration is quite concise and can be easily understood by the average person. Its language is to a great extent appealing and inspiring and that is conducive to enhancing wide public awareness of environmental and developmental concerns, and to promoting public participation in the environmental protection.

(d) The Declaration has not only reaffirmed but also developed the ideas and principles contained in 1972 Stockholm Declaration on Human Environment. It thus represents the deepening and enhancement of human cognition on human kind itself, the nature, and the relationship between them which hopefully will lead to the 21st Century on a new and more enlightened basis.

36. In the context of the involvement of the AALCC, the Member States of the Committee might be satisfied with that most of the basic ideas and principles advocated and upheld by the Committee at the Islamabad Session in February 1992 are to a large

extent appropriately reflected and incorporated in the Rio Declaration, including *inter alia* the following:
– the protection and preservance of the global environment is the common concern of mankind which should be pursued in full cooperation and global partnership;
– the environment and development are intrinsically and inextricably linked. The need to protect the environment requires to be viewed in a perspective where due emphasis is accorded to promoting economic growth and social development of developing countries, including the eradication of poverty and ignorance, meeting basic needs and enhancing the quality of life;
– the principle of sustainable development should be given due effect, and development shall not be pursued in such a manner as would endanger the environment;
– the responsibility of member States of the international community shall be common but differentiated and the application and enforcement of environmental standards by the developing countries shall be in accordance with their respective capabilities and responsibilities;
– the principle of precaution shall also be given due effect. All members of the international community shall ensure that no appreciable or significant harm is caused to the environment and the environment does not suffer severe and irreversible degradation;
– the need to protect intergeneration equities within the context of the progressive development and codification of international environmental law; and
– the instrument to be adopted by the UNCED should include appropriate provision for the peaceful settlement of environmental disputes.

37. However, as mentioned before, some member States particularly developing countries might be disappointed in the wording of principles regarding the financial resources and technology transfer. Most member States of the Committee are of the view that the developed countries, international and regional organizations and financial institutions should consider, explore and 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. The developed countries should also, in the interest of the common future of mankind, seriously consider making available to the developing countries environmentally sound technologies on a preferential and non-commercial basis. Those points of view are also shared by the Group of 77. During the final Session of the Prepcom for UNCED held in New York in March 1992, the G-77 renewed its proposal to include into the Rio Declaration the principle which would have provided that in view of their main historical and current responsibility for global environmental degradation and their capability to address this common concern, the developed countries shall provide adequate, new and additional financial resources and environmentally sound technologies on preferential and concessional terms to developing countries to enable them to achieve sustainable development. This proposal was, however, deemed as unacceptable and thus was rejected by some industrialized countries, particularly by the United States.

Through intense negotiations, a final compromise was reached to the effect that in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibilities that they bear in the international pursuit of sustainable development in

view of the pressures their societies place on the global environment and of the technology and financial resources they command, and thus agree that States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchange of scientific and technological knowledge and by enhancing the development, adaptation, diffusion and transfer of technology including new and innovative technology. It seems that the commitment by the developed countries in this respect is quite weak, and the demands of developing countries have not been fully met.

38. On the other hand, however, some more inspiring and favourable terms have been included in the relevant chapters of Agenda 21. It provides in Chapter 33 dealing with financial resources and mechanism that in light of the global benefits to be realized by the implementation of Agenda 21 as a whole, the provision to developing countries of effective means, *inter alia*, financial resources and technology, without which it will be difficult for them to implement fully their commitments, will serve the common interest of developed and developing countries and of humankind in general, including future generations (para 33.3). It is further stated that the implementation of the huge sustainable development programmes of Agenda 21 will require the provision to developing countries of substantial new and additional financial resources (para 33.10). It is further agreed that the provision of new and additional financial resources should be both adequate and predictable (para 33.12). These to some extent go to meet the concern of the developing countries on the important issue of funding mechanism which was a result of very intense negotiations within the Working Group during the Rio Conference under the very able Chairmanship of Ambassador Koh.

39. With regard to environmentally sound technologies, Chapter 34 of Agenda 21 refers to the need for favourable access to and transfer of such technologies, in particular to developing countries (para 34.4). It also refers to help to ensure the access, in particular of developing countries to scientific and technological information, promote, facilitate and finance, as appropriate, the access to and the transfer of environmentally sound technologies and corresponding know-how, in particular to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed, taking into account the need to protect intellectual property rights as well as the special needs of developing countries for the implementation of Agenda 21 (para 34.14). This delicate balance was also arrived at after prolonged negotiations within the Working Group.

40. It might also be somewhat regretable that the proposal by the AALCC on the protection of the marine environment has not received appropriate reflection in the Rio Declaration despite every effort made by the Secretariat of the Committee. During the whole period of the preparation for UNCED, the AALCC had, on quite a few occasions, appealed to the Prepcom that the protection of the marine environment should be accorded great importance in drafting the Rio Declaration. Emphasis had also been made concerning the critical need for the universal ratification of the 1982 UN Convention on the Law of the Sea...At the Fourth Session of the Prepcom for UNCED, the delegation of the AALCC further proposed, in cooperation with the Prepcom for the International Seabed Authority, to include a new paragraph in the Rio Declaration, which would read as follows:

> "All States and people shall protect and preserve the marine environment. They shall facilitate international communication, and shall promote the peaceful use of the

seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study of the marine environment. For doing so, a universal adherence to the United Nations Convention on the Law of the Sea, which contains a comprehensive global framework and lays down fundamental rules for all relevant ocean-related activities, would solidify those already widely accepted principles."

Unfortunately, they were deemed as unacceptable by some countries, and therefore were not inserted in the Rio Declaration. Nevertheless, the AALCC will resolutely continue its endeavours to promote universal adherence to the 1982 UN Convention on the Law of the Sea.

AGENDA 21

...

42. The principal outcome of the Rio Conference was the adoption of Agenda 21, which addresses the pressing problems of today and also aims at preparing the world for the challenge of the next century. It is thus a century blueprint to save our fragile planet earth. Being a comprehensive and dynamic programme, running to over 800 pages, Agenda 21 consists of a preamble, four sections, and 40 chapters. It covers a wide range of programme areas, including social and economic dimensions, conservation and management of resources for development, strenghening of the role of major implementing groups and the means of implementation.

43. Among the issues addressed by Agenda 21, are the issues related to legal instruments, institutional arrangements and financial resources as well as transfer of environmentally sound technologies. These issues have also been the main areas of concern and consideration by the AALCC. The discussion below will focus on the legal instrument and institutional arrangements. The financial resources and technology transfer will be discussed separately in connection to the Framework Convention on Climate Change.

44. The progressive development and codification of international law in the field of the environmental protection and sustainable development is designated as one of the main means of the implementation of Agenda 21, and is the subject of Chapter 39, entitled 'International Legal Instruments and Mechanisms'. The programme areas that constitute Chapter 39 are described in terms of the basis for action, objectives and activities.

...

COMMENTS AND OBSERVATIONS

53. While going through the text of Chapter 39, it might be concluded that the basis for action, objectives and activities regarding international legal instruments and mechanisms in the context of the implementation of Agenda 21 are quite well identified and considered. *Inter alia*, issues concerning the importance and means of further development of international law on sustainable development, of the integration of environmental and developmental concerns, and adequate and effective participation of developing countries in the negotiation, implementation, review and governance of international legal instruments are appropriately addressed. It is thus a valuable guidance to the future work in this regard.

54. The overall objective of the review and development of international environ-

mental law, as indicated by Chapter 39, includes two aspects. The first is to evaluate and promote the efficiency of that law. The second is to promote the integration of environment and development policies through effective international agreements or instruments. These two aspects are intrinsically linked, and cannot be pursued in isolation from each other. An effective instrument of environmental law must be one that successfully integrates the environment and development. Therefore, the review of existing international legal instruments and future law-making on environment should, in principle, be closely linked with the need to embody the principle contained in the Rio Declaration and to implement effectively Agenda 21, taking into account the special needs of developing countries.

55. When evaluating the past performance and effectiveness of existing international agreements or instruments concerned, some basic criteria should be used: whether or not and to what extent does an agreement or instrument under the evaluation:

(a) meet the need to integrate the environment and development and is conducive to the promotion of sustainable development;
(b) take into account the special needs and concerns of developing countries;
(c) have adequate incentives to encourage the participation of developing countries; and
(d) implemented and complied by the contracting parties, and the existence of appropriate mechanisms for the enforcement of the agreement and for the settlement of disputes over the implementation.

56. As regards the future law-making process, benefiting from the past experiences, it is important to avoid the proliferation of new agreements or instruments without making concrete arrangements for their realistic implementation. It is equally important that the effective participation of all countries concerned and in particular developing countries, in negotiation and governance should be ensured and necessary and appropriate technical and financial assistance should be provided for this purpose.

57. While the adoption of some new convention may indeed be necessary, such as the one envisaged on nuclear safety in the framework of the International Atomic Energy Agency, more efforts should be made to bring into force a large number of existing international multilateral or regional treaties that have not yet become effective through identification and addressing difficulties which prevent some States, in particular developing countries, from participating in those treaties, and where appropriate reviewing and revising them with a view to promotion of their wider participation and more effective implementation.

58. The role of the International Law Commission in the progressive development and codification of international environmental law should be underscored and further strengthened. The AALCC has made a proposal requesting the International Law Commission to include an item related to the protection of environment in its long-term work programme and take it up as a priority item. This may include an elaboration of legal norms on general rights and obligations of States in the field of the environmental protection and sustainable development, including development of law regarding liability and compensation for the victims of environmental damages. It is understood that the International Law Commission is sympathetic to this request.

59. With regard to the settlement of environmental disputes, the AALCC member States believe that the principle of peaceful settlement of international disputes including environmental disputes, is a matter of great significance in the international

community today. Besides political settlement through negotiation and consultation, the judicial settlement of legal disputes, particularly recourse to the International Court of Justice, is becoming all the more important. The members of the International Community should take advantage of the growing confidence in the International Court of Justice, and make efforts to facilitate the judicial settlement of environmental disputes through the ICJ. In this regard, the initiative undertaken by the Secretary-General of the United Nations in establishing a Trust Fund to assist States in recourse to the ICJ for dispute settlement should be appreciated and supported.

60. Finally, the Secretariat of the Committee wishes to express its willingness to render legal assistance, as appropriate, and on request to the member States of the Committee in the field of national legislation regarding the environmental protection and sustainable development.

INTERNATIONAL INSTITUTIONAL ARRANGEMENTS

61. The important issues regarding international institutional arrangements in the follow-up to the Rio Conference are addressed in Chapter 38 of Agenda 21 in terms of the basis for action, objectives and the envisaged institutional structure.

62. In light of the provisions of Chapter 38, the institutional arrangements shall be guided by the following principles:

(a) the intergovernmental follow-up to the UNCED process shall be within the framework of the UN system, with the General Assembly being the *Supreme Policy-making forum* that would provide overall guidance to governments, UN System and relevant treaty bodies. At the same time, governments, as well as regional economic and technical cooperation organizations, have a responsibility to play an important role. Their commitments and actions should be adequately supported by the UN system and multilateral financial institutions:

(b) there is a need for institutional arrangements within the UN system in conformity with, and providing input into the restructuring and revitalization of the UN in the economic social and related fields, and the overall reform of the UN. Implementation of Agenda 21 and other conclusions of the Rio Conference shall be based on action and result oriented approach and consistent with the principles of universality, democracy, transparency, cost-effectiveness and accountability;

(c) The UN system is uniquely positioned to assist governments to establish more effective patterns of economic and social development with a view to achieving the objectives of Agenda 21 and sustainable development;

(d) All agencies of UN system have a key role to play in the implementation of Agenda 21 within their respective competence. To ensure proper coordination and avoid duplication, there should be an effective division of labour, and all bodies of the UN should be required to elaborate and publish reports of their activities on the implementation of Agenda 21 on a regular basis. Serious and continuous review of their policies, programme, budgets and activities will also be required;

(e) The continued active and effective participation of non-governmental organizations, the scientific community and private sectors as well as local groups and communities are important in the implementation of Agenda 21; and

(f) The institutional structure will be based on agreement on financial resources and mechanisms, technology transfer, the Rio Declaration and agenda 21.

63. The overall objective of the institutional arrangements is the integration of environmental and developmental issues at national, subregional, regional and

international levels.

64. The specific objectives are as follows:

(a) To ensure and review the implementation of Agenda 21 so as to achieve sustainable development in all countries;

(b) To enhance the role and functioning of the UN system in the field of environment and development;

(c) To strengthen cooperation and coordination on environment and development in the UN System;

(d) To encourage interaction and cooperation between the UN system and other intergovernmental and non-governmental subregional, regional and global institutions and non-governmental organizations in the field of environment and development;

(e) To strengthen institutional capabilities and arrangements required for the effective implementation, follow-up and review of Agenda 21;

(f) To assist in the strengthening and coordination of national, subregional and regional capacities and actions in the areas of environment and development.

(g) To establish effective cooperation and exchange of information between the UN organs, organizations, programmes and the multilateral financial bodies, within the institutional arrangements for the follow-up of Agenda 21;

(h) To respond to continuing and emerging issues relating to environment and development;

(i) To ensure that any new institutional arrangements would support revitalization, clear division of responsibilities and the avoidance of duplication in the UN system and depend to the maximum extent possible upon existing resources.

65. Guided by the above-mentioned principles and objectives, the overall institutional structure as envisaged, the main elements of which consist of the following:

(a) **The General Assembly**: The General Assembly is designated to be the principal policy-making and the appraisal organ on matters relating to the follow-up to the Rio Conference. The General Assembly would organize a regular review of the implementation of Agenda 21. It could consider the timing, format and organizational aspects of such a review, and consider holding a special Session no later than 1997 for the purpose of overall review and appraisal of Agenda 21, with adequate preparation at a high level.

(b) **The Economic and Social Council**: The ECOSOC would assist the General Assembly through overseeing system-wide coordination, overview on the implementation of Agenda 21 and making recommendations in this regard. The ECOSOC would also undertake the task of directing system-wide coordination and integration of environmental and developmental aspects in the UN policies and programmes and make appropriate recommendation to the General Assembly, specialized agencies concerned and Member States. Appropriate steps should be taken to obtain regular reports from specialized agencies on their plans and programmes related to the implementation of Agenda 21, pursuant to Article 64 of the Charter of the United Nations. The ECOSOC should organize a periodic review of the work of the proposed Commission on Sustainable Development, as well as of system-wide activities to integrate environment and development, making full use of its high-level and coordination segments.

(c) **Commission on Sustainable Development**: A high-level Commission on Sustainable Development should be established to serve as the intergovernmental mechanism, in accordance with Article 68 of the Charter of the United Nations. The Commission should consist of representatives of states elected as members, with due regard to equitable geographical distribution. Its main functions should include the monitoring of progress in the implementation of Agenda 21; to consider information provided by Governments; to review the progress in the implementation of the commitments contained in Agenda 21; to receive and analyze relevant input from competent non-governmental organizations, in the context of the overall implementation of Agenda 21; to enhance the dialogue; and to provide appropriate recommendations to the General Assembly through the ECOSOC. The Commission would report to the ECOSOC. The first meeting of the Commission should be convened no later than 1993. The General Assembly, at its 47th Session, should determine specific organizational modalities for the work of the Commission.

(d) **The Secretary-General**: Strong and effective leadership on the part of the Secretary-General is considered vital.

(e) **Inter-agency coordination mechanism**: There is a need for a high-level inter-agency coordination mechanism under the direct leadership of the Secretary-General. The task is proposed to be given to the Administrative Committee on Coordination (ACC) headed by the Secretary-General, ACC would thus provide a vital link and interface between the multilateral financial institutions and other UN bodies at the highest administrative level. All heads of agencies and institutions of UN should be expected to cooperate fully with the Secretary-General.

(f) **Advisory Body**: It is suggested to establish a high-level advisory board consisting of eminent persons knowledgeable about environment and development, appointed by the Secretary-General in their personal capacity.

(g) **Secretariat support structure**: It should provide support to the work of both intergovernmental and inter-agency coordination mechanisms. Concrete organizational decisions fall within the competence of the Secretary-General.

(h) **Organs, programmes and organizations of the UN system**: All relevant bodies of the UN system, such as UNEP, UNDP, UNCTAD, and specialized agencies, will have an important role within their respective areas of expertise and mandate in supporting and supplementing national efforts.

(i) **Regional and subregional cooperation and implementation**: The regional Commissions, regional development banks and regional economic and technical cooperation organizations can make contributions in this regard. Particularly, the regional Commissions as appropriate, should play a leading role in coordinating regional and subregional activities by sectoral and other UN bodies and shall assist countries in achieving sustainable development.

(j) **National Implementation**: States may wish to consider setting up a national coordinational structure responsible for the follow-up on Agenda 21.

(k) **Cooperation between UN bodies and international financial organizations**: The Secretary-General and Heads of UN Programmes, organizations and multilateral financial organizations have a special responsibility in forging effective cooperation between UN bodies and multilateral financial organizations, not

only through the UN high-level coordination mechanism, but also at regional and national level.

(l) **Non-governmental organizations**: Relevant non-governmental organizations, the private sectors, various groups etc., should be given opportunities to make their contributions and establish appropriate relationship with the UN system.

66. In assessing the institutional arrangements envisaged above, the member States of the Committee would be pleased to hear that many of their propositions and proposals on the institutional follow-up to the Rio Conference are appropriately reflected in the provisions of Chapter 38 of Agenda 21. *Inter alia* those on the importance of the most efficient and effective use of the existing financial and human resources and non-proliferation of new institutions; on the supremacy of the General Assembly and the role of the ECOSOC in the institutional structure, on the establishment of a more comprehensive inter-governmental Committee based on restructuring several existing Committees of ECOSOC, and set up of a special expert advisory group, as well as the strengthening of the UNEP have been endorsed.

67. It has been the view of the AALCC that the institutional follow-up to the Rio Conference should ensure the improvement and strengthening of the existing institutional mechanism within the United Nations system with the General Assembly as the Supreme policy-making forum in the context of the integration of environment and development and the effective implementation of Agenda 21. A new institutional arrangement should ensure the full and effective participation of all countries, in particular developing countries in the policy-making process, make full use of existing institutions of the UN system, and promote better cooperation and coordination among States, UN bodies, specialised agencies and other organizations involved in the field of environment and development.

68. Therefore, the Member States of the Committee may wish to consider using the above-mentioned elements as some of the criteria for the evaluation of the feasibility and effectiveness of the institutional structure proposed by Chapter 38 of Agenda 21.

69. As regards the General Assembly, it is important that its principal function in the political deliberation and policy guidance related to environment and development should be further enhanced and reinforced. In this context it may be suggested that one main committee of the General Assembly be designated as responsible. In addition the General Assembly may decide to convene meetings at the ministerial level for the purpose of overall review and appraisal of Agenda 21.

70. With respect to the ECOSOC, while the restructuring and revitalization of the United Nations in the economic, social and related fields is underway, the institutional need for the integration of environment and development and for the effective implementation of Agenda 21 should be fully taken into account and be given priority. The vital role of the ECOSOC in this regard should be greatly strengthened and enhanced.

71. ECOSOC should welcome the agreement on the establishment of the Commission on Sustainable Development as the main inter-governmental mechanism. The AALCC has proposed that the Commission could be constituted through combining and restructuring a number of existing Committees of ECOSOC dealing closely with related matters. About the composition of the Commission, it is necessary to underscore further the importance of wider involvement and participation of developing countries and the preservation of the democratic principle in the decision-making process of the Commission.

72. To establish an effective and efficient inter-agency coordination mechanism in the field of the environmental protection and sustainable development is undoubtedly crucial in the implementation of Agenda 21 and achieving the objective of sustainable development. The efforts should be made to have all the relevant organizations or institutions. Particularly the multilateral financial institutions involved in the coordination mechanism and to ensure the best cooperation in a team spirit.

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE

1. By its Resolution 45/212 of 21 December 1990, the General Assembly established the Inter-governmental Negotiating Committee for a Framework Convention on Climate Change (INC) and mandated it to prepare an effective framework Convention on climate change containing appropriate commitments, and any related instruments as might be agreed upon. At the subsequent session, the General Assembly reviewed the progress thus made in the INC and urged it "to expedite and successfully complete the negotiations as soon as possible and to adopt the Framework Convention on Climate Change in time for it to be opened for signature during the United Nations Conference on Environment and Development."

2. The Inter-governmental Committee for a Framework Convention on Climate Change held five sessions, the last one in two parts. The second part of the fifth session was held in New York from 28 April to 9 May 1992. At the beginning of that Session, the Chairman of the INC introduced a set of working papers which were prepared after consultations with the INC Bureau and a number of delegations. These working papers were the focus of hectic deliberations for the whole week. On 9 May 1992 the INC adopted the final text of the "United Nations Framework Convention on Climate Change" and recommended that it be opened for signature at the United Nations Conference on Environment and Development scheduled to be held at Rio de Janeiro from 3–14 June 1992. It also adopted a resolution which *inter alia* provided for certain follow-up measures during the interim period between the signing of the Convention and its entry into force.

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4. The Framework Convention consists of a Preamble, 26 Articles and two Annexes. Articles 1 to 3 contain general provisions such as definition, objective and principles. Article 4 is the key article dealing with the commitments. Articles 5 and 6 further elaborate commitments specifically in respect of research and systematic observation, education, training and public awareness. Articles 7 to 11 deal with the institutional arrangements, including the financial mechanism. Article 12 is another article dealing with commitments concerning communication of information related to implementation of the Convention. Articles 13 and 14 provide for amicable settlement of any disagreement or dispute. Articles 15 to 20 and 22 to 26 stipulate provisions concerning final clauses such as amendments, adoptation of protocols, signature, entry into force, reservation, withdrawal etc. Article 21 entitled interim arrangements, deals with the arrangements prior to the coming into force of the Convention. Annex I contains the list of countries which includes 25 members of the OECD and 11 countries that are undergoing the process of transition to market economy. Annex II contains the list of OECD members.

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GENERAL OBSERVATIONS

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2. Although the final text represents only a 'package deal' and the Convention as a whole fell short of expectations of several delegations on many counts, nevertheless it is a significant first step. It provides a basis on which other measures have to be built.

3. Global warming poses an environmental threat of unprecedented nature. However, the uncertainties in predictions with regard to the timing and magnitude due to lack of adequate understanding of the phenomenon and other material evidence have to be taken into account. The IPCC has made a tremendous contribution in establishing the scientific basis of the Convention. It is hoped that the six tasks agreed on at the Fifth Session of the IPCC (Geneva, March 1991) would be useful in adopting further measures to implement the provisions of the Convention.

4. Thanks to the generous financial assistance provided by the INC, representatives of a large number of developing countries were able to participate at the INC Sessions. This helped them immensely to increase their awareness and get first hand information about the problems of climate change and the measures to tackle them.

5. It is heartening to note that as many as 155 States including the EEC have signed the Convention at Rio during the UNCED in June 1992. Some of the States which have not yet signed the Convention have however expressed concern and dissatisfaction over certain provisions in the Convention. Some States have expressed serious reservations regarding the provisions on specific commitments. The fossil-fuel producing countries are concerned that in the implementation of the Convention they might have to pay a higher price than others, due to repercussions inherent in the implementation process. Although the provisions dealing with special situations take into consideration this aspect, however, it is not quite satisfactory to them. Much more has to be done to allay their concern and to bring them in the Convention's fold. The first and foremost thing, therefore, is to win their confidence and make the Convention universally acceptable. It is not the intention to suggest that the Convention should be amended at the very first instance. The present text is flexible enough to accomodate the genuine concerns of many non-signatories.

6. In the present text of the Convention the provisions concerning financial mechanism and transfer of technology to the developing countries need to be strengthened. The developing countries have lost the battle to secure any firm commitments from the developed countries in respect of these two matters. The vague assurance and feable attempts would not sooth their feelings.

7. It is a matter of satisfaction that the resolution on interim arrangements adopted by the INC along with the text of the framework convention considered it essential to involve in future negotiations all participants in the INC irrespective of whether they are signatories to the Convention or not. This would avoid any discrimination and leave the doors open for constructive negotiations in the crucial phase of future of negotiations. It is expected that the General Assembly at its Forty-seventh Session will endorse the Report of the INC fifth Session and recommend the convening of INC Sixth Session probably in early December this year to initiate necessary arrangements to be made for the preparation of the first Session of the Conference of the parties as specified in the Convention.

8. The Convention would come into force on the nineteenth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession.

Further as provided in Article 7 the first session of the Conference of Parties would be held not later than one year after the date of entry into force of the Convention. The first session of the Conference of Parties would have an exhaustive agenda for consideration. A tentative list of items as deduced from various provisions of the Convention might include:

(i) Adoption of the rules of procedure of the Conference of Parties as well as those of the subsidiary bodies established by the Convention. These procedures will include decision making procedures for matters not covered in the Convention (Article 7.3).
(ii) Designation of a Permanent Secretariat and necessary arrangements for its functioning. (Article 8.3).
(iii) A review of the adequacy of the specific commitments undertaken by the developed country parties.
(iv) Review of the information communicated by the developed countries parties on their policies and measures related to mitigation of climate change (Article 4.2(b).
(v) Approval of methodologies for calculations of emissions by sources and removals by sinks of greenhouse gases (Article 4.2(c)).

9. The success of the first session of the Conference of the Parties would very much depend on the preparatory work undertaken during the interim period until the Convention comes into force. It is good that the INC and the IPCC are actively involved in this process. It would ensure continuity and avoid the hassles involved in establishing a new set-up.

10. The General Assembly at its Forty-Seventh Session will consider the necessary arrangements required for continuation of the functioning of the INC, including the financial aspects. It would be desirable if the expenses during the interim period could be met by the resources generated by the implementation mechanism of the Convention itself. The United Nations is already facing serious financial crisis. Such a move would lessen the burden on the United Nations.

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CONVENTION ON BIOLOGICAL DIVERSITY

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6. ...[T]he UNEP Governing Council by its decisions 15/34 and SS.II.5 appointed an Ad Hoc Working Group of Legal and Technical Experts with a mandate to negotiate an international legal instrument for the conservation of biological diversity. At its first session held in Nairobi from 19–23 November 1990, the Group focused on the elements for possible inclusion in a global framework Convention on Biological Diversity. On the basis of its consideration of these elements the session requested the UNEP Secretariat to prepare a draft Convention on Biological Diversity which was presented to the second session of the Ad Hoc Working Group held in Nairobi from 25 February to 6 March 1991 (UNEP/Bio.Div./WG.2/2/2). The second session discussed parts of the draft Convention and identified a number of issues for further clarification with the help of notes to be prepared by the UNEP Secretariat. It made recommendations to the Secretariat on the revision of the draft Convention. The Session also requested the Executive Director to convene a meeting of a regionally balanced group of lawyers (Lawyers' Meeting) to review the draft Convention as revised by the Secretariat. The session also made important decisions on procedural and organizational matters...

7. The UNEP Governing Council, at its sixteenth session, by Decision 16/42 renamed

the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity as the *Intergovernmental Negotiating Committee (INC) for a Convention on Biological Diversity* clarifying that the change of name did not mean a new negotiating body nor affect the continuity of the process of elaborating the Convention. The INC was split into two working groups. Working Group I was assigned almost two-thirds of the Draft Convention. Working Group II was allotted specific draft articles which constituted the heart of the Draft Convention. The successful elaboration of the Convention depended upon agreement being reached on the issues which were being tackled by Working Group II. Those included access to genetic resources; access to and transfer of technology including biotechnology; and financial resources and funding mechanisms.

8. The first session of the INC was held in Madrid from 24 June to 3 July 1991; the second session in Nairobi from 23 September to 2 October 1991; the third session in Geneva from 25 November to 4 December 1991; the fourth session in Nairobi from 6 to 15 February 1992, and the fifth and final session in Nairobi from 11 to 19 May 1992 at which the text of the Convention on Biological Diversity was eventually finalized. Subsequently ... at the United Nations Conference on Environment and Development (UNCED) held in Rio (Brazil) it was opened for signature from 5 to 14 June 1992. The Convention is now open for signature at United Nations headquarters in New York until 4 June 1993.

9. As of 29 June 1992, the Convention had received 157 signatures. From among the member States of the AALCC, 35 States have signed the Convention. These are as follows:

> Arab Republic of Egypt; Bangladesh; China; Cyprus; Gambia; Ghana; India; Indonesia; Iran; Japan; Jordan; Kenya; DPR Korea; Republic of Korea; Kuwait; Malaysia; Mauritius; Mongolia; Nepal; Nigeria; Oman; Pakistan; Philippines; Qatar; Senegal; Sri Lanka; State of Palestine; Sudan; Tanzania; Thailand; Turkey; Uganda; United Arab Emirates; Yemen; and Botswana.

The non-signatory AALCC member States are Iraq; Libya; Saudi Arabia; Sierra Leone; Singapore; Somalia; and Syrian Arab Republic.

10. Significantly, the USA, the largest economy in the world, did not sign the Convention. Lack of patent protection is stated to be the main reason for which the USA refused to sign the Convention. The US delegation also claimed that the Convention would take away American jobs, though how this would happen was never explained.

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GENERAL OBSERVATIONS

45. Although the Convention on Biological Diversity seems to have received worldwide affirmation as is evident from the fact that it has been signed by 157 countries, its success and effectiveness will depend on the actual implementation of the crucial provisions of the Convention such as those related to access to genetic resources (Article 15), access to and transfer of technology (Article 16) and financial resources and a funding mechanism (Articles 20 and 21).

46. There is an intrinsic interlinkage between access to genetic resources, transfer of technology and financial assistance to the developing countries to enable them to carry out their obligations under the Convention. The value of genetic resources depends on the technology to use them. Although genetic resources, for the most part, are concentrated in the developing countries, the technologies 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 regimes to the diffusion of

technology, which in the context of this Convention, would mainly be biotechnology, a suspicion lurking in the minds of the developing countries has been that the developed countries wanted them to conserve their genetic resources without giving them any corresponding financial or other compensation. It is for this reason that the developing countries insisted during the negotiations on a trade-off with the developed countries in the INC negotiations that in return for providing access to this resource, they are able to secure access to relevant technologies. This would enable them to build their own capability to maintain *in situ* collections, including the use of technologies such as cryogenics (freezing techniques) and biotechnology. Biotechnology is a fast-growing research-intensive industry born of scientific advances in genetic engineering dating from 1973. These advances have made it possible to create in a laboratory new organisms that can be used to make commercial products ranging from improved medicines, to better strains of crops, and to bacteria for use in pest control. Biotechnology has immense potential for contributing to improved health care, food production, environmental problems and industry in developing countries.

47. It was in response to these concerns of the developing countries that the texts of Articles 15 and 16 were revised to reflect those concerns. Thus, Article 15 invests the national governments with the authority to determine access to their genetic resources and to provide access only on mutually agreed terms and with their prior informed consent, unless waived by them. It also requires the Contracting Parties to carry out scientific research based on the genetic resources provided by the other contracting parties with their full participation and, where feasible, in their own countries. It also requires the Contracting Parties to share in a fair and equitable way the results of such scientific research and the benefits accruing from the commercial exploitation of genetic resources with the Contracting Parties providing those resources. This sharing has to be on mutually agreed terms.

48. What causes some concern, however, are some of the provisions in Article 16 on transfer of technology. Those provisions, *inter alia*, provide that in the case of technology protected by patents and other intellectual property rights, the transfer of technology is to be effected in conformity with those rights. This has been modified somewhat in the case of the Contracting Parties providing the genetic materials by the provision that such transfers will be effected on mutually agreed terms notwithstanding the protection of intellectual property rights. This would necessarily imply that even in the case of Contracting Parties supplying the genetic materials, only those technologies would be transferred over which the Governments would be having ownership rights or control, but this would not be possible in case of those technologies which are in the hands of private owners and are protected by intellectual property rights.[4]

49. According to the *Global Biodiversity Report* prepared by the World Resources Institute and other world conservation organizations, finding patentable products is not a quick process. A rule of thumb in screening samples is that only one out of 10,000 actually leads to a marketable product. The right to own and license genetic materials developed from discoveries is imperative since without the guarantee of exclusive use, nobody would commit the amount of money—on an average about US $100 million—required to bring each biotechnologically created drug in the market.

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4 It may be pointed out that the US biotechnology industry has grown from 1 firm in 1976 to more than 1,100 today with revenues reaching US $5,800 million (Economic News from USA, June 1992).

50. Against this, it can be contended that the experience of the developing countries, which have been the main repository of the genetic materials, has been that most of them have been unfairly denied compensation for genetic substances found within their territory. A frequently cited example is *Vincristine*, a cancer drug with a multi-million dollar market developed from the rosy periwinkle of Madagascar which received none of its profits. It is, therefore, justly argued by these countries that without some right to the profits from products developed from their genetic resources they will have few incentives to continue protecting biologically diverse areas.

51. Since the biotechnology industry continually needs samples of genetic materials found in biologically diverse developing countries, which provide the basis for genetically engineered products, it has been suggested that the biotechnology firms in the industrialized countries would find it advantageous to join with biodiverse countries for a regular source of new genetic samples. In this context, the World Resources Institute has recommended the two-year agreement between Costa Rica's National Biodiversity Institute (INBio) and the US pharmaceutical giant Merck and Company as the model for similar agreements with other developing countries. INBio was established in 1989 to catalogue and manage Costa Rica's remarkable biodiversity. Under the Agreement, Merck is paying US $1 million during the next two years for the opportunity to examine the plants and other species that INBio is collecting: INBio prepares from the samples chemical abstracts that are sent to Merck's laboratories. INBio is reported to receive an unspecified amount of royalities (1 to 3 per cent) from the sales of any products developed from the genetic materials of these samples. Merck is also donating equipment to INBio and training the Institute's scientists.

52. Even if INBio receives only 2 per cent of royalties from the pharmaceuticals developed from Costa Rica's biodiversity, it would take only 20 drugs for INBio to be able to earn more funds than Costa Rica currently gets from coffee and banana, its two major exports. The INBio-Merck Agreement is the only one of its kind in the developing world, and because of its success it is likely to be followed in other developing countries. Mexico has already set up its own Commission on biodiversity and both India and Kenya are examining the possibilities. (US Information Service, New Delhi. *Economic News from USA* August 1992). Thus, for a share of reasonable profits and access to technologies, it would be in the interest of developing countries to seek such agreements with the biotechnology firms in the industrialized countries.

53. Although in the Biodiversity Convention, developing countries have somewhat succeeded in limiting the impact of intellectual property rights on the transfer of technology including biotechnology, they should equally be cautious and concerned about the developments taking place in the ongoing Uruguay Round negotiations under the GATT auspices related to Trade Related Intellectual Property Rights (TRIPS). GATT is, strictly speaking, not the forum for discussing the question of intellectual property for which there are separate fora such as WIPO. The reason why the US was nevertheless interested in bringing intellectual property into GATT is because by linking it with trade, it gives the US the possibility of retaliatory action which would not have been possible in other fora.

54. Patenting, the most familiar form of IPR, until very recently only applied to inventions which were applicable in industry. Earlier even in western countries, society had prevented this kind of monopolization of knowledge being extended to important areas such as treatment of diseases and agriculture. But over the years, the idea of

intellectual property is being extended to plants also. A special type of property right adapted to plants was created which is known as plant breeders' rights (PBRs). With the takeover of the seed companies by the multinational corporations and the coming of biotechnology, there is now a demand for a stronger monopoly of plant Breeder Rights. Under these rights the farmers will be prevented from using the variety to develop new varieties for 20 years for which the right might be granted. Since patents give the possibility of making unlimited number of claims, it gives the multinationals the opportunity to claim not only individual varieties but also characteristics and even species and genera. Already patents have been given for plants in the US and Europe: in 1985 in the US and 1989 in Europe. The home countries of these multinationals have taken a stand supporting Plant Breeders Rights in various fora. In the TRIPs negotiations as well as in the WIPO, the US has been arguing for the stronger form of monopolies represented by PBRs to be made applicable to plants and animals.[5] Developing countries should take a concerted stand against these development lest agricultural development is allowed to take place in a particular direction which will be principally in the interest of multinational corporations.

55. Another issue of vital importance relates to the question of financial resources and the financing mechanism for the application of the convention nationally and internationally. The basic principles of each Contracting State providing financial support for its national activities related to conservation and sustainable use of biodiversity, and the commitment of the developed country Parties to provide new and additional resources for meeting the agreed incremental costs to the developing country Parties in fulfilling their obligations under the Convention, have been enshrined in the Convention. However, the incremental costs and a list of developed countries and their scale of contributions have as yet to be established by the Conference of the Parties.

56. Similarly, the financial facility which will administer the funds to the developing countries has still to be agreed on by the Conference of the Parties. Pending the finalization of these arrangements, the Global Environment Facility (GEF) of the UNDP, UNEP and the World Bank has been instituted as the financial facility for the interim period. The GEF was established in 1990 with a funding of US $1300 million to provide grants on highly concessional terms to developing countries to meet the costs of well appraised conservation projects in four sectors: global warming, biological diversity, pollution of international waters and depletion of the protective ozone layer. Subsequently, at the insistence of the developing countries, land degradation problems, primarily in desertification and deforestation, that are tied to one of four other problem areas, were made eligible for funding.

57. At present, the industrialized countries that have made contributions to the GEF control approval of projects. The UNDP and the UNEP supply the technical and scientific expertise to evaluate projects and the World Bank manages them when approved. The Convention, however, insists that before the GEF becomes the funding mechanism for the interim period it would be necessary to make it more transparent and

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5 USHA MENOH, 'Intellectual Property Rights and Agriculture Development', *Economic and Political Weekly*, New Delhi 6–13 July 1991; UPOV. Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants, Geneva, 4 to 19 March 1991. (Article 14)—this question has not been dealth with in the Convention but left to be decided upon by the Conference of the Parties.

democratic in its functioning. Recently, 15 developing countries including China, India and Brazil negotiated with the United States, West European nations and Japan at a two-day meeting in Washington in May 1992.[6] It has been agreed to expand the membership and to share power in the GEF. Revised procedures are being prepared, under which decisions will be taken by consensus and if a vote is called for, developing countries as a group or industrialized countries as a block can veto a project.

SUGGESTED POINTS FOR CONSIDERATION OF THE LEGAL ADVISERS OF AALCC MEMBER STATES

In the light of the foregoing, the AALCC Secretariat would like to suggest the following points for consideration of the Legal Advisers:

(1) National legislation to implement the Convention and its provisions. Apart from enacting the Convention in the national domain, the Convention requires the Contracting Parties to enact national legislation regulating certain specific matters such as those related to (a) integration of conservation and sustainable use of biodiversity in national policies (Article 6); identification and monitoring of components of biological diversity important for conservation and sustainable use (Article 7); protection of threatened species and populations (Article 8); incentives for the conservation and sustainble use of biodiversity (Article 11); promoting understanding and awareness about the importance of conservation of biological diversity (Article 13); regulation of access to genetic resources (Article 15); sharing the results of research and development and benefits arising from the commercial exploitation of genetic resources (Article 15); access to and transfer of technologies including biotechnology for Contracting States providing genetic resources (Article 16); encouraging development and use of technologies including indigenous and traditional technologies (Article 18) and participation of developing countries in biotechnological research and ensuring safety in the handling of biotechnology (Article 19). A major issue in this connection will be whether one comprehensive legislation covering all these aspects or separate legislation devoted to specific matters would be appropriate and necessary.

(2) The question of liability and compensation for causing damage to the biodiversity or environment of other States.

(3) The inter-related issues of access to genetic resources and transfer of technology including biotechnology which are covered by intellectual property rights (Articles 15 and 16).

(4) Financial resources for developing countries and the financing facility (Articles 20 and 21): the establishment of the financing facility contemplated by Article 21, an indicative list of incremental costs to developing countries, and their eligibility for access to the funds; a list of developed contracting Parties who would contribute to the proposed facility and their scale of contributions have all been left to the Conference of the Parties to work out.

(5) Interim Financing Facility (Article 39): Article 39 institutes the existing Global Environment Facility (GEF) as the interim financing facility until the Conference of the Parties decides on this question finally. Before it commences its formal functioning

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6 US Information Service, New Delhi. *Economic News from USA* (June 1992).

for the Convention, it is required to be democratized and made transparent in its operations. What aspects should be incorporated in this process?

38. Introducing the Secretariat document, the Secretary-General emphasized the importance of the four main documents analyzed and commented on therein. In his opinion, integration of environment and development would be the guiding principle for future environmental activities. He noted that the General Assembly had already taken action that would revitalize and enhance the role of the organization in that field, referring, in particular, to the establishment of a high level Commission on Sustainable Development in order to ensure effective follow-up of Agenda 21; to the establishment of an inter-governmental committee for the elaboration of an international convention to combat desertification in those countries experiencing serious drought, particularly in Africa expected to complete its work by June 1994; and to the convening of a global conference on the sustainable development of small island developing States in April 1994.

39. The Secretary-General noted the concerns of some member States of AALCC, especially the oil-producing States, regarding implementation of the Framework Convention on Climate Change, and urged their participation in the follow-up process with a view to correcting any imbalance that might have arisen due to approaches taken by the developed countries which were themselves responsible for the largest emissions of carbon dioxide and other greenhouse gases. In his view the developing countries had a vital stake in the successful implementation of the provisions dealing with access to and transfer of technology, and funding mechanisms, in the Convention on Biological Diversity. He declared that the work programme of the AALCC Secretariat would include monitoring and reporting on ratification and implementation of both Conventions, as well as assisting member States in their consideration of the question of liability and compensation for damage caused to the biodiversity or environment of a State; transfer of technology, including bio-technology, covered by intellectual property rights; financial resources for developing countries; improvement of the democratization and governance of the Global Environment Facility; national implementing legislation, and the work of the Commission on Sustainable Development. Noting that the General Assembly had, at its Forty-seventh Session decided to establish an Inter-governmental Negotiating Committee to draw up an international convention to combat desertification, he observed that the Secretariat's early involvement would provide it with the opportunity to assist member Governments as it had done in regard to other global environmental agreements.

40. The delegate of *Japan* emphasized the importance of early effective implementation of the Framework Convention on Climate Change (FCCC) and the Convention on Biological Diversity (CBD). He declared his Government's commitment to strengthen overseas technical and financial cooperation with respect to afforestation and the sustainable management of forests, and its support for the efforts of the developing countries in environmental matters, outlining the objectives set by Japan in connection with disbursement of some 7 to 8 billion US dollars in official development assistance in the field of the environment over a 5-year period from fiscal 1992. He informed the meeting of the establishment of International Environmental Technology Centres of UNEP at Osaka and Shiga which would, *inter alia*, promote the transfer of environmentally sound technologies to developing countries, their special focus being the sustainable development of big cities, and the preservation of fresh water resources.

41. Referring to issues connected with financing measures outlined in Agenda 21 and mechanisms for facilitating global technology transfer, the delegate of the *Republic of Korea* urged that the international community focus its efforts on the creation of an effective Commission on Sustainable Development which would monitor UNCED follow-up action. He described his country's environmental protection programme, as well as environmental cooperation in the Northeast Asian Region, which comprised the Korean Peninsula, Japan, Russia, China and Mongolia.

42. The delegate of the *Islamic Republic of Iran* emphasized the need for the developing countries to fulfil the right to development (General Assembly Resolution 41/128, 4 December 1986, and Rio Declaration, Principle 3) and the dilemma confronting those who must decide between measures to prevent environmental degradation and measures to promote sustained economic growth and development, when the values and priorities involved in each case were in conflict-with each other. He observed that the key to resolving many environmental problems, including those of desertification and land degradation was the provision of additional financial resources and the transfer of the necessary technologies.

43. The delegate of *Jordan* observed that the mere adoption of Agenda 21 could not be expected to resolve the world's environmental problems, which included the problems of Somalia, lack of water and food in some of the developing countries, the priorities of some international organizations which spent money on academic research rather than on useful enterprises, and the non-participation of industrialized countries in important international convention regimes. Emphasizing the need for each country to develop its own national environmental strategy, he proposed that each member State (a) establish a committee for that purpose, (b) carry out studies on the state of its

environment, and (c) establish training programmes for training of the necessary personnel.

44. The delegate of *China* suggested that the new 'global partnership' (Rio Declaration, Principle 7) would be characterized by the following five features: enhanced international cooperation; respect for the basic norms (five principles) of international law; an equitable and just order; proper handling of issues relating to financial resources and technology transfer; and active and effective participation of the whole international community. The results of UNCED, he believed, would depend upon the credibility and effectiveness of the measures taken by way of follow-up.

45. The delegates of *Indonesia, DPR Korea, Kuwait, Uganda, Pakistan, Sri Lanka, Tanzania, Libyan Arab Jamahiriya, India* and *Nepal* made statements in which they recognized the importance of the Rio Declaration, Agenda 21 and the two Conventions adopted at UNCED, noted the problems that would confront the developing countries in their efforts to implement their provisions (essentially inadequacy of financial resources and lack of the necessary technologies), and called for enhanced international cooperation with a view to resolving them.

Decision

46. In the decision adopted (*Report*, pp. 229–30) following discussion of the item (*Report*, pp. 119–134), the Committee *inter alia*:

...

1. *Directs* the Secretariat to continue monitoring the follow-up work in the aforesaid fields and prepare studies aimed at promoting ratifications of the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity and the institutional arrangements resulting from the decisions of the General Assembly at its Forty-seventh session;

2. *Requests* the Secretary-General to initiate preparation of studies on the proposed international convention to combat desertification;

3. *Welcomes* the conclusion of a Memorandum of Understanding on cooperation between the Asian-African Legal Consultative Committee and the United Nations Environment Programme;

4. *Approves* the proposal to convene an Expert Group Meeting on Environmental Law jointly with the UNEP;

5. *Invites* the Organization of African Unity and the League of Arab States to participate and initiate joint programmes on environmental issues in cooperation with the Asian-African Legal Consultative Committee;

6. *Urges* the member Governments to make voluntary contributions to the AALCC's Special Fund on Environment; ...

...

4.2 UN Decade of International Law

47. The Committee had before it a document entitled *The United Nations Decade of International Law: Report of the Secretary-General* (Doc. No. AALCC/XXXII/KAMPALA/93/2) containing an outline of the history of the item and its consideration by AALCC, to which are annexed a Report submitted by the Secretary-General of AALCC to the Secretary-General of the United Nations in response to General Assembly Resolution 46/53 of 9 January 1992; and the statement of the Secretary-General of AALCC at the Symposium on 'Teaching, Study, Dissemination and Wider Appreciation of International Law in the Developing Countries', held in Beijing, 24–6 August 1992.

48. The delegate of *China* referred to two seminars on international law convened at Beijing in 1991 and 1992 respectively, as contributions to the programme of activities for the Decade. He said his Government shared with the majority of the members of the international community, the desire to strengthen the role of the International Court of Justice. The delegate of the *Islamic Republic of Iran*, declaring that it was imperative that all member States of AALCC uphold the primacy of the rule of law in inter-State relations, said that international organizations, both universal and regional, should also promote the acceptance of, and respect for, principles of international law. In that connection he recalled his Government's proposal made in the General Assembly's Sixth Committee for the holding of a week-long Congress on Public International Law.

49. The delegate of *Japan*, emphasizing the significance of the Decade, urged all member States to strengthen the role of the International Court of Justice, and to accept the compulsory jurisdiction of the Court with a view to facilitating recognition of the rule of law within the society of States. He announced that his Government proposed to contribute US $25,000 to the UN Secretary-General's Trust Fund for Peaceful Settlement of International Disputes by recourse to the Court.

50. The delegates of the *Arab Republic of Egypt, India* and *Libya* re-affirmed their support for the objectives of the Decade, placing special emphasis on the peaceful settlement of international disputes. The delegate of *Egypt* said that one means of realizing the objectives of the Decade was to ensure support for the idea of formulating a Convention on peaceful settlement of disputes. The delegate of *Tanzania*, recalling that most developing countries had not been able to participate at the two earlier Peace Conferences, should avail

themselves of the opportunity to influence the world order by making a tangible contribution to the development of international law at the proposed third Peace Conference. The Decade should be a period characterized by action rather than rhetoric, when States ratified existing conventions and enacted domestic legislation to give effect to them.

51. The delegate of *Kenya* supported the objectives of the Decade, observing that the developing countries were often victims of opportunistic interpretation and application of international law. The delegate of *Iraq* objected to what he termed the 'double standard' applied by the Security Council in deciding whether a State had or had not violated the terms of the Fourth 1949 Geneva Convention and Protocol I thereto. He observed that jurists were obliged to stop the use of force regardless of who the actors were.

52. The delegate of *Cyprus* said that the proposed draft Code of Crimes against the Peace and Security of Mankind should clearly define crimes such as aggression, 'ethnic cleansing', demographic alteration and illegal transfer of populations, suggesting that the proposed International Criminal Court should be vested with compulsory jurisdiction. This would reflect the will of the community to apply international law even-handedly and in a uniform matter.

Decision

53. In the decision adopted (*Report*, p. 237–8) following discussion of the item (*Report*, p. 99–105), the Committee *inter alia*:

...

1. *Reaffirms* the importance of strict adherence to the principles of International Law as enshrined in the Charter of the United Nations;
2. *Reiterates* that many of the political, economic and social problems which riddle the Member States of the International Society can be resolved on the basis of the law;
3. *Welcomes* the various initiatives taken by member States of the Committee in the implementation and observance of the Decade;
4. *Requests* member States to continue to give serious attention to the observance and implementation of the Decade;
5. *Requests* the Secretary-General to apprise the Secretary-General of the United Nations of the initiatives taken by the Committee in this regard;
6. *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-eighth Session of the General Assembly;
7. *Accepts* the offer of the Government of Qatar to host an International Seminar under the auspices of the AALCC on the implementation of the principles of the new international law within the new international order;

...

4.3. Debt burden of developing countries

54. The Committee had before it a document entitled *Debt burden of developing countries: guidelines for re-scheduling* (Doc. No. AALCC/XXXII/KAMPALA/93/5) prepared by the Secretariat, which described the evolution, nature and extent of the external indebtedness of Asian and African countries and, having discussed various initiatives taken in international fora for dealing with the 'debt crisis', focuses on 'debt rescheduling' or modification, with the concurrence of a creditor, of the payment arrangement of an existing debt, so as to afford the debtor a measure of temporary relief. In conclusion, the document offers guidelines for re-scheduling, or an outline of the various steps to be taken by a State when rescheduling or renegotiating its debts, keeping in view, in particular, the interests of developing countries. The Committee had not, at its two immediately preceding meetings (Cairo, 1990; Islamabad, 1992) been able to discuss this item for lack of time.

55. The delegate of *Indonesia* said that any measures for alleviating the debt burden of a developing country should not only enable it to pay its debt, but also to sustain economic growth and re-vitalize the development process. He emphasized the importance of exchanges of views among the developing countries and the sharing among them of their experience in debt management. The delegate of *Uganda*, agreed that the debt re-scheduling process dealt with in the Secretariat document would offer a developing country only temporary relief, unless the underlying causes of the problem, such as stagnation of exports and increased import burdens, were fully addressed. He said that re-scheduling methods should take into account the development and investment needs of each country.

Decision

56. As discussion of the item (*Report*, p. 150–2) could not be continued for lack of time, the Committee's decision (*Report*, page 239), *inter alia*, urges member States to 'initiate necessary dialogue with other members of the international community, including various international agencies to find a durable and workable solution to the debt problem,' and directs the Secretariat to continue to update its study.

4.4 Preparation for the World Conference on Human Rights

57. The Committee had before it two documents prepared by the Secretariat: *Preparation for the World Conference on Human Rights* (Doc. No. AALCC/XXXII/KAMPALA/93/11), and *Draft Working Paper submitted by the Secretariat concerning General Principles on Human Rights* (Doc. No.

AALCC/XXXII/KAMPALA/93/11A). Other reference documents provided by delegations included: the Joint Statement of the Attorneys-General and Ministers of Justice of Eastern, Central and Southern African States on the Administration of Justice and Human Rights, issued in Nairobi in October, 1992; and the Report of the Asia-Pacific Workshop on Human Rights Issues.

58. At the commencement of its Thirty-second Session, the Committee established a Working Group consisting of the delegates of the Arab Republic of Egypt, Bangladesh, China, India, Indonesia, Iran, Japan, Kenya, Syria, Thailand and Uganda, as well as the observers from Swaziland and Zimbabwe, and requested it to prepare a draft Kampala Declaration on Human Rights for consideration by the Committee. Mr. LUCIAN TIBARUHA (Uganda) served as chairman of the Working Group.

59. Introducing the Report of the Working Group, the *Assistant Secretary-General* said that the draft Kampala Declaration on Human Rights annexed to the Report had been adopted unanimously by the Working Group, which had taken note of the position of the delegate of *Japan*, who had reservations on some of its paragraphs, but did not wish to block the adoption of the Declaration.

Decision

60. Following discussion of the Report of the Working Group (*Report*, pp. 180–7) and the incorporation of some amendments proposed by member States (*Report*, pp. 166–71), the Committee decided *inter alia* to adopt the Kampala Declaration on General Principles of Human Rights (*Report*, pp. 188–194, also reproduced in UNdoc. A/CONF.157/PC/62/Ad.), and to request the Secretary-General to submit the Declaration to the Fourth Session of the Preparatory Committee for the World Conference on Human Rights scheduled to be held in Geneva in April 1993; and to approve the AALCC's Work Programme on the item which included preparation by the Secretariat of a general assessment of the main outcome of the World Conference on Human Rights, and of additional studies on the development of international law in the field of human rights, including refugee and humanitarian law (*Report*, pp. 241–2). The Kampala Declaration on Human Rights adopted by the Committee reads as follows (pre-ambular paragraphs omitted):

'THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

...

DECLARES THAT

1. The Universal Declaration of Human Rights proclaims a common understanding of all the peoples of the world in the field of human rights and gives help, guidance and inspiration to humanity in the promotion of human rights and fundamental freedoms.

2. Since the adoption of the Universal Declaration of Human Rights, the United Nations has through the adoption of various international instruments made much

progress in defining standards for the promotion, enjoyment and protection of human rights and fundamental freedoms. It is an obligation of the members of the international community to ensure the observance of these rights and freedoms.

3. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Granting of Independence to colonial countries and peoples, the International Convention on the Elimination of All Forms of Racial Discrimination, Declaration on the Right to Development as well as other conventions, declarations, proclamations, decisions, principles and resolutions in the field of human rights adopted under the auspices of the United Nations, the specialized agencies and regional intergovernmental organizations, have created new standards and obligations to which all countries should conform.

4. All States that have not yet ratified or acceded to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other international human rights conventions should make very effort to do so.

5. It is the obligation of all members of the international community to ensure that the principles enshrined in the Charter of the United Nations and in other international human rights instruments are enforced. All Governments, organizations and peoples should promote the universal respect and observance of human rights.

6. Peace and security are not only Human Rights in themselves but are also a necessary prerequisite for the full realization of all other inalienable and indivisible human rights. Efforts should be made to save present and future generations from the scourge of wars and armed conflicts, and to maintain international peace and security in accordance with the Charter of the United Nations.

7. The validity and universality of human rights, whether civil, political, economic, social or cultural is indispensable and these rights must be protected, upheld and promoted by all. To this end, all governments have a special duty to ensure that the constitutions and laws of their States that relate to human rights are in compliance with international human rights standards and are observed and respected.

8. The right to development is an inalienable human right. The vital importance of economic and social development to the full enjoyment of human rights, should be further recognized and underscored. It is undoubted that the existence of widespread poverty is a main reason resulting in the insufficient enjoyment of human rights by the majority of humanity. Therefore, all States should cooperate in the essential task of eradicating poverty as an indispensable requirement for universal realization of human rights.

9. Sustainable Development and the Environment are intrinsically linked and should not be considered in isolation from each other. Sustainable Development cannot be merely an abstract concept and should be promoted and strengthened through the process of social and economic development. The human right to a clean and salubrious environment requires to be progressively developed and codified.

10. The principle of the indivisibility and interdependence of human rights has been recognized and must be given effect in policy formulation and implementation. Civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and the satisfaction of economic, social and cultural rights are a guarantee for the enjoyment of civil and political rights. None of these rights should be given precedence over the others.

11. The primary responsibility for implementing and giving effect to human rights is at the national level. Consequently, the most effective system or method of promoting and protecting these rights has to take into account the nation's history, culture, traditions, norms and values. There is no single universally valid prescription model or system. Whilst the international community should be concerned about the observance of these rights, it should not seek to impose or influence the adoption of their criteria and systems on developing countries. It should be sensitive to the unique aspects of each situation and establish impartiality and genuine concern on human rights problems by objective and acceptable factual analysis of events and situations.
12. The promotion and protection of the rights of vulnerable groups such as women, children, refugees, disabled, migrant workers and minorities should be given special attention and priority.
13. The international community should devise effective action plans and concrete measures to overcome the current obstacles to the full realization of human rights, namely, threat to peace and security, foreign aggression and occupation, colonization, racism, racial discrimination, apartheid, terrorism, xenophobia, ethnic and religious intolerance and human rights abuse thereof, denial of justice, torture, unfair and unjust international economic order, widespread poverty and illiteracy, worsening economic situation of developing countries and heavy burden of external debts.
14. The rule of law and the administration of justice in every country shall be inspired by the principles enshrined in the Universal Declaration of Human Rights and other international human rights instruments relating to the administration of justice.
15. The international community recognizes the importance of the rule of law, the independence of the judiciary and the administration of justice in the development process. To this end, governments, regional and international financial institutions and the donor community are called upon to give necessary financial resources and assistance to enable those entrusted with the administration of justice to carry out their tasks.
16. The international community affirms that training, equipment and incentives be provided to those State agencies involved in the administration of justice within the developing countries on the basis of their need and request. To this end, governments, regional and international financial institutions and the donor community are urged to give the necessary resources.
17. The international community calls upon States to ensure that law enforcement Officials shall in the performance of their duties respect and protect human dignity and maintain and uphold human rights of all persons in accordance with international standards enshrined in the Universal Declaration of Human Rights and international human rights instruments regarding arrest, prosecution, detention, imprisonment, protection against torture, cruel, inhuman or degrading treatment or punishment.
18. Cooperation between national, regional and international organizations in the field of human rights should be encouraged by all peoples of the world.
19. Non-governmental organizations in the field of human rights have an important role in the promotion of human rights. Their ideals and activities could be mobilized into the process of universal realization of human rights.
20. The public awareness and concerns of human rights should be enhanced. Citizens should have appropriate access to information concerning their rights, and opportunity to participate in decision-making process. States should encourage and facilitate the public awareness and participation.

21. The United Nations system in the field of human rights is urged to use existing mechanisms and resources effectively and efficiently. The improvement of existing institutional mechanisms and the enhancement of their better cooperation and coordination should be undertaken. All the members of the international community are called upon to contribute additional financial and other resources for human rights activities.'

4.5. Trade Law Matters

61. The Committee had before it the following documents prepared by the Secretariat: *Progress Report covering the legislative activities of the United Nations and other international organizations concerned with International Trade Law* (Doc. No. AALCC/XXXII/KAMPALA/93/12) covering the work of the UN Commission on International Trade Law (UNCITRAL) at its Twenty-fifth Session (4–22 May 1992); the work programme approved by the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) at its 71st Session (22–24 June 1992); the current legislative programme of the UN Conference on Trade and Development (UNCTAD); the current programme and activities of the UN Industrial Development Organization (UNIDO); and subjects currently under study by the Hague Conference on Private International Law. *Legal issues involved in the matter of privatization of State-owned enterprises* (Doc. No. AALCC/XXXII/KAMPALA/93/13) containing a revised preliminary study, which adds materials supplied by Kuwait and Turkey; and *Progress Report on AALCC's Centres for Arbitration* (Doc. No. AALCC/XXXII/KAMPALA/93/14) which covers the work of arbitration centres established at Kuala Lumpur (1978), Cairo (1979) and Nigeria (1989), and foresees the establishment of additional centres, including one at Tehran.

62. The Sub-Committee on International Trade Law Matters, which convened under the chairmanship of Mr. MIRZA ASADUZZAMAN AL-FAROUQUI (Bangladesh) to consider these documents and report thereon to the Committee, was able to discuss only the 'Progress Report covering the legislative activities of the United Nations, etc.' in view of the delegations' preoccupation with important institutional issues and the consequent limitation of time available for the work of the Sub-Committee. The Report of the Sub-Committee is on pages 173–9 of the *Report*.

Decisions

63. The Committee, after consideration of the Report of the Sub-Committee on International Trade Law Matters, decided unanimously to adopt it (*Report*, page 171).

After discussion of the relevant documents (*Report*, p. 97–9), the Committee adopted a decision commending progress made in the activities of AALCC's regional arbitration centres (*Report*, p. 195–215, 218) and resolutions recommending that member States consider ratifying or acceding to the UN Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) (*Report*, page 219); and that member States give due consideration to the UNCITRAL Model Law on International Commercial Arbitration (*Report*, page 220).

64. Following discussion (*Report*, p. 150–1) of the study entitled *Legal issues involved in the matter of privatization of State-owned enterprises*, the Committee adopted a decision which *inter alia* urges all member States and Observer Delegations to make available to the Secretariat information relating to their privatization plans or programmes (*Report*, page 240).

65. A decision of the Committee (*Report*, page 243) notes the establishment on 1 February 1992, following an initiative of the Republic of Korea, of AALCC's Data Collection Unit, and *inter alia*, urges all member States to furnish to it information and materials in the official language of AALCC, "including copies of bilateral or multilateral agreements concluded, ratified or acceded to by them in the fields of international trade and economic relations, as well as legislation enacting such agreements in the national domain."

UNITED NATIONS ACTIVITIES WITH SPECIAL RELEVANCE TO ASIA

Lee Shih-Guang*

1. UN MEMBERSHIP

1.1 New Members

In 1992, the following new member States joined the United Nations:

Armenia (2 March 1992); Azerbaijan (2 March 1992); Croatia (22 May 1992); Georgia (31 July (1992); Kazakhstan (2 March 1992); Kyrgyz Republic (2 March 1992); Republic of Moldova (2 March 1992); Slovenia (22 May 1992); Tajikistan (2 March 1992); Turkmenistan (2 March 1992); Uzbekistan (2 March 1992);

bringing the total membership to 174.

1.2. The Case of Yugoslavia (Serbia and Montenegro)

On 19 September 1992, the Security Council adopted Resolution 777 (1992) in which it considered that the State formally known as the Socialist Federal Republic of Yugoslavia had ceased to exist, and noted that

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"the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro), to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted."

The Security Council considered that the "Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the Socialist Federal Republic of Yugoslavia in the United Nations" and therefore recommended to the General Assembly that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that "it shall not participate in the work of the General Assembly"[1]

The General Assembly, by its Resolution 47/1 entitled *Recommendation of the Security Council of 19 September 1992* accepted the recommendation of the Security Council of 19 September 1992.[2]

In a letter dated 25 September 1992 from the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations addressed to the Secretary-General (A/47/474), the Permanent Representatives raised a number of questions regarding the meaning of Resolution 47/1 and requested the Secretary-General to provide a "legal explanatory statement concerning the questions raised". In response to that request, the Secretary-General issued a note (A/47/485) clarifying the following points:

(1) General Assembly 47/1 dealt with a membership issue which was not foreseen in the Charter of the United Nations, namely, the consequence, for purposes of membership in the United Nations, of the disintegration of a member State on which there was no agreement among the immediate successors of that State or among the membership of the Organization at large.

(2) Resolution 47/1 was not adopted pursuant to Article 5 (suspension of the membership) nor under Article 6 (Expulsion). The Resolution made no reference either to those Articles or to the criteria contained in those Articles.

(3) The only practical consequence stated in the resolution was that the Federal Republic of Yugoslavia (Serbia and Montenegro) "shall not participate" in the work of the General Assembly, which meant that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) could no longer participate in the work of the General

1 The resolution was adopted by 12 in favour, none against with 3 abstentions (China, India and Zimbabwe). For discussion in the Security Council, see S/PV.3116.

2 Resolution 47/1 was adopted by 127 in favour, 6 against (Kenya, Swaziland, United Republic of Tanzania, Yugoslavia, Zambia and Zimbabwe) with 26 abstentions. For views expressed on this question, see A/47/PV.7

Assembly, its subsidiary organs, nor conferences and meetings convened by the General Assembly.

(4) The resolution neither terminated nor suspended Yugoslavia's membership in the Organization. The seat and the nameplate remained as before, but in Assembly bodies, representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) could not sit behind the sign "Yugoslavia".

(5) Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat would continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat.

(6) The resolution did not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies.

(7) The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter would terminate the situation created by General Assembly Resolution 47/1.

2. LAW OF THE SEA

As of 11 December 1992, 53 States have ratified or acceded to the 1992 United Nations Convention on the Law of the Sea of which 11 are Asian States: Bahrain, Fiji, Cyprus, Indonesia, Iraq, Kuwait, Marshall Islands, Micronesia, Philippines and Yemen.

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 1991 United Nations Convention on the Law of the Sea continued in 1992. During the 1992 consultations, it was decided that environmental considerations were no longer considered a controversial issue in the deep seabed mining context, and they were dropped from the list of identified problem areas. The Secretary-General intended to continue his initiative and convene more sessions in 1993.

3. ESTABLISHMENT OF A NUCLEAR WEAPON FREE ZONE IN SOUTH ASIA

As in previous years, the General Assembly adopted a resolution entitled

Establishment of a Nuclear Weapon Free Zone in South Asia.[3] The Secretary-General submitted a report on this question.[4] The General Assembly reaffirmed its endorsement in principle of the concept of a nuclear weapon free zone, urged once again the States of South Asia to continue to make all possible efforts to establish a nuclear weapon free zone in South Asia and to refrain in the meantime from any action contrary to that objective; called upon the nuclear weapon States that have not done so to respond positively to this proposal and to extend the necessary cooperation in the effort to establish such a zone.

4. TREATY OF AMITY AND COOPERATION IN SOUTHEAST ASIA: CLOSER RELATIONSHIPS BETWEEN THE UN AND REGIONAL ASSOCIATIONS

The Treaty of Amity and Cooperation in Southeast Asia[5] is now in force in respect of Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei Darussalam, Papua New Guinea, Vietnam and Laos. The purpose of the Treaty is to promote perpetual peace, ever-lasting amity and cooperation among the peoples of Southeast Asia in accordance with the principles of the Charter of the United Nations including, *inter alia*, mutual respect for the independence, sovereignty and the territorial integrity of all nations, non-interference in the internal affairs of all nations, peaceful settlement of differences and disputes, and renunciation of the threat or use of force. The Treaty also includes provisions for the peaceful settlement of disputes.

The General Assembly[6] recognized that the 1976 Treaty provided a strong foundation for regional confidence building and for regional cooperation and that it was consistent with the call by the Secretary-General of the United Nations in his report "An Agenda for Peace" for a closer relationship between the United Nations and regional associations; thus endorsed the purposes and principles of the Treaty and its provisions for the pacific settlement of regional disputes and for regional cooperation in order to achieve peace, amity and friendship among the peoples of Southeast Asia.[7]

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3 Resolution 47/49 was adopted by 144 in favour, 3 against (Bhutan, India and Mauritius) with 13 abstentions (which include Cyprus, Indonesia, Lao People's Democratic Republic, Myanmar, Republic of Korea, Seychelles, Viet Nam and Yemen).

4 A/47/304.

5 Bali, 24 February 1976, entered into force 15 July 1976.

6 Resolution 47/533 of 9 December 1992.

7 A/47/277—S/24 111.

5. ENVIRONMENTAL CONSEQUENCES ON KUWAIT[8]

The Secretary-General submitted to the Security Council a report describing the nature and extent of environmental damage suffered by Kuwait as a result of Iraq's invasion.[9]

The General Assembly[10] took note of the disastrous situation caused in Kuwait and neighbouring areas by the burning and destruction of hundreds of its oil wells and by the other environmental consequences on the atmosphere, land and marine life; expressed concern at the degradation of the environment as a consequence of the damage, the adverse impact on the economic activities of Kuwait and other countries of the region including the effects on livestock, agriculture and fishing as well as on wildlife; appealed to all States members of the United Nations, inter-governmental and non-governmental organizations, scientific bodies and individuals to provide assistance for programmes aimed at the study and mitigation of the environmental degradation of the region, and at strengthening the regional organization for the protection of the marine environment and its role in coordinating the implementation of those programmes. The resolution was adopted by 159 in favour, none against and 2 abstentions (Iraq and Sudan).

6. CONFERENCE ON STRADDLING AND HIGHLY MIGRATORY FISHSTOCKS

The General Assembly by its Resolution 47/192 decided to convene in 1993 an inter-governmental conference under United Nations auspices on straddling and highly migratory fishstocks. The conference should take into account relevant activities at the sub-regional, regional and global levels with a view to promoting effective implementation of the provisions of the United Nations Convention on the Law of the Sea on straddling fishstocks and highly migratory fishstocks.

The work and results of the conference should be fully consistent with the provisions of the United Nations Convention on the Law of the Sea, in particular the rights and obligations of coastal States and States fishing on the high seas. States should give full effect to the high seas provisions of the 1982 Convention with regard to fisheries populations whose ranges lie both within

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8 Forming part of Asia in UN practice.

9 S/22535 and Corr.1 and 2, Annexes.

10 GA resolution 47/151 entitled "International Cooperation to Mitigate the Environmental Consequences on Kuwait and other Countries in the Region resulting from the Situation between Iraq and Kuwait", adopted on 18 December 1992.

and beyond the exclusive economic zones (straddling fishstocks and highly migratory fishstocks).

According to FAO statistics, China, Japan, Republic of Korea and Indonesia are among the countries which led in distant-water fishing.

7.DRUG ABUSE AND ILLICIT TRAFFICKING

The General Assembly[11] affirmed that the fight against drug abuse and illicit trafficking should continue to be based on strict respect for the principles enshrined in the UN Charter and in international law, particularly, the respect for sovereignty and territorial integrity of States, and the non-use of force or the threat of force in international relations; called upon all States to intensify their actions to promote effective cooperation in the effort to combat drug abuse and illicit trafficking so as to contribute to a climate conducive to achieving that end and to refrain from using the issue for political purposes.

The General Assembly also reaffirmed that the international fight against drug trafficking should not in any way justify violation of the principles enshrined in the Charter of the United Nations 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.[12]

8. PROTECTION OF PERSONS FROM ENFORCED DISAPPEARANCE

On 18 December 1992, the Assembly adopted the Declaration on the Protection of all Persons from Enforced Disappearance.[13] The Assembly was deeply concerned that in many countries, often in a persistent manner, enforced disappearance occurs.[14] The Declaration on the Protection of all

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11 Resolution 47/98, and the Secretary-General's report A/47/710. For discussion on this report, see A/47/PV.89.

12 Ibid.

13 General Assembly Resolution 47/133 which was adopted without a vote at its 92nd meeting (for a report thereon, see A/47/678/Add.2).

14 The term enforced disappearance is meant to include persons who are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of government or by organized groups or private individuals acting on behalf of or with the support, direct or indirect, consent, or acquiescence of a government followed by a refusal to disclose the fate or whereabouts of the person or persons concerned or a refusal to acknowledge the deprivation of their liberty thereby placing such persons outside the protection of the law.

Persons from Enforced Disappearances was proclaimed as a body of principles for all States to be generally known and respected.

9. DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL, ETHNIC RELIGIOUS AND LINGUISTIC MINORITIES

On 18 December 1992, the General Assembly adopted the above-mentioned Declaration.[15] It stressed the need to ensure for all without discrimination of any kind, full enjoyment and exercise of human rights and fundamental freedoms; invited the relevant organs and bodies of the United Nations including treaty bodies and representatives of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to give due regard to the Declaration within their mandates.

10. THE SITUATION IN AFGHANISTAN

The General Assembly,[16] *inter alia*, urged all the Afghan parties to respect accepted humanitarian rules as set out in the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 1977, to halt the use of weapons against the civilian population, to protect all prisoners from acts of reprisal and violence (including ill treatment, torture and summary executions), to transmit to the ICRC the names of all prisoners, to expedite the exchange of prisoners whenever they may be held, and to grant to the Committee unrestricted access to all parts of the country and the right to visit all prisoners in accordance with its established criteria. It called upon the authorities in Afghanistan to investigate thoroughly the fate of those persons who have disappeared, to apply amnesty decrees equally to all detainees, to reduce the period during which prisoners await trial, to treat all prisoners especially those awaiting trial or those in custody in juvenile rehabilitation centres in accordance with the Standard Minimum Rules for Treatment of Prisoners adopted by the United Nations in 1977.

The Assembly expressed its concern at reports that the living conditions of refugees especially those of women and children were becoming increasingly difficult because of the decline in international humanitarian assistance; urged all Afghan parties to undertake all necessary measures to ensure the safety of

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15 General Assembly Resolution 47/135. See also report of and note by the Secretary-General: A/47/678 and Add. 1 and 2, and A/47/501.

16 GA Resolution 47/141 (adopted on 18 December 1992 without a vote).

the personnel of humanitarian organizations involved in the implementation of the United Nations humanitarian and economic assistance programmes relating the Afghanistan and the programme of the United Nations High Commissioner for Refugees.[17]

The UN Commission on Human Rights appointed a Special Rapporteur on the situation of human rights in Afghanistan, who prepared a report[18] on that subject.

11. THE SITUATION IN MYANMAR

The UN Commission on Human Rights in 1992 nominated a Special Rapporteur to establish direct contact with the government and the people of Myanmar with a view to examining the situation of human rights therein and following any progress made towards the transfer of power to civilian government and the drafting of a new constitution, the lifting of restrictions on personal freedoms and the restoration of human rights in Myanmar. The Special Rapporteur submitted a preliminary report in 1992.[19]

The General Assembly,[20] *inter alia*, noted the measures taken by the Government of Myanmar, including its accession to the Geneva Conventions of 1949 on the Protection of Victims of War, the release of a number of political prisoners, the lifting of the curfew, the revocation of certain martial laws, and the reopening of the universities in response to the concerns expressed by the international community, including the General Assembly and the Commission on Human Rights; called upon the Government of Myanmar to extend its full and unreserved cooperation to the Special Rapporteur and to ensure that he has free access to any person in Myanmar whom he deems appropriate to meet for the conduct of his mandate; urged the Government of Myanmar to take every appropriate measure to allow all citizens to participate freely in the political process in accordance with the principles of the Universal Declaration of Human Rights and to accelerate the process of transition to democracy, in particular, through the transfer of power to the democratically elected; urged the Government to ensure full respect for human rights and fundamental freedoms and the protection of the rights of persons belonging to ethnic and religious minorities; expressed deep regrets about the fact that many political leaders were still deprived of their freedom and their fundamental rights; called upon Myanmar to release unconditionally the Nobel Peace Laureate AUNG SAN SUUKYI who was in her fourth year of

17 Ibid.
18 A/47/656, Annex.
19 A/47/651, Annex.
20 GA Resolution 47/144 (adopted on 18 December 1992 without a vote).

detention without trial, and other political leaders and the remaining political prisoners; called upon the Government to respect fully the obligations of the Geneva Conventions of 1949 in particular the obligations in common Article 3 and to make use of such services as may be offered by impartial humanitarian bodies.

12. HUMAN RIGHTS IN IRAQ[21]

Subsequent to its Resolution 1991/74 of 6 March 1991, requesting its Chairman to appoint a Special Rapporteur to make a thorough study of the violations of human rights by the Government of Iraq,[22] the UN Commission on Human Rights[23]condemned the flagrant violations of human rights by the Government of Iraq and requested the Special Rapporteur to visit again the northern area of Iraq and to submit reports to the General Assembly and the Commission.

The General Assembly[24] expressed its strong condemnation of the massive violation of human rights of the gravest nature for which the Government of Iraq was responsible and to which the Special Rapporteur referred in his reports, in particular,

(a) summary and arbitrary executions, orchestrated mass executions and burials, extra-judicial killings, including political killings, in particular in the northern region of Iraq, in southern Shiite centres and in the southern marshes;
(b) the widespread routine practice of systematic torture in its most cruel forms, including the torture of children;
(c) enforced or involuntary disappearances routinely practised; arbitrary arrest and detention, including of women and children, and consistent and routine failure to respect due process under rule of law;
(d) suppression of freedom of thought, expression and association, and violations of property rights.

The Assembly, *inter alia*, deplored Iraq's refusal to cooperate in the implementation of Security Council Resolution 706 (1991) and 712 (1991) and its failure to provide the Iraqi population with access to adequate food and health care; called upon Iraq as a State party to the International Covenant on Economic, Social and Cultural Rights as well as to the International Covenant on Civil and Political Rights to abide by its freely undertaken obligations under

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21 Forming part of Asia in UN practice.

22 See also Resolution 688(1991) of 5 April 1991 of the Security Council.

23 Resolution 1992/71

24 Resolution 47/145, adopted on 2 December 1992 by a recorded vote of 126 in favour, 2 against (Iraq and Sudan) with 26 abstentions.

the Covenants and other international instruments on human rights and particularly to respect and ensure the rights of all individuals irrespective of their origin within its territory and subject to its jurisdiction; welcomed the Special Rapporteur's proposal for a system of human rights monitors to constitute an independent and reliable source of information and invited the Commission on Human Rights to follow up this proposal at its 49th session in 1993; expressed special alarm at the repressive policies and practices directed against the Kurds and at the resurgence of grave violence of human rights against Shiite communities especially in southern Iraq.[25]

13. HUMAN RIGHTS IN IRAN

The Sub-Commission on Prevention of Discrimination and Protection of Minorities in its Resolution 1992/15 condemned the continuing grave violations of human rights in Iran.

After the Government of Iran allowed the Special Representative of the Commission on Human Rights to visit that country three times, the Government discontinued its cooperation and did not reply to allegations of human rights violations transmitted to it by the Special Representative.[26]

The General Assembly[27] expressed its concern at the main criticisms of the Special Representative of the human rights situation in Iran, namely: the high number of executions, the practice of torture, the standard of the administration of justice, the absence of guarantees of due legal process, the treatment of the Bahai community and the restrictions of the freedom of expression, thought, opinion and press; called upon the Government to intensify its efforts to investigate and rectify the human rights issues raised by the Special Representative in his observations, in particular, as regards the administration of justice and due process of law; called upon Iran to comply with international instruments of human rights, in particular, the International Covenant on Civil and Political Rights to which Iran is a party, and to ensure that all individuals within its territory and subject to its jurisdiction including religious groups enjoy the rights recognized in these instruments.

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25 Ibid.

26 Report of the Special Representative, A/47/617, Annex.

27 Resolution 47/146 entitled *Situation of Human Rights in the Islamic Republic of Iran*, which was adopted on 18 December 1992 by recorded vote of 86 in favour, 16 against with 38 abstentions. The countries who abstained include Afghanistan, Bangladesh, China, Democratic People's Republic of Korea, Indonesia, Iran, Laos, Malaysia, Myanmar, Pakistan, Sri Lanka, Syria and Vietnam.

14. NON-SELF-GOVERNING TERRITORIES[28]

14.1 American Samoa

The General Assembly[29] welcomed the establishment of a new political status and constitutional review commission, created under Executive Order by the Governor in August 1992; called upon the Administrative Power to continue to promote the economic and social development of the territory in order to reduce its heavy economic and financial dependence on the United States of America; urged the Administrative Power to continue to support measures by the Territorial Government aimed at promoting the diversification of the economy and the development of the existing industries, particularly commercial fishing and tourism.

14.2 Guam

The General Assembly[30] again called upon the Administering Power to continue to ensure that the presence of military bases and installations in the Territory should not constitute an obstacle to the implementation of independence in conformity with the purposes and principles of the Charter; called upon the Administering Power to continue to expedite the transfer of land to the people of the Territory and to take the necessary steps to safeguard their property rights.

Discussions held between the Government of the United States and the Guam Commission on self-determination had resulted in qualified agreements on the provisions of the Guam Commonwealth Act, including agreement to disagree on several substantive portions of the Guam Proposal which were forwarded to the Congress of the United States for consideration. The Administering Power was urged to continue to support appropriate measures by the Territory Government aimed at promoting growth in commercial fishing and agriculture.

14.3 Tokelau

The General Assembly[31] once again encouraged the Government of New

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28 Covering territories that form part of Asia in UN practice.
29 Resolution 47/271.
30 Resolution 47/27 VI.
31 Resolution 47/27 VIII.

Zealand (the Administering Power) to continue to respect the wishes of the people of Tokelau in carrying out the political and economic development of the Territory in such a way as to preserve their social, cultural and traditional heritage; called upon New Zealand in consultation with the General Fono (Council) to continue to expand its development assistance to Tokelau in order to promote the economic and social development of the Territory; took note that the plan to transfer the Office for Tokelau Affairs from Apia to Tokelau was being pursued within the context of the exploration of ways of achieving greater political and administrative autonomy; and invited the Administering Power to continue to provide maximum assistance in this regard; invited all governmental and non-governmental organizations, financial institutions, member States and organizations of the United Nations system to grant or to continue to grant to Tokelau special emergency economic assistance to mitigate the effects of cyclonic storms and to enable the Territory to meet its medium- and long-term reconstruction and rehabilitation requirements and to address the issues of changes in climatic patterns.

15. UNITED NATIONS DECADE OF INTERNATIONAL LAW

The General Assembly adopted in December 1992 the programme for the activities to be commenced during the second term 1993–1994 of the United Nations Decade of International Law, which was attached to General Assembly Resolution 47/32 entitled "United Nations Decade of International Law". The programme is substantially identical to its programme for the first term 1991–1992. The Assembly invited all States and all international organizations and institutions referred to in the programme to undertake the relevant activities outlined therein and as appropriate, to submit to the Secretary-General interim or final reports for transmission to the General Assembly at its 48th Session or at the latest its 49th Session.

16. THE INTERNATIONAL LAW COMMISSION

Chapter II of the Report of the International Law Commission on the work of its forty-fourth session (1992)[32] entitled Draft Code of Crimes Against the Peace and Security of Mankind was devoted to the question of the possible establishment of international criminal jurisdiction. The General Assembly, by its Resolution 47/33, requested the Commission to undertake the project for

32 GAOR Forty-seventh session, suppl. No. 10 (A/47/10).

the elaboration of a draft statute for an International Criminal Court as a matter of priority as from its next session, beginning with the examination of the issues identified in the Report of the Working Group concerned and in the debate in the Sixth Committee, with a view to drafting a statute on the basis of the Report of the Working Group and taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States and to submit a Progress Report to the General Assembly at its 48th Session (1993).

The General Assembly endorsed the decision of the Commission not to pursue further, during the present term of office of its members, the consideration of the second part of the topic *Relations between States and the International Organizations.*

17. INTERNATIONAL TRADE LAW

The Trade Law Commission adopted the UN Commission on International Trade Law (UNCITRAL) Model Law on International Credit Transfers and also adopted the Legal Guide on International Counter-Trade Transactions.[33]

18. PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT

The Secretary-General submitted a Report (A/47/328) pursuant to General Assembly Decision 46/417 of 9 December 1991 which was taken in response to the request of Jordan at the forty-fifth Session, proposing an item entitled Exploitation of the Environment as a Weapon in Times of Armed Conflict and the Taking of Measures to Prevent Such Exploitation.

The item was subsequently assigned to the Sixth Committee and retitled *Protection of the Environment in Times of Armed Conflict.* After deliberation in the Sixth Committee, the General Assembly adopted Resolution 47/36 on 25 November 1992 without a vote (see report A/47/590). It urged States to take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict and appealed to all States that had not yet done so to consider becoming parties to the relevant international Conventions; urged States to take steps to incorporate the provisions of international law applicable to the protection of the environment into their military manuals and to ensure that they were effectively

33 These texts were annexed to the report of the Commission, GAOR Forty-Seventh Session, Suppl. No. 17 (A/47/17).

disseminated; welcomed the activities of the International Committee of the Red Cross in this field and its readiness to prepare a handbook of model guidelines for military manuals; requested the Secretary-General to invite the ICRC to report on activities undertaken by it and other relevant bodies in that field.

19. THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON STRENGTHENING OF THE ROLE OF THE ORGANIZATION

The General Assembly requested the Special Committee at its session in 1993, first, to accord priority to the question of the maintenance of international peace and security in all its aspects in order to strengthen the role of the UN and, in this connection, to continue its consideration of the proposal on the enhancement of cooperation between the UN and regional organizations, and of the proposal on the implementation of the provisions of the UN Charter related to the assistance to third States affected by the application of sanctions under Chapter VII of the Charter; and to consider other specific proposals relevant in this field. Second, to continue its work on the question of the peaceful settlement of disputes between States and in this connection, to consider the proposal on UN rules for the conciliation of disputes between States, and other specific proposals related thereto. Third, to consider various proposals with the aim of strengthening the role of the organization and enhancing its effectiveness.

The Assembly also requested the Special Committee to be mindful of the importance of reaching general agreement whenever that has significance for the outcome of its work.

As from its 1993 session, the Special Committee is to accept the participation of observers of UN member States in its meetings and its working groups, and to invite other States or inter-governmental organizations to participate in the debate in plenary meeting of the Committee on specific items where the Committee considers that such participation would assist in its work.

ASEAN ACTIVITIES WITH RESPECT TO THE ENVIRONMENT*

SOMPONG SUCHARITKUL**

INTRODUCTION

The Association of South East Asian Nations (ASEAN)[1] currently comprises six members: Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand.[2] Having celebrated its twenty-fifth anniversary in the summer of 1992, ASEAN looks to the future with confidence, expanding its relations with countries within[3] and outside[4] the region.

By 1992, some 20 years had elapsed since the international community began its efforts to develop and codify international law concerning protection of the environment. Since the UN Conference on the Human Environment convened at Stockholm from 5–16 June 1972,[5] according to one source, some 200 documents containing resolutions, guidelines, principles, decisions and recommendations have been prepared by international organizations of

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1 For a general introduction to ASEAN, see SOMPONG SUCHARITKUL, "ASEAN Society, a Dynamic Experiment for South East Asian Regional Cooperation", 1 AsYIL (1991) 113–148.

2 For basic texts, see *ASEAN Documents Series 1967–1988* (third edition, ASEAN Secretariat, Jakarta, ISBN 979–8080–0107, hereafter: Doc. Ser.) p. 45.

3 Papua New Guinea has regularly attended the annual ASEAN Ministerial Meetings since 1980, and in 1992 Vietnam and Laos acceded to the ASEAN Treaty of Amity and Cooperation in South East Asia of 24 February, 1976, Doc. Ser. 39–44.

4 As to ASEAN cooperation with Australia, Canada, the EEC, Japan, New Zealand and USA, see SUCHARITKUL, loc. cit. n. 1 at pp. 141–147.

5 The Declaration of the UN Conference on the Human Environment, Stockholm, 5 June 1972, was adopted at its 21st plenary meeting on 16 June 1972, see *Basic Documents of International Environmental Law* (Vol. 1, 1992, ed. HARALD HOHMANN No. 1) (hereafter Basic Docs.).

Asian Yearbook of International Law, Volume 3 (Ko Swan Sik *et al.*, eds.; 0-7923-2708-X; © 1994 Kluwer Academic Publishers; printed in Great Britain), pp. 317–338

universal (e.g. UN, UNEP, ILC) or regional (e.g. ASEAN, OAU, EEC) character, or by learned societies (e.g. Institut de Droit International, International Law Association) and, in some instances, have led to the conclusion of international conventions on environmental law.[6]

While ASEAN nations or their experts have participated actively in the preparation of such documents, and thus contributed to the norm-creating process aimed at protection and preservation of the global environment, their principal aim has been to ensure the safety and welfare of their inhabitants through environmental measures at the regional level. The following deals mainly, but not exclusively, with such measures.

1. INTERNATIONAL PROTECTION OF THE ENVIRONMENT OF THE ASEAN REGION

1.1 The Manila Declaration on the ASEAN Environment, Manila, 30 April 1981[7] and its Sequence

The ASEAN Ministers of Environment meeting in Manila, adopted a Declaration on the ASEAN Environment, to which was annexed the ASEAN Environmental Programme (ASEP), prepared with the support of UNEP and other international organizations. The Programme deals with the following areas:[8]

(a) Environmental Management including Environmental Impact Assessment;
(b) Nature Conservation and Terrestrial Ecosystems;
(c) Marine Environment;
(d) Industry and Environment;
(e) Environmental Education and Training; and
(f) Environmental Information.

1.1.1 The Objective of ASEP

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6 See Basic Docs. Vols. I, II and III. Larger collections of international environmental law documents include *International Protection of the Environment, Treaties and Related Documents* (Dobbs Ferry, Oceana, 1990), 30 volumes and Index and three additional loose-leaf volumes.

7 Doc. Ser., pp. 400–401. No Press Release was issued by the First ASEAN Ministerial Meeting on the Environment, during which the Manila Declaration was adopted.

8 The Reports of the ASEAN Experts' Group meetings and the ASEAN Environmental Programme Document was annexed to the Manila Declaration in Doc. no. ASEAN/MME/4.

The Manila Declaration on the ASEAN Environment was endorsed by the Fourteenth ASEAN Ministerial Meeting in Manila on 17–18 June 1981.[9] Its overall objective as well as policy guidelines were formulated on the basis of preparatory work undertaken earlier by the ASEAN Experts' Group.[10] The objective of ASEP is to ensure the protection of the ASEAN environment and the sustainability of its natural resources, so that it can sustain continued development with the aims of eradicating poverty and attaining the highest possible quality of life for the people of the ASEAN countries.[11]

1.1.2 Policy Guidelines

Policy guidelines for the progressive implementation of projects under ASEP were adopted as follows:

(1) Foster a common awareness among the people of the ASEAN countries of the biological, physical and social environment and its vital significance for sustained development to proceed apace;
(2) Ensure, as far as possible, that environmental considerations are taken into account in development efforts, both on-going and future;
(3) Encourage the enactment and enforcement of environmental protection measures in the ASEAN countries;
(4) Foster the development of environmental educational programmes."[12]

The Second ASEAN Ministerial Meeting on the Environment was convened in Bangkok on 29–30 November 1984,[13] preceded by a meeting of ASEAN Senior Environmental Officials. Two important Declarations were adopted by the expanded ASEAN including Brunei Darussalam: the ASEAN Declaration on Heritage Parks and Reserves[14] and the Bangkok Declaration on the ASEAN Environment.[15] The ASEAN Environmental Programme II also received ministerial endorsement.[16]

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9 See the Joint Communiqué in Doc. Ser., pp. 97–104, especially para 46 on p. 102.
10 The meetings of the ASEAN Experts' Group were held in Jakarta (1978); Penang (1979); Manila (1980) and Singapore (1981).
11 See the Manila Declaration.
12 Para 1, Doc. Ser. p. 400.
13 See the Joint Communiqué of the Second Ministerial Meeting on the Environment, Bangkok, 29–30 November 1984; ibid, at pp. 402–403.
14 Ibid, at pp. 404–405.
15 Ibid., at pp. 406–408.
16 This programme is referred to as ASEP II.

1.2. ASEAN Declaration on Heritage Parks and Reserves, Bangkok, 29 November 1984

Recognizing the uniqueness, diversity and outstanding values of certain national parks and reserves of ASEAN countries, ASEAN Ministers proceeded to identify and declare the following ASEAN national heritage parks and nature reserves:[17]

(1) Brunei Darussalam: Tasek Merimbun;
(2) Indonesia: Leuser National Park, Kerinci-Seblat National Park and Lorentz Nature Reserve;
(3) Malaysia[18]: Kinabalu National Park, Mulu National Park and Taman Negara National Park;
(4) Philippines: Mount Apo National Park and Iglit-Baco National Park;
(5) Thailand: Khao Yai National Park and Kor Tarutao National Park.

The Ministers envisaged the setting up of regional conservation and management plans to prepare and implement guidelines, to undertake research on the structure and function of ecosystems and to promote education on wilderness values, with a view to maintaining ecological processes and life support systems, preserving genetic diversity, ensuring sustainable utilization of species and ecosystems, and preserving wilderness for its scenic, cultural, educational, research, recreational and touristic values.

1.3 Bangkok Declaration on the ASEAN Environment, Bangkok, 29 November 1984

The Bangkok Declaration on the ASEAN Environment[19] was another milestone in further refinement of policy guidelines to be implemented throughout the ASEAN region with respect to the following areas:

(1) *Environmental Management*: notably to develop a macro-economic *cum* environmental development plan, to strengthen the use of Environmental Impact Assessment (EIA) and extended Cost-Benefit Analysis for minimizing adverse effects, to evolve criteria for augmentation of renewable resources and economical use of non-renewable resources, and to prepare an optional land use pattern and zoning plan.
(2) *Nature Conservation*: to develop new and practical approaches for preserving forest wildlife, and other ecological systems in the face of continuing population pressure.
(3) *Marine Environment*: to develop practical methods for the management

17 Doc. Ser., operative paragraph on p. 404.
18 It is noted that Singapore has not identified a national heritage site for conservation purposes.
19 Doc. Ser. pp. 406–408.

of pollution discharges, so that economic development of coastal resources may proceed in parallel with the preservation of the quality of coastal beaches and resorts and the marine environment.

(4) *Industrial Development*: to devise practical methods for ensuring reasonable control of waste discharges from the earliest stage of project planning and, wherever practical, to adopt low waste and non-waste technology and more effective re-use and recycling of wastes in production; and to develop a toxic and hazardous waste control programme as well as suitable systems for control by government agencies and industry.

(5) *Urban Environment*: to increase efforts to provide water-borne sewage systems with central sewage treatment facilities.

(6) *Environmental Education*: to enhance public awareness of the importance of environmental protection, to provide training of personnel involved in decision-making on projects, to introduce stronger general environmental themes into school and university syllabuses, and to provide technical training for the staff of environmental protection agencies.

(7) *Environmental Information System*: to facilitate decision-making, to establish suitable data bank/storage and retrieval systems, to implement monitoring programmes for continuing surveillance of sensitive environmental resources and to promote increased use of remote sensing to establish environmental data bases.

(8) *Wider Involvement*: to promote cooperation between governments, NGOs, universities, and business communities within ASEAN in the field of environmental management.

(9) *Legislation*: to prepare legislation in support of proper management and development of the environment.

(10) *International Cooperation*: c) to promote further cooperation with developed and developing countries and international agencies for transfer of technology and sharing of experience in the management of the environment.

1.4. ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur, 9 July 1985

Following the Bangkok Declaration, the Foreign Ministers of ASEAN signed in Kuala Lumpur on 9 July 1985, the "ASEAN Agreement on the Conservation of Nature and Natural Resources",[20] the first and comprehensive instrument in a series of agreements to be concluded by ASEAN countries.

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20 Doc. Ser. pp. 409–420.

The Agreement contains eight chapters totalling 35 articles, including the final clauses.

As a fundamental principle,[21] ASEAN member countries have agreed to adopt singly as well as through concerted action, measures necessary to maintain ecological processes and life-support systems, to preserve genetic diversity and to ensure the sustainable utilization of harvested natural resources under national jurisdiction in accordance with scientific principles and with a view to attaining the goal of sustainable development. To this end, national conservation strategies shall be developed and coordinated within the framework of a collective strategy of the region. Conservation and management of natural resources are to be treated as an integral part of national development planning at all stages and levels.[22]

Chapter II provides for the conservation of species and ecosystems,[23] maintaining maximum genetic diversity by ensuring the survival of all species under national jurisdiction and control. Appropriate measures are to be adopted to conserve animal and plant species whether terrestrial, marine or fresh water, and more especially to conserve their habitats, to ensure sustainable use of harvested species and take all measures to prevent the extinction of any species or sub-species.[24] Parties also agree to take all necessary measures to ensure the conservation of the vegetation cover and, in particular, of the forest cover on lands under their national jurisdiction. Accordingly, they agree to control clearance of vegetation, prevent bush and forest fires and overgrazing, regulate mining or mineral exploration requiring rehabilitation of vegetation, reforestation and afforestation in designated forest reserves, to maintain potential for optimal sustainable yield, and avoid depletion of resource capital.[25]

Attention is drawn to measures of soil conservation, improvement and rehabilitation, taking necessary steps to prevent soil erosion and other forms of degradation, safeguarding the processes of organic decomposition and continuing fertility.[26] Appropriate measures shall also be taken towards conservation of underground and ground water resources, promoting of hydrological research to ascertain the characteristics of each watershed; control and maintenance of natural life support systems and aquatic fauna and flora.[27] Measures are to be taken to ensure air quality management compatible with sustainable development.[28]

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21 See Article 1 in Chapter I: Conservation and Development, ibid, at p. 409.
22 See Article 2, ibid, at pp. 409–410.
23 Ibid, at pp. 409–412.
24 See Articles 3, 4, 5 and 6, ibid, pp. 410–411.
25 Article 6: Vegetation Cover and Forest Resources, ibid, p. 411.
26 Article 7: Soil, ibid, pp. 411–412.
27 Article 8: Water, ibid, p. 412.
28 Article 9: Air, ibid, p. 412.

Conservation of ecological processes is provided for in Chapter III. Article 10 prescribes specific measures to prevent, reduce and control degradation of the natural environment, including sound agricultural practices and proper application of pesticides, pollution control of industrial processes and products with adequate economic or fiscal incentives.[29] Article 11 requires States to endeavour to prevent, reduce and control polluting discharges and emissions harmful to the natural ecosystem of animal and plant species.[30]

Chapter IV contains provisions relating to Land Use Planning,[31] Protected Areas[32] and Impact Assessment.[33] Chapter V provides for measures promoting scientific research,[34] education[35] and administrative machinery to implement the provisions of the Agreement.[36]

Key provisions are contained in Chapter VI on International Cooperation.[37] Cooperation and coordination of activities in the field of conservation of nature and management of natural resources are required of member States of ASEAN by way of mutual assistance and exchange of information and data on a regular basis.[38] Harmonious utilization of shared resources is mandatory, taking into account the sovereignty, rights and interests of the Parties concerned in accordance with generally accepted principles of international law.[39] The Contracting Parties accept responsibility for ensuring that activities under their jurisdiction or control do not cause damage to the environment or the natural resources of other Contracting Parties or of areas beyond the limits of national jurisdiction, by requiring environmental impact assessment before engaging in any risk-creating activity, by notifying in advance details of the planned activities and by consultation and exchange of information.[40]

Chapter VII institutionalizes international supporting measures,[41] specifying

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29 Article 10: Environmental Degradation, ibid, at p. 412.
30 Article 11: Pollution, ibid, at p. 413.
31 See Chapter IV: Environmental Planning Measures, Article 12, ibid, p. 413.
32 Article 13, ibid, pp. 413–414.
33 Article 14, ibid, p. 414.
34 See Chapter V: National Supporting Measures, Article 15, ibid, p. 415.
35 Article 16, ibid, p. 415.
36 Article 17, ibid, p. 415.
37 See Chapter IV, ibid, pp. 415–416.
38 Article 18: Cooperative Activities, ibid, pp. 415–416.
39 Article 19: Shared Resources, imposes a duty to give advance notification and to consult as well as to inform of emergency situations and sudden grave natural events generating adverse repercussions on their environment.
40 Article 20: Transfrontier Environmental Effects, ibid, p. 417.
41 Chapter VII: International Supporting Measures, ibid, pp. 417–418.

the need for periodic meetings of the Parties,[42] the establishment of a central secretariat,[43] and national focal points.[44] The last chapter contains Final Clauses.[45]

The ASEAN Agreement on the Conservation of Nature and Natural Resources is thus an example of a framework agreement pursuant to which ASEAN nations could assist each other in close cooperation and collaboration with other nations at the global as well as the regional level, and with competent international organizations and NGOs active in environmental affairs.

Actual implementation of the fundamental principles and policy guidelines enshrined in the ASEAN Agreement is left to each individual member State and is to be carried out in accordance with its national conservation strategies and legislation. Being non-self-executing, it is left to each State to act in conformity with its own processes of ratification, accession or acceptance[46]. It is the avowed intention of ASEAN nations to undertake individual and collective action for the conservation and management of the living and non-living resources on which they depend.[47]

1.5 Jakarta Resolution on Sustainable Development, Jakarta, 30 October 1987

The Third ASEAN Ministerial Meeting on the Environment (AMME III), met in Jakarta on 29–30 October 1987, and adopted the ASEAN Environment Programme III (ASEP III : 1988–1992) and the Jakarta Resolution on Sustainable Development.[48] The Resolution emphasizes the need to strengthen ASEAN regional cooperation on all matters relating to the environment. It stresses that efforts be aimed at common resources and issues that affect the well-being of the peoples of ASEAN, and that ASEAN cooperation should encompass governments and government agencies as well as the private sector, professional associations, educational and academic institutions and NGOs. Environmental considerations will be incorporated into the programme and

42 Article 21: Meeting of the Contracting Parties, ibid, pp. 417–418.
43 Article 22: Secretariat, ibid, p. 418.
44 Article 23: National Focal Points, agencies or institutions, ibid, p. 418.
45 The Final Clauses, Articles 24–35, pp. 418–420.
46 This Agreement is treated by ASEAN as a Treaty and is required to be registered in conformity with Article of 102 of the Charter.
47 See, e.g., the Preamble to the 1985 ASEAN Agreement on the Environment, Doc. Ser. pp. 409.
48 See Doc. Ser. pp. 422–423.

activities of the ASEAN committees, thereby strengthening existing institutional arrangements for regional cooperation.[49]

The Jakarta Resolution will serve as a guide and as an integrating factor in the common effort to implement the principle of sustainable development.[50] The Ministers identified as common resources and issues on which to focus ASEAN cooperative efforts[51] the following:

(a) The common seas;
(b) Land resources and land-based pollution;
(c) Tropical rain forests;
(d) Air quality; and
(e) Urban and rural pollution.

It was noted that the promotion of sustainable development would be best served by the establishment of a regional body on the environment of sufficient stature, in particular, to recommend policy guidelines for the implementation of the principle of sustainable development, to monitor the quality of the environment and natural resources, to enable the periodic compilation of ASEAN state-of-the-environment reports, and to enhance in general intra-ASEAN cooperation on all environmental matters.[52]

1.6 Kuala Lumpur Accord on Environment and Development, Kuala Lumpur, 19 June 1990

Following the Jakarta Resolution on Sustainable Development of 30 October 1987, the ASEAN Heads of Government met in Manila on 14–15 December 1987[53] and confirmed the desire that ASEAN cooperation should aim at achieving sustainable development based on sustained availability of needed natural resources, and should seek continuous improvement in the level of income, the quality of life and the environment. The ASEAN Heads of Government declared that to this end ASEAN shall systematically integrate the principle of sustainable development into all aspects of development.[54]

ASEAN has developed a practice of sharing and dividing the collective endeavours. In this connection, six Working Groups under the chairmanship of respective ASEAN member countries were established as the result of the Fourth ASEAN Ministerial Meeting on the Environment (AMME IV),

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49 See Joint Press Release of the Third Ministerial Meeting on the Environment, Jakarta, 29–30 October 1987, ibid, p. 421.

50 See operative para. I of the Jakarta Resolution, ibid, p. 422.

51 See operative para. II of the Jakarta Resolution, ibid, p. 422.

52 See operative para. IV of Jakarta Resolution, ibid, p. 422.

53 See Joint Press Statement, Meeting of the ASEAN Heads of Government, Manila, 14–15 December 1987, *ibid*, pp. 61–70.

54 Ibid, para. 47, at p. 67.

Selangor, Malaysia, 18–19 June 1990.[55] They are:

(1) ASEAN Working Group on Nature Conservation (ANC);
(2) ASEAN Working Group on ASEAN Seas and Marine Environment;
(3) ASEAN Working Group on Transboundary Pollution;
(4) ASEAN Working Group on Environmental Management;
(5) ASEAN Working Group on Environmental Economics; and
(6) ASEAN Working Group on Environmental Information.

AMME IV also created a body known as the ASEAN Senior Officials on the Environment (ASOEN),[56] adopted the Kuala Lumpur Accord on Environment and Development[57] and agreed on a common ASEAN stand on major environment issues in preparation for ASEAN's participation at future ministerial meetings such as the Conference on Environment for Asia and the Pacific 1990[58] and the United Nations Conference on Environment and Developmemt 1992.[59] The linkages of environmental concerns with the development needs of countries were stressed, and it was recognized that the future of mankind rests on an equitable sharing of duties and obligations and allocation of liabilities in global environmental efforts, taking into account existing asymmetries between developed and developing countries.[60]

The Kuala Lumpur Accord of June 19 1990,[61] also referred to the Langawi Declaration on Environment issued by the Heads of Government of the Commonwealth countries in October 1989.[62] The Accord reaffirms ASEAN's commitment to the pursuit of sustainable development, and contributes towards ASEAN's preparation for the 1992 United Nations Conference on Environment and Development. It was recognized that in the pursuit of environmental conservation and sustainable development, developing countries would have to forego some economic and developmental opportunities. Developed countries should appreciate the needs of the developing countries, assist the latter through transfer of environmentally sound technology, and contribute to appropriate funding mechanisms. ASEAN Environmental Ministers agreed on the following ASEAN common stand on environmental issues:

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55 See Joint Press Release, in: *ASEAN Documents Series 1989–1991*, Supplementary Edition (hereafter: Doc. Ser. Suppl.) pp. 50–51.

56 Joint Press Release of AMME IV, ibid, p. 50.

57 Ibid, pp. 52–53.

58 See the Bangkok ESCAP Ministerial Declaration on Environmentally Sound and Sustainable Development 1990, in: Basic Docs, doc. 38 a, Vol. 1, pp. 567–569.

59 The Earth Summit Document ibid, docs. 78 a, 78 b, pp. 1737–1804.

60 Joint Press Release, AMME IV, ibid. pp. 50–51.

61 Ibid., pp.52–53.

62 See the Joint Declaration Eighth ASEAN-EC Ministerial Meeting, Kuching, Malaysia, 16–17 February 1990, ibid, pp. 55–64, especially para. 83, pp. 63–64.

(1) On the Montreal Protocol on Substances that Deplete the Ozone Layer, the need for transfer of technology and provision of financial assistance;
(2) On the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, greater emphasis to be placed on issues relating to the responsibilities of exporting countries to re-import wastes, and on liability and compensation for damage resulting from transboundary movements and disposal of hazardous wastes;
(3) On the proposed Climate Change Convention, the need to assess the ecological and socio-economic impacts of global warming and the implications of the proposed Convention for the ASEAN region;
(4) On the Biological Diversity Convention, the need to consider issues on poverty and development as well as compensation in the proposed international legal instrument on the Conservation of Biological Diversity of the Planet.[63]

1.7. ASEAN-EC cooperation in the preservation of global environment, Kuching, 16–17 February 1990

The Eighth ASEAN-EC Ministerial Meeting in Kuching, Malaysia, 16–17 February 1990[64], marked another significant step in the integration of environmental issues into mutually beneficial cooperation between the European Community and the ASEAN countries to ensure a more integrated approach to environmental and development problems.[65] Consensus was reached as regards the need to strengthen ASEAN's ability to respond to environmental concerns which, as a major issue, should not be used to introduce a new form of conditionality in aid and development financing. The European Community Ministers agreed to consider assisting the upgrading of ASEAN's facilities, capabilities and expertise in the areas of management of natural resources and environment monitoring through technical and environmental assistance.[66]

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63 See the Joint Press Release of AMME IV, ibid, p. 51; and the Kuala Lumpur Accord of 1990, ibid, pp. 52–53.
64 See Joint Declaration of the Eighth ASEAN-EC Ministerial Meeting, Kuching, Malaysia, 16–17 February 1990, ibid, pp. 55–64.
65 See in particular, paras 77–83: Environment, ibid, pp. 63–64.
66 See paras 81–82, ibid, at p. 63.

2. SOME SPECIALIZED AREAS OF ENVIRONMENTAL PROTECTION

2.1 ASEAN Tropical Forestry

One of the common areas and issues on which ASEAN attention has been focused is the management of ASEAN tropical forestry resources. This sector embraces the forest cover of the soil, soil erosion, deforestation, flood control, rain forests and even climate change, affecting not only the land but also the water resources and the air quality. ASEAN efforts in this particular area of environmental protection are outlined below.

2.1.1 Jakarta Consensus on ASEAN Tropical Forestry, 13 August 1981

Prior to the conclusion of the 1985 ASEAN Agreement, a less formal instrument recorded the consensus reached among ASEAN Economic Ministers regarding forestry management and development within the ASEAN region.[67] A common ASEAN policy was adopted for developing the forestry sector in ASEAN countries as the basis for long-term development of that sector. This Common ASEAN Forestry Policy[68] pertains to:

(a) Conservation, Reforestation and Management of Forestry Resources;
(b) Utilization of Forest Resources: Production, Processing and Marketing;
(c) Research and Development;
(d) Education and Training.

Technical cooperation is vigorously pursued among ASEAN countries in each of the above four fields.[69] Cooperation is promoted in intra-ASEAN trade in timber and wood-based products.[70] Several models of institutions such as the Institution of Forest Management, the Timber Industry Research, Development and Training Centre and other similar institutions have been studied to implement the above areas of cooperation.[71] A common stand was agreed on international forestry issues, including technical and development cooperation, economic and trade cooperation as well as environment and wild life protection.

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67 VISU SINNADURAI (ed.) *Multilateral Treaties between ASEAN Countries*, Butterworths 1986, pp. 225–230.

68 I. ASEAN Common Forestry Policy.

69 II. Technical Cooperation, ibid, pp. 227–228.

70 III. Institutions and IV. Cooperation in Intra-ASEAN Timber Trade, ibid p. 228.

71 V. ASEAN Common Stand on International Issues on Forestry, ibid pp. 228–229.

2.1.2 Cooperation with the EC

Following the Eighth ASEAN-EC Ministerial Meeting in Kuching, on 16–17 February 1990[72] where the EC agreed to consider helping ASEAN upgrade its facilities, capabilities and expertise in the field of management of natural resources and environment monitoring, an ASEAN tropical forest mission, led by Indonesia's Forestry Minister, met European Commission officials in Brussels in October 1990. The discussion focused on sustainable forest management in the ASEAN countries. One issue covered, *inter alia*, trade in tropical timber products which some of the EC member countries want banned. The meeting agreed that ASEAN and the EC have a common interest and common responsibility in conserving and regenerating tropical forests. The European Commission proceeded to launch significant pilot projects in the ASEAN region and carried out a first identification mission in January 1991.[73]

2.1.3 Tropical Timber Agreement, Geneva, 1983

An agreement was concluded on tropical timber in Geneva in 1983,[74] establishing a framework for international cooperation between producing and consuming members in finding solutions to problems facing the tropical timber economy, recognizing the importance of tropical timber to the exports of producing members and the supply requirements of consuming members. Among the producing members are listed four ASEAN countries: Indonesia, with 139 votes; Malaysia, 20 votes; Philippines, 43 votes; and Thailand, 19 votes. Myanmar, 31 votes, Papua New Guinea, 24 votes and Vietnam, 18 votes, are also named as producing members from the region of South East Asia. The allocation of votes gives ASEAN countries 221 out of the total of 1000 votes. Among the heavier consumers of tropical timber are Japan with 330 votes; the EC, 277 votes; the United States, 79 votes; and the Republic of Korea, 56 votes. The objectives of the Agreement include the following:[75]

(1) To provide an effective framework for cooperation and consultation with regard to all relevant aspects of tropical timber economy;
(2) To promote the expansion and diversification of international trade in timber and the improvement of structural conditions in the tropical timber market;
(3) To improve forest management and wood utilization;
(4) To promote industrialization and increase export earnings;

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72 See the Joint Declaration, para. 82 ibid, p. 63.
73 See the European Community's relations with ASEAN, Europe Information 1/91
74 See Doc. No. 64a Basic Docs. Vol. III pp. 1398–1400.
75 See Article 1. Objectives, ibid, pp. 1388–1389.

(5) To develop industrial tropical timber reforestation and forest management activities;
(6) To improve marketing and distribution of tropical timber exports;
(7) To encourage sustainable utilization and conservation of tropical forests and their genetic resources, thereby maintaining the ecological balance in the regions concerned.

2.2 Marine Environmental Protection and Related Issues

2.2.1 ASEAN cooperation

ASEAN cooperation in the environmental field was initiated in 1977 when ASEP I was prepared with the assistance of the UNEP. Draft ASEP I was considered by the ASEAN Experts Group on the Environment (AEGE) in Jakarta on 18–20 December 1978. Since then, the AEGE has met regularly each year and has become a permanent body under the purview of the ASEAN Committee on Science and Technology (ASEAN COST).[76]

ASEAN cooperation in the field of marine science and marine environment is conducted through three distinct regional bodies, the Coordinating Body on the Seas of East Asia (COBSEA), the AEGE and the Working Group on Marine Science (WGMS). While AEGE and WGMS are ASEAN bodies under ASEAN COST, COBSEA is directly under the purview of the UNEP.

COBSEA was established in December 1981 by the ASEAN countries to coordinate the Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region. Progress of the Action Plan was reviewed through annual meetings in Bangkok (1982), Yogyakarta (1983), Genting Highlands (1984), Manila (1985), and Singapore (1986); the following projects were among those implemented under the Plan:

(a) Cooperative Research on Oil and Oil Dispersant Toxicity;
(b) Study on Coral Resources and the Effects of Pollutants and other Distinctive Factors on Coral Communities and Related Fisheries;
(c) Study of the Maritime Meteorological Phenomena and Oceanographic Features;

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76 See the 1981 Manila Declaration on the ASEAN Environment, *supra* n. 7.
77 See MOCHTAR KUSUMA-ATMADJA, "Regional Marine Environmental Protection in the Southeast Asian Seas," *Proceedings of SEAPOL International Conference on the Implementation of the Law of the Sea Convention*, Denpasar, 28–30 May 1990 (Bandung, 1992) pp. 52–53.
78 Ibid, pp. 56–57. The Expert Group on Marine Pollution followed closely IMCO recommendations and guidelines on marine pollution matters.

(d) Survey and Monitoring of Oil Pollution and Development of National Coordinating Mechanisms for the Management and Establishment of Regional Data Exchange System;
(e) Assessment of Concentration Levels and Trends of Non-Oil Pollutants and their Effects on the Marine Environment; and
(f) Implementation of a Technical and Scientific Support Programme for Oil Spill Contingency Plan.[77]

A UNEP-COBSEA Workshop on Cleaning Up of Urban Rivers was held in Singapore on 14–16 January 1986. Measures were recommended to solve short-and long-term urban river pollution problems in ASEAN countries.

Two ASEAN-UNDP Projects funded by UNDP Fourth Cycle deserve mention. The first, the Development of Cooperation Action Plan for Oil Pollution Combat (South China Sea) and second, Environmental Guidelines for Coastal Zones Management. A third project is entitled "The Integrated Island Ecosystems Development Approach in ASEAN Countries".

The ASEAN-US Coastal Resources Management Project (CRMP) was initiated in 1984 to develop site-specific management plans in each of the ASEAN countries. Other such projects include ASEAN-Australia Living Coastal Resources Project.

2.2.2 ASEAN Contingency Plan

ASEAN developed its own Contingency Plan for marine pollution due to oil spills occurring in the early 1970s in the Straits of Malacca and Singapore. The ASEAN Contingency Plan was drafted by the Expert Group on Marine Pollution in November 1974 and finalized at the Manila Meeting in July 1975. The Plan is designed to ensure "Control and Mitigation of Marine Pollution" with the following objectives:[78]

(a) to cater for effective reporting to alert member countries;
(b) to keep each other up-to-date on individual anti-pollution capabilities;
(c) to render mutual assistance wherever possible in anti-pollution operations.

The value of the ASEAN Contingency Plan has been put to a test since the grounding of the *Showa Maru* in the Straits of Singapore in 1975.[79] The nightmare of a catastrophic oil spillage by a transit tanker had been a matter of serious concern for many years. The ASEAN Straits States, Malaysia, Singapore and Indonesia, took the initiative of instituting a unique under-

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79 See CHIA LIN SIEN and COLLIN MACANDREWS, (eds.) *The Straits of Malacca and Singapore: Navigational, Resources and Environmental Considerations*; also in *Southeast Asian Seas: Frontiers for Development* (1981), pp. 239–263, at p. 245.

keel clearance scheme with the approval of the IMO,[80] not only for the safety of transit passage navigation but also for the environmental protection of the coastal areas. Traffic separation schemes were also introduced and enforced by the ASEAN Straits States with the endorsement of the IMO.[81] The three ASEAN Governments agreed:

i. that the safety of navigation in the Straits of Malacca and Singapore is the responsibility of the coastal States concerned;
ii. that the safety of navigation in the area depends on tripartite cooperation;
iii. that a regional body to coordinate such efforts be established, i.e., the Malacca Straits Council.

2.2.3 Protection of the marine environment through the global system and national legislation

Several treaty régimes have been established to preserve and protect the marine environment from pollution from various sources. These include:

(1) The United Nations Convention on the Law of the Sea 1982,[82] signed by all ASEAN States and already ratified by archipelagic States within the ASEAN community. Article 194 requires States to take all measures consistent with the Convention to prevent, reduce and control pollution of the marine environment from any source, in particular,
   (a) the release of toxic, harmful or noxious substances from land-based sources, from or through the atmosphere or by dumping;
   (b) pollution from vessels;
   (c) pollution from installations and devices used in exploration or exploitation of the natural resources of sea bed and subsoil;
   (d) pollution from other installations or devices in operation in the marine environment.

(2) The Convention for the Prevention of Pollution from Ships (MARPOL) 1973 as revised in 1978.[83] Tankers and sea-going vessels have been improved and are safer in operational terms. Standards and operational procedures have been greatly improved in ports and oil terminals.

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80 See MARK J. VALENCIA and ABU BAKAR JAAFAR, "Environmental Management of the Malacca/Singapore Strait: Legal and Institutional Issues." 25 *Natural Resources Journal* (1985) 195.

81 See SOMPONG SUCHARITKUL, "Thailand's Positions in the Light of the New Law of the Sea", *SEAPOL Studies* No. 3, 1991, pp. 1–36, at pp. 16–17 and 26–32.

82 Montego Bay, Jamaica, 10 December, 1982. Ratifications by Indonesia, 3 February, 1986, and by the Philippines, 8 May, 1984. Other ASEAN countries signed the Convention on 10 December, 1982, and Brunei on 5 December, 1984, upon attaining independence.

83 The Convention entered into force in 1983. Annex I Pollution by Oil; Annex II Noxious Liquid Substances. See also the 1978 Tanker Safety and Pollution Prevention Protocol (MARPOL PROT 1978).

ASEAN countries have revised and updated their national legislation to protect and preserve their respective coastal areas including coastal zone management.[84] ASEAN countries have participated in the South East Asian Programme on Ocean Law Policy and Management (SEAPOL) which include regional participants from Myanmar, Vietnam, Japan and Korea and from other distant Pacific neighbours such as Canada, the United States and Australia. Attention has been directed towards precautionary measures to prevent marine pollution from offshore hydrocarbon development.[85]

2.2.4 Protection of ASEAN marine environment: management of living resources

Apart from protection of the marine environment from pollution from various sources, ASEAN countries have been actively engaged in studies and scientific researches in fisheries management to ensure optimum utilization of the living resources of the sea in accordance with the principle of sustainable development. Thus, ASEAN experts and specialists have taken part in the various international conferences and regional workshops organized by SEAPOL relating to marine environmental protection and other issues. The Denpasar Workshop 29–30 May, 1990, devoted one entire session to the problems of national management of fishery resources.[86] A subsequent workshop, SEAPOL III, was convened in Rayong, Thailand, on 6–9 December, 1992, entitled "Challenges to Fishery Policy and Diplomacy in Southeast Asia." Wide-ranging problems have been examined from regional fishery interests, to national fishery management policies and practices in the region as well as fishery disputes and their settlement.[87]

2.3 Protection of the Air and the Atmosphere

2.3.1 Convention for the Protection of the Ozone Layer, Vienna, 1985

Practically every ASEAN member State has ratified the Vienna Convention for the Protection of the Ozone Layer 1985: Malaysia on 29 August 1989, the

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84 See, e.g., ARTHUR J. HANSON, "Coastal Zone Management in a National Planning Context: Indonesia and Thailand Compared" *SEAPOL Phuket Workshop, Thailand, 1–3 May, 1989* (1992) pp. 91–114; and in the Philippines: "Development and Perspectives", ibid, pp. 115–122.

85 See *SEAPOL Proceedings, Denpasar (Bali), Indonesia, 28–30 May, 1990*, Section VII: "Offshore Hydrocarbon Development and Marine Pollution" (1992) pp. 321–363.

86 See the Denpasar Proceedings, pp. 364–404.

87 See the Working Documents of SEAPOL III, 1992, International Workshop, Rayong, 6–9 December, 1992.

Philippines on 19 July 1991, Singapore on 5 January 1989, Thailand on 7 July 1989, and Brunei on 20 July 1990.[88] Indonesia and the Philippines signed the Montreal Protocol on Substances that Deplete the Ozone Layer which entered into force on 1 January 1989, while Thailand, Singapore and Malaysia have already ratified the Protocol.[89]

2.3.2 Draft Convention on Climate Change

Prior to the Rio Conference on Environment and Development of June 1992, the Heads of State and Government of ASEAN met in Singapore and adopted the Singapore Declaration on 28 January 1992. Paragraph 7 of the Declaration: ASEAN Functional Cooperation, contains a clear statement of ASEAN environmental policy. It runs, in part,[90]

> "The ASEAN member countries shall continue to play an active part in protecting the environment by continuing to cooperate in promoting the principle of sustainable development and integrating it into all aspects of development;
>
> ASEAN member countries should continue to enhance environmental cooperation, particularly in issues of transboundary pollution, natural disasters, forest fires and in addressing the anti-tropical timber campaign;
>
> The developed countries should commit themselves to assist developing countries by providing them new and additional financial resources as well as the transfer of, and access to environmentally sound technology on concessional and preferential terms;
>
> The developed countries should also help to maintain an international environment supportive of economic growth and development."

To these words, the ASEAN Foreign Ministers added in their Joint Communiqué of the 25th ASEAN Ministerial Meeting, Manila, 21–22 July 1992, that "Environmental and human rights concerns should not be made conditionalities in economic and development cooperation".[91]

3. THE RIO CONFERENCE AND FOLLOW-UP ACTION

The environmental policy guidelines agreed at the ASEAN Summit in

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88 Basic Docs. Vol III, No. 76, pp. 1679–1703; 1 *AsYIL* (1991) p. 187. The Convention entered into force on 22 September, 1988.

89 See Basic Docs. Vol. III, No. 76a, pp. 11704–1713; 1 *AsYIL* (1991) p. 188.

90 Singapore Declaration, para. 7.

91 See the Joint Communiqué of the 25th ASEAN Ministerial Meeting, Manila, 21–22 July, 1992, para. 18.

Singapore in 1992[92] reaffirmed the determination of ASEAN nations to continue their joint efforts to preserve and protect the global environment and attain the goals and objectives of the Rio Conference of June 3–14, 1992.[93] These policy guidelines were followed by ASEAN delegations attending the Conference and post-Rio Meetings.

While the four United Nations documents prepared for the Earth Summit in Rio have met with a substantial measure of success, much is left for further follow-up action. The Rio Declaration on Environment and Development is the counterpart of the Stockholm Declaration on Human Environment of 1972. Twenty-seven principles were adopted, of which the second principle was a revised updated version of the time-honoured Principle 21 of the Stockholm Declaration.[94] New elements were introduced at Rio, notably a statement on "precautionary approach", reference to a "right to development", assertion of an obligation to undertake "environmental impact assessments" and the desirability of a "supportive and open economic system".[95] The Framework Convention on Climate Change reflects a consensus among the parties to establish a process whereby greenhouse gas emissions can be monitored and controlled. National reports and inventories of sources and sinks of greenhouse gases are subject to review by the parties. Assistance is to be channelled through the Global Environmental Facility of the World Bank, UNDP and UNEP until the first Conference of the Parties. A subsidiary body will be set up to provide further scientific assessments and advise on advances in relevant technologies for addressing climate change and global warming.[96] The Convention on Biological Diversity provides for national monitoring of biological diversity, development of national strategies, plans and programmes for conservation measures to implement the Convention and the effectiveness of these measures. The United States Government announced that it would not sign the Convention pending clarification of certain points of concern, such as

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92 See above, Singapore Declaration, especially sub-paras 4, 5 and 6 of para. 7. Sub-para. 7 declares: "ASEAN looks forward to seeing these commitments (i.e., on the part of developed countries to provide additional financial resources...etc.) reflected in the outcome of the United Nations Conference on Environment and Development in 1992 at Rio de Janeiro."

93 The outcome of the Rio Conference of 1992 has not fulfilled the expectations of ASEAN leaders. Four documents were adopted: (1) the Rio Declaration on Environment and Development; (2) the Framework Convention on Climate Change; (3) the Convention on Biological Diversity; and (4) the Statement of Principles for a Global Consensus of the Management, Conservation and Sustainable Development of all Types of Forests. See 31 ILM, 874, 849, 818 and 881.

94 See Stockholm Declaration on the Environment and an Action Plan 1972 leading to the establishment of the UNEP with an Inter-governmental Governing Council and an Environmental Fund, UN Doc. A/CONF.48/141 Rev. 1, U.N. Publication E. II A.14 (1973); ILM (1972) 1416.

95 See Introductory Note by EDITH BROWN WEISS in 31 ILM (1992) 814 at 816; for Agenda 21 negotiations, see *ibid*, pp. 814–815.

96 Ibid, at p. 816. Global warming, if unchecked, may raise the sea level high enough to cover the entire Maldive Islands and several other low-lands.

technology transfer and intellectual property rights, biotechnology and biosafety, and the designation of a permanent financial mechanism.[97] The Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests represents the first global consensus applicable to all forests although still at this stage non-binding on the parties. It could serve as a point of departure to address a series of global problems relating to forests. The United States Government gave top priority to the item on forests and offered US$ 150 million to fund forest activities. Germany added another US$ 165 million to this fund.[98] On the whole, the Earth Summit constitutes a significant milestone in the progressive development of international environmental law.[99]

Among the earliest follow-up actions taken by the ASEAN Foreign Ministers at their Twenty-fifth Ministerial Meeting in Manila, 21–22 July 1992, was an expression of welcome for the convening of the Rio Earth Summit which they viewed "not as an end in itself but as a new beginning for a global partnership in attaining sustainable development in both developed and developing countries".[100] In this context, it is imperative that "the developed countries and the multilateral financial institutions implement the commitments made in Rio by granting new and additional financial resources and environmentally sound technologies to the developing countries".[101] The extra-territorial application of strict legal provisions requiring higher standards of protection for industrial development outside the developed world would be noted in developing countries. The ASEAN Ministers reiterated that "environment and development are mutually interrelated and mutually reinforcing. The right to development is a fundamental right of all peoples and measures for the protection of the environment should support economic growth and sustainable development".[102] The Foreign Ministers reaffirmed that "ASEAN should strengthen joint actions in countering the anti-tropical ... campaigns in the major developed countries".[103]

The ASEAN Foreign Ministers at the Manila Meeting endorsed "the Singapore Resolution on Environment and Development adopted by the Fifth Conference of ASEAN Ministers Responsible for Environment held in

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97 Ibid, at pp. 816–817.

98 Ibid, at p. 817.

99 ASEAN Leaders were not satisfied with the immediate outcome of the Rio Conference. Industrialized countries did not agree to commit 0.7 per cent of their Gross National Product to assist developing countries as suggested by the Group of 77, of which ASEAN countries form an integral part.

100 See the Joint Communiqué of the twenty-fifth ASEAN Ministerial Meeting, Manila, 21–22 July 1992, para. 37.

101 Ibid, *in fine*.

102 Ibid, para. 36.

103 Ibid, *in fine*.

Singapore on 17–18 February 1992, which sets the directions for ASEAN to enhance its on-going and future cooperations on environment and development".[104] They maintained that "environmental and human rights concerns should not be made conditionalities in economic and development cooperation", and noted that "human rights, while universal in character are governed by the distinct culture and history of, and socio-economic conditions in, each country" and that "their expression and application in the national context are within the competence and responsibility of each country".[105]

Further significant follow-up actions were initiated by ASEAN leaders through Malaysia's introduction of seven draft resolutions[106] which were all adopted without a vote by the General Assembly of the United Nations at its forty-seventh session on 22 December 1992, after careful consideration and minor amendment. The seven resolutions were numbered 47/188, 47/189, 47/190, 47/191, 47/192, 47/193 and 47/194 respectively.[107]

Resolution I (47/188) decides to establish an Inter-governmental Negotiating Committee to elaborate a Convention on combatting drought and desertification "particularly in Africa", including appointment of chairman of the committee, membership, site, agenda, sessions, secretariat and a multi-disciplinary panel of experts with necessary funding, and inviting participation of UNDP, UNEP, FAO, IFAD, WHO, WMO, UNESCO and UNCTAD as well as interested competent non-governmental organizations.[108]

Resolution II (47/189) decides to convene a Conference in April 1994 on the utilization of marine and coastal resources to meet essential human needs, maintain bio-diversity and improve the quality of life for island people, particularly in developing island States, and establishes a list of specific tasks for the Conference. A Preparatory Committee is set up for the Conference, with the appointment of Chairman, schedules of the sessions, provisions for funding and participation of relevant NGOs.[109]

Resolution III (47/190) decides to convene not later than 1997 a special session for the purpose of an overall review and appraisal of Agenda 21.[110]

Resolution IV (47/191) designates institutional arrangements to follow up UNCED by endorsing the establishment of a high-level Commission on

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104 Ibid, para. 47.

105 Ibid, para. 18, *in fine*.

106 The Seven draft resolutions were introduced by H.E. RAZALI ISMAIL (Malaysia), Chairman of the informal group on the item: Report of the UNCED, as submitted to the Second Committee. See doc. A/47/719 (December 18, 1992).

107 There were, respectively, Draft Resolution A/C.2/47/L.46; A/C.2/47/L.47; A/C.2/47/L.51; A/C.2/47/L.61; A/C.2/47/L.62; A/C.2/47/L.63; and A/C.2/47/L.64. For details of the deliberations and proposals for amendments, see doc. A/4/47/719.

108 See 32 ILM (1993) 286, pp. 244–246.

109 Ibid, pp. 247–251.

110 Ibid, pp. 252–253.

Sustainable Development to make recommendations to the General Assembly through the Economic and Social Council in coordination with other United Nations bodies such as UNEP, UNDP, UNCTAD and UN Sudano-Sahelian Office, with United Nations regional commissions and a high-level Advisory Board with Secretariat support.[111]

Resolution V (47/192) decides to convene a Conference in 1993 on straddling and highly migratory fish stocks, with an organizing session on 19–23 April, and a substantive session on 12–30 July 1993, in New York to complete its work in advance of the forty-ninth session of the General Assembly in 1994.[112]

Resolution VI (47/193) decides to declare 22 March of each year "World Day for Water", starting in 1993, to promote public awareness of the conservation and development of water resources and the implementation of Agenda 21.[113]

Resolution VII (47/194) requests the Commission on Sustainable Development to give urgent consideration to the implementation of Agenda 21 on capacity-building, and to adopt early action in support of developing countries, in particular the least developed countries in the area of capacity-building.[114]

111 Ibid, pp. 254–262.
112 Ibid, pp. 263–265.
113 Ibid, pp. 265–266.
114 Ibid, p. 266.

CHRONICLE

CHRONICLE OF EVENTS AND INCIDENTS RELATING TO ASIA WITH RELEVANCE TO INTERNATIONAL LAW August 1992–June 1993

Ko Swan Sik*
in cooperation with FOO KIM BOON (Singapore), WAN ARFAH HAMZAH (Kuala Lumpur), SUGENG ISTANTO (Yogyakarta), KRIANGSAK KITTICHAISAREE (Bangkok), S.K. LEE (New York)

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AFGHANISTAN

Evacuation of foreign missions

As a result of the fights between the government forces (mainly Uzbek-supported Tajik) and fundamentalist Islamic (Pashtun) forces (*see* 2 AsYIL 283) several countries closed their embassies and withdrew their diplomats and the Red Cross handed over responsibility for its hospital to the Health Ministry, complaining that the warring factions did not respect its premises. (IHT 24 and 25-08-92)

Agreement on the forming of a national government

On 7 March 1993 an accord was concluded at Islamabad between eight out of the ten main warring factions. One group, the YUNUS KHALIS-led part of the Hizbe Islami faction, boycotted the negotiations and the faction led by General RASHEED DOSTAM was excluded because of his background of being connected with the NAJIBULLAH regime. The Islamabad Agreement was based on a Pakistani-proposed idea and allowed for a power-sharing regime. Under the accord Mr. RABBANI would remain president for 18 months from the date of his installation in December 1992 while Mr. HEKMATYAR would become Prime Minister. Elections for a constituent assembly would be held within eight months. The assembly would be required to approve a constitution under which elections must be held before the end of the 18-month period of President RABBANI. Although President RABBANI at first insisted on the retention of AHMAD SHAH MASUD as defence minister it was decided to form a 16-member defence council in which all eight rival factions would be represented.

The agreement did not prevent the cease-fire from breaking down a few days after it was agreed. (IHT 04–03,08–03,10–03–93; FEER 18–03–93 p.22)

AIR TRAFFIC

Disputes over transport on continuing flights

The US Department of Transport ruled in favour of United Airlines which had complained against a Japanese requirement for continuing flights from Tokyo to Sydney, consisting of a restriction of the number of passengers that originate in Japan to no more than a half. The restrictions were considered to be contrary to the bilateral Air Services Agreement between Japan and the US of 1952. (IHT 6/7–02–93)

On the other hand, Japan considered penalization of North West Airlines for allegedly violating the existing Air Services Agreement by picking up too many passengers on its New York-Osaka-Sydney route. According to the Japanese the US-Japanese aviation agreement provides that no more than 50 per cent of the passengers on the North West flight to Sydney should originate in Osaka, while in fact the figure had been more than 70 per cent for several months.

The differences result from a different interpretation of the "beyond" or "fifth freedom" rights referred to in the agreement and from the changes that have taken place in the market situation in the past 40 years. In Japan's interpretation of the 1952 agreement, "beyond" rights are intended to be supplementary in nature, while from its launch in November 1991 Northwest's New York-Osaka-Sydney route drew far in excess of 50 per cent of its Sydney passengers from Japan. Furthermore, lights to Sydney via Osaka are almost 3,000 km longer than from New York via Los Angeles. In the Japanese view, therefore, the real intent of North West was to establish an Osaka-Sydney service. Japan proposed that the dispute be put to arbitration besides trying to renegotiate the 1952 accord.

Several Asia-Pacific countries faced similar problems and were contesting air rights with the US. For example, Thailand allowed its agreement with the US to terminate in 1990, and flights between the two countries were since operating under a standstill arrangement which freezes services at current levels pending negotiation of a new accord. (*see* 1 AsYIL 268) (IHT 10/11–04–93;FEER 11–03–93 p.40)

Revision of existing air agreements requested

Many of the agreements were negotiated in the 1950s and the 1960s and no longer provide an acceptable balance of frequency allocation and gateway accessibility. They reflect a situation where most of the passengers were American.

In 1965 46,000 Japanese flew to the US and 185,000 Americans travelled the other way. By 1990 the Japanese tally had soared more than 70 times while the US figure had merely tripled. In accordance with the initial situation Japanese airlines provided a much lower percentage of the seats of the US-Japan flights than the US airlines. Seven US carriers fly 55 routes to Japan; of these, 23 go through Japan to ten major cities in

the Asia-Pacific region. By contrast, four Japanese airlines fly just 20 routes, with only one going beyond the US.

Fourteen Asian airlines, united in the Orient Airlines Association urged Asian governments to renegotiate bilateral air agreements with the US in order to allow the airlines greater access to the US. Many of them suffer from the existing restrictions, placing them at a significant disadvantage to US carriers. Asian airlines are restricted to flights to and from nine US cities but US carriers can fly to and from Asia through 21 US cities.

A modified British-US agreement for Hong Kong was reportedly almost ready for signature under which the US would not be granted beyond rights because the Hong Kong major carrier Cathay Pacific had little interest in similar rights that the US had available to trade.

Japan Airlines held up the British-US agreement as the one it would most like to see Japan emulate: under that agreement capacity is almost equally shared by the two sides. (IHT 10/11–04–93,24–06–93;FEER 11–03–93 p.40)

Air services agreement between Malaysia and South Africa

An air services agreement for the operation of scheduled air services was signed on 5 January 1993. Under the agreement, the designated airline of each country is entitled to operate two flights a week between the two countries. The designated airline of each country is also entitled to operate services to any three intermediate points and any three points beyond of its choice. (NST 06–01–93)

ALIENS

Expulsion because of behaviour contrary to visa purposes

China expelled an American scholar who acted as the adviser to a Chinese dissident who had returned to China from abroad and was arrested. The reason of the expulsion was "actions incompatible with his status as a tourist". (IHT 03–09–92)

Illegal immigrants in India

Indian police rounded up 132 Bangladeshi and transported them to the Bangladesh border on 11 September 1992. It was reported that there were as many as 10 million Bangladeshi illegals in India. (FEER 24–09–92 p.24)

Deportation for bribery

A Hong Kong woman journalist was deported from China on 1 November 1992 on charges—to which she confessed—that she had bribed a government employee in exchange for classified documents. (IHT 02–11–92;FEER 12–11–92 p.14)

Denial of consular access to detainee

Iran had arrested an American on charges of illegal business dealings and links with foreign intelligence agencies. The man had been living in Iran since before the revolution and was married to an Iranian woman who was a sister of the former head of the secret police of the Shah. The Iranian authorities denied [Swiss] consular access to the man. [Since the revolution the Swiss embassy handles US interests in Iran]. (IHT 5 and 7/8–11–92).

Abolition of fingerprinting for identification of aliens
(*see* AsYIL Vol. 1 p. 269, Vol. 2 p.285)

Japan relaxed the fingerprinting requirements for foreign permanent residents, after years of protests. This would affect about 638,000 foreigners, mostly Koreans and Taiwanese. The aliens will now be required to supply a photograph, signature and evidence of family registration. (IHT 9/10–01–93)

Deportation of illegal aliens from Japan

According to a Japanese Immigration Bureau report Japan had deported 3,391 aliens in April 1993 for violating visa and immigration regulations. South Koreans topped the list with 745, followed by Thais with 651, Malaysians with 540 and Iranians with 487. More than 90 per cent of the deportees had been illegal workers. (IHT 28–06–93)

Illegal aliens in Malaysia

Twenty-nine Indonesian immigrants drowned and 40 others were missing when they and 50 others were forced by the captain of their boat to swim ashore, 3km off Morib in the State of Selangor, on 20 July 1993. The captain had thought they were near shore when the boat hit a sandbar, and ordered the passengers to jump.

Malaysian Police had been waiting for the illegal immigrants after receiving information about a possible landing. All survivors were handed over to the Immigration Department to be deported to Indonesia. (NST 21–07–93;STAR 21–07–93)

ALLIANCES

Revision of Soviet-North Korean Friendship Treaty

According to Seoul newspaper dispatches Russia had proposed to amend the treaty to reflect the changing international situation, in particular a commitment to intervene in behalf of North Korea in the event of armed conflict. (IHT 6/7–02–93)

ARMS SUPPLIES
See also: Missile technology

US warplanes to Taiwan

Reversing a ten-year old policy towards China based on a Sino-US agreement of 17 August 1982 (the "1982 Communique") the US decided on 2 September 1992 to permit the sale of 150 F-16 warplanes to Taiwan. The decision was predominantly motivated by electoral considerations of employment preservation, but the sale was formally justified with the alleged fundamental change of the military balance by China's recent purchase of Russian *SUKHOI*-27 warplanes. (*see* 1 AsYIL 270)

By way of response China warned that it might withdraw from the arms-control talks (which had begun in 1991 after the Gulf War) among the five permanent members of the Security Council as the world's main weapons producers and withhold its cooperation at the UN.

In a later commentary the official Chinese press agency said that to purchase a limited amount of weapons is entirely a matter within a country's sovereignty in which no foreign country should interfere. On the other hand it was argued that the US was selling sophisticated weapons to a province that is temporarily separated from the country which meant a direct infringement upon China's sovereignty and a gross interference in China's internal affairs.

Comments from both Japan and Korea were concerned that the proposed F-16 purchase would eventually increase tensions.

It was also reported that the US planned to sell 12 anti-submarine helicopters to Taiwan. The plan was denounced by China as a violation of the 1982 Sino-US communiqué, an infringement of Chinese sovereignty and interference in Chinese internal affairs. (IHT 03, 04, 5/6, 10, 17 and 26/27–09–92)

US arms sales to China

The US Government announced on 22 December 1992 that it would lift the ban on sales of military technology to China enacted after the 1989 Tienanmen riots. (FEER 07–01–93 p.12)

Mirage 2000 jet fighters for Taiwan

The French Government gave its approval for the sale of Mirage-2000-5 warplanes to Taiwan. For French weapons sales abroad initial permission must be obtained from an inter-ministerial commission on the export of war materiel (CIEEMG), followed by a government permission to negotiate (which had now been granted in the present case), followed by a final official approval once the negotiations are concluded.

The French Minister for Industry and Foreign Trade said that the final official approval in the present case "would not be considered by the French Government as an act of aggression against the People's Republic of China." The deal would include "at least 1,000 Mica air-to-air missiles."

Meanwhile, according to a Taipei newspaper (United Daily News) the US had pressed Taiwan to cancel the proposed purchase of French warplanes as it might lead to a regional arms race. (IHT 07,10 and 11–09–92;FEER 03–12–92 p.9)

Russian offer of gunboats to the Philippines

Russia was reported to have offered to sell modern missile gunboats to the Philippine Navy. The offer was said to be under consideration. (IHT 16–09–92)

Malaysian warplanes procurement

Malaysia was reported to consider the purchase of Russian MiG-29 warplanes, offered by Russia at bargain prices. Later it also considered the American F-18D fighter, stating that "political risks" involving the stability of Russia as a long-term supplier were part of Malaysia's "calculations". (IHT 2909–92, 05 and 26–02–93)

Russian submarines and other weaponry for Iran

According to US Defense Ministry officials Russia had sold two dozen SU-24 bombers to Iran and was providing spare parts for some of the Iraqi planes that were flown to Iran during the Gulf War.

Russia also sold three diesel submarines of the "Kilo"-class to Iran which is the first Gulf country to possess submarines. The first ship arrived in Iran in the middle of November 1992 and joined the Iranian fleet.

US officials expressed their concern about what they saw as a new threat to naval operations in the sea lanes of the Gulf and the Arabian Sea. It was reported that the US Government had tried but failed to interest Saudi Arabia in paying Russia to abandon the transaction. When the acting US Secretary of State tried to stop the sale the Russian Foreign Ministry noted the recent US decision to sell fighter-planes to Saudi Arabia. Moreover, the Russian Foreign Ministry was reported as saying that the US concern was dictated not by political considerations but by the desire of the US to return to the Iranian arms market. (IHT 25–09, 26/27–09, 3/4–10, 31–10/01–11, 14/15–11, 24 and 30–11–92)

Iranian arms purchases

For its part Iran, cut off from the Western suppliers that sold arms to the pro-Western monarchy in the 1970s, turned to Russia, China, North Korea, Pakistan, Brazil and Argentina as major suppliers. According to foreign monitors Iran had committed more than $7 billion in 1988 to buy arms and nuclear technology from China, North Korea and Russia. (IHT 10–08, 3/4–10–92)

North Korean missiles for Iran

According to US news reports Iran was close to concluding a transaction with North Korea under which it would acquire missiles with a 600-mile range and an ability to carry chemical weapons. (IHT 09–04–93)

Portuguese weapons for Myanmar

One or more shipments of arms and ammunition from Portugal arrived in Yangon, in spite of the EC arms embargo against Myanmar. The shipments were from the Portuguese arms manufacturer Industrias Nacionias de Defensa EP. (FEER 12–11–92 p.8)

Weapons from Cambodia

Since the peace process an increased flow of weapons from Cambodia seemed to have found their way to a wide variety of destinations, such as the army of the drug warlord KHUN SA in the Shan State of Myanmar, the Karen rebels, the Muslim rebels on Myanmar's western border with Bangladesh, insurgent groups in the Philippines and Sri Lanka and Sikh separatists in India. (FEER 12–11–92 p.9)

Russian MiG-29s for India

Russia agreed to sell 20 MiG-29 fighter planes to India. (IHT 25–11–92)

Chinese arms for Bangladesh

All the Bangladeshi fighter aircraft and warships lost in the 30 April 1991 cyclone were replaced by China. (FEER 05–11–92 p.7)

Indonesian purchase of ships of former East German fleet

Indonesia in December 1992 bought nearly a third of the former East German Navy,

including 39 naval vessels. The purchase would cover 16 corvettes, 8 minesweepers, and landing ships. In addition three new submarines were being built on order. (IHT 05–02–93;FEER 18–02–93 p.11)

Polish tanks for Pakistan

Pakistan was reported to be negotiating the purchase of 320 T-72 tanks from Poland. (IHT 05–02–93)

Export of Chinese arms to the US

According to US officials and documents the Chinese Armed Forces exported close to two million guns to the US during the period between 1989 and 1991 and set up or bought a number of companies in the US in an effort to earn hard currency and obtain American technology for military use. The US began allowing China to export arms to the US in 1987. (IHT 05–03–93)

ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN)

Accelerated tariff reduction

The ASEAN countries agreed on 23 October 1992 at Manila to accelerate tariff reduction on 15 priority products as a basis of the projected free-trade area to be established within 15 years. (*see* 2 AsYIL p.288) Tariffs in these categories of no more than 20 percent would be cut to 0–5 percent within seven years and those of more than 20 percent would be cut within ten years, although each country would be allowed to temporarily exempt a limited number of items under each sector. (IHT 24/25–10–92;FEER 05–11–92 p.50)

ASEAN-EEC trade agreement

ASEAN and the EC set aside their dispute over human rights (*see* 2 AsYIL p. xxx) and succeeded in concluding an agreement on trade and investment in Manila on 30 October 1992. A compromise was reached on the issue of human rights in East Timor by a pledge from Indonesia and Portugal as to their commitment to human rights and an agreement to continue the dialogue and cooperation on these issues. (IHT 31–10/01–11–92;FEER 12–11–92 p.14)

BORDERS, BORDER DISPUTES AND BORDER INCIDENTS

See also: Cambodia, Territorial claims

China–Vietnam

The first Sino-Vietnamese talks on the two countries' border dispute since they normalized relations in November 1991 opened on 12 October 1992 and ended on 17 October. Subject of discussion were the land borders, the Gulf of Tonkin and the South China Sea. The issues were again discussed during the visit by the Chinese Prime Minister to Vietnam from 30 November to 4 December 1992.

The two countries failed to resolve the dispute over the Tu Chinh bank, some 80 nautical miles off the coast of southern Vietnam, where the US Crestone Energy Corp. had been given permission by China to explore for oil. (*see* 2 AsYIL 378) The two sides reached some agreement on the issues of their land border and that in the Gulf of Tonkin. They agreed to use the Sino-French treaties of 1887 and 1895, when France ruled Vietnam as a colony, to resolve their land frontier. (IHT 13–10–92,01 and 03–12–92;FEER 01–10–92 p. 12,29–10–92 p. 22,17–12–92 p. 23)

Thailand–Laos

(*See*: Inter-state relations, *infra*)

Thailand–Myanmar

Six Thai villagers were seized by Myanmar authorities in an area opposite the Thai province of Mae Hong Son in late August 1992. When ten Thai officials entered Myanmar territory to secure the release of the villagers they were taken prisoner on 6 October. On 13 October Myanmar released one of the low-level officials and pledged to also free the other nine and also the villagers. (FEER 22–10–92 p. 14)

On 4 September 1992 ethnic Karenni (to be distinguished from Karen) rebels of Kayah State in Myanmar launched an attack on their old headquarters near the Thai northwestern border which had been occupied by government forces for more than three years. In the raid a number of Myanmar soldiers were killed and others were captured and kept prisoner by the Karenni. The camp at Hwe Pong Laung on the Pai River was later recaptured by government forces. When on 1 November a major offensive was launched in Kayah the fighting spilled over the Thai border. As a result the border village of Huay Pleung, 3 km inside Thailand, was occupied by Myanmar forces since 5 November 1992.

The policing of the porous, 2,100-km border is difficult and extremely costly. Instead, ethnic minority groups in Myanmar have in practice been encouraged to serve as buffers. (FEER 03–12–92 p. 22).

Since February 1992 Myanmar troops had also occupied so-called Hill 491 after having cleared the area from Karen rebels. According to the Thais the hill was just inside Chumphon province, on Thai territory.

In a highly unusual way the Thai king intervened by calling for a peaceful solution. He said the hill could either be declared no-man's land, or there should be a joint Thai-Burmese survey of the area. "Both sides should agree that they will not carry out any activity there. Or if there is going to be any activity, both sides must do it together."

Four days later a Thai military delegation was invited to Yangon where the two sides

agreed on a withdrawal of troops from the hill, followed by a meeting of a border demarcation committee. (FEER 17–12–92 p.13)

India–Pakistan

Pakistani and Indian officials held talks aimed at containing the conflict on the disputed Siachen glacier in the western Himalayan mountains.

The Siachen campaign began in the 1970s, when a Pakistani travel agent helped foreign mountaineers scale the Sia Kangri peak in the Himalayan range beyond the NJ9842 map coordinate that marks the eastern end of the Line of Control separating the Pakistani and Indian zones of Kashmir. When the expeditions came to the notice of the Indian authorities, they became alarmed at the fact that Pakistani maps showed a claimed extension to the LoC running obliquely east and joining up with the Chinese border at the Karakorum Pass. Indian suspicions arose about eventual Pakistani plans to occupy the Siachen Glacier with a view to mounting an attack from the Karakorum Mountains into Indian-held Kashmir down the Nubra River Valley.

As a result in April 1984 Indian troops were moved and positioned into the Saltoro Range overlooking the key passes to the western edge of the glacier, whereupon Pakistan responded likewise.

Talks began in 1986 and five rounds were held, but were suspended in June 1989. They were resumed with a sixth round in early November 1992. Both sides agreed to separate the issues of troop disengagement and extending the agreed LoC. They also agreed on technical details involved in identifying the locations to which troops would be withdrawn, as well as on a system of joint helicopter patrols of the area. However, the negotiations bogged down on the marking of existing troop positions on a map to be annexed to the agreement because of Pakistani suspicions that the markings on the map would be used to press India's claims on delimiting the LoC. Pakistan insisted on written assurances that the recording of existing deployments would be without prejudice to any future claims. In turn, India pressed for a discussion of the principles on which the LoC could be extended. (FEER 12–11–22 p.14, 26–11–92 p.28)

China–India

China and India held their fifth round of border talks in Beijing in late October 1992. Efforts to boost confidence include twice-annual meetings between local military commanders, the installation of a communications "hot line" and an agreement of advance notification of military exercises. (FEER 12–11–92 p.30)

Afghanistan–Tajikistan
(*See also*: Civil war)

The Government of Tajikistan issued a statement on 21 December 1992 concerning "large numbers of troops massed in the border areas of the Islamic State of Afghanistan" who "have repeatedly violated the State border of the Republic of

Tajikistan", which actions "cannot fail to arouse the concern of the people and Government of the Republic of Tajikistan". (UN Doc.S/25025)

Intrusion of Thai customs officers into Malaysia

Six Thai customs officers were reported to have intruded into the northern border town of Padang Besar in the State of Perlis on 15 February 1993. During the incident, the customs officers seized goods worth RM 5000 said to belong to Malaysian traders which they believed were intended to be smuggled into Thailand. The goods were kept in two huts said to be about ten metres from the Malaysian-Thai border. The intrusion was the sixth since a much-publicized intrusion by 30 armed Thai enforcement officers into the triangular bazaar area on 30 June 1990.

Thai authorities, on the other hand, claimed that the area which the Thai customs officers had entered was Thai territory.

Following the incident the Malaysian Government conveyed to the Thai Government through the Thai ambassador their dissatisfaction over the incident and a request for firm action by the Thai Government to prevent a recurrence. The incident prompted the State government to deploy more police and an Anti-Smuggling Unit to reinforce security in the disputed area. (NST 18–02, 19–02, 20–02 and 22–02–93, 05–03–93)

Territorial waters boundary between Malaysia and Singapore

Malaysian and Singaporean officials reached agreement on 29 July 1993 on a new territorial waters boundary in the Straits of Johor. The draft agreement would be finalized by the end of the year.

Hitherto, there was no permanent territorial waters boundary in the Johor Straits but only a preliminary boundary agreed upon in 1985 after a joint hydrographic survey conducted in 1982. The midpoints of the deepest water channels along the Straits of Johor were collectively taken as the boundary then. That method led to ambiguity as pollution caused changes to the depths of the water channels.

The new permanent boundary would be determined by joining the geographical co-ordinates or fixed points agreed to by the two countries. (NST 30–07–93;STAR 30–07–93)

Papua New Guinea–Solomon Islands
(*see*: Inter-state relations, *infra* p.398)

BOYCOTT

Japan seeks end of Arab boycott of Israel

Japan called on the Arab States to end their boycott of companies that do business with Israel. (IHT 04–12–92)

BROADCASTING

Dissident broadcasting to Vietnam

Moscow Radio had rented transmission facilities to a private radio station which was supported by a Vietnamese dissident group from the US, calling itself "The Organization for Renaissance", and broadcasting under the name of "Radio Irina" since 20 July 1992. Although Vietnam protested strongly and expressed accusations of interference in its internal affairs, the Russian foreign ministry felt powerless to intervene because a new Russian law on press rights, passed in December 1991, legalized the creation of independent radio stations and did not contain exceptional provisions on broadcasts to other countries. (IHT 15/16–08–92; FEER 13–08–92 p.7,01–10–92 p.18)

BBC broadcasts to China

The BBC planned to start broadcasting to China by using transmitters in the Russian Far East to get around Chinese efforts to prevent it from being received in China. (IHT 10–09–92)

American broadcasts to Asia

A US Congressional commission recommended that the US expand broadcasting to China and other Asian countries with programmes providing domestic news and supporting democratic movements, but was sharply divided over whether to set up news services for Asia similar to Radio Free Europe and Radio Liberty or to rely on the existing network of the Voice of America. The commission recomnended that broadcasts be beamed to China, Vietnam, Laos, Cambodia, North Korea and Myanmar. (IHT 16–09–92;FEER 25–03–93 p.28)

Apology for insulting broadcast

Malaysia apologized to Indonesia over the broadcast of a foreign news report on Malaysian television on 23 September 1992 showing Indonesian soldiers firing on demonstrating mourners in East Timor in November 1991. The broadcast was considered insulting by an Indonesian youth group. (FEER 08–10–92 p.14)

Second AsiaSat satellite

Asia Satellite Telecommunications Co., a consortium of British, Chinese and Hong Kong interests, placed an order for a second broadcasting and communications satellite (AsiaSat-2) that will be in orbit by late 1994 and will cover an area from Tokyo to Australia and west to Berlin. AsiaSat is owned by Hong Kong, British and Chinese companies. (FEER 05–11–92 p.65)

CAMBODIA

The status of Cambodia-Vietnam borders

The Khmer Rouge introduced a demand for redrawing Cambodia's borders with Vietnam as a precondition for implementing the 1991 Paris peace accords. According to the claim Vietnam had annexed Cambodian territory as a result of three treaties concluded with the Phnom Penh Government between 1982 and 1985, and now the borders had to be returned to those existing in 1970 when Prince SIHANOUK was ousted in a coup by General LON NOL.

In the Vietnam-Cambodian agreement on "historical waters" of 7 July 1982 historical waters were defined as the body of sea located between the coast of Vietnam's Kien Giang province, Phu Quoc island and the Tho Chu archipelago and the coast of Cambodia's Kampot province and the Pulo Wai group of islands. The two sides also agreed to hold further negotiations on the issue "at a suitable time."

Another of the three agreements detailed the land border and was called the National Border Delimitation Treaty, concluded on 27 December 1985. According to the US State Department all the disputed areas were awarded to Vietnam with one small exception involving one square kilometer. (FEER 03–09–92 p.16)

Massacre of Vietnamese

(*See also*: Minorities)

On 10 March 1993, 33 Vietnamese fishermen and members of their families were killed in Chong Kneas, a floating village on Tonle Sap Lake, Siem Reap province, and 26 others were wounded. The gunmen were believed to belong to the Party of Democratic Cambodia (PDK, or Khmer Rouge). This was the fifth and biggest event of its kind recorded since July 1992. In these earlier incidents 35 Vietnamese had been killed. On 25 March 1993 there was another massacre of eight ethnic Vietnamese 90 kilometers northwest of Phnom Penh while there were similar reports of further killings of Vietnamese. Upon complaints by Vietnam the UN Secretary-General assured the Vietnamese Government that the UN would do all it could to protect ethnic Vietnamese from attack by the Khmer Rouge. (IHT 12 and 17–03–93,26–03–93,13–04–93; UNdoc. S/25053, S/25409, letter Vietnamese foreign minister 16–03–93, UN Doc. S/25455; FEER 08–04–93 p.22)

Freeze on disarmament

It was announced by the head of the UNTAC that a temporary freeze on the disarmament of three of the warring factions was necessary to maintain a balance of power between the four contending parties. The PDK ("Khmer Rouge") had so far refused to go along with the second phase of the peace accord, in which the four factions were to disarm and prepare for the elections to be held in 1993. (IHT 22–10–92)

The peace process
(*see also* 1 AsYIL 389 and: Minorities)

It was reported in late October 1992 that Japan and Thailand, who were given until the end of October by the UN Security Council to coax the Khmer Rouge faction back into the peace process, had failed in their efforts. The Khmer Rouge controlled 15–20 per cent of Cambodian territory and about ten per cent of the population, or 500,000 to 600,000 out of 9 million. (IHT 30–10–92; UNdoc. S/24800)

The Khmer Rouge would not take part in the planned elections nor honour their results unless the Phnom Penh Government be replaced by the Supreme National Council before the elections. In the opinion of the Khmer Rouge, elections in the prevailing conditions "would not be basically different from those staged in the past by Vietnam and its puppets."

Further talks among the four factions with the two co-chairmen of the Paris Peace Conference and the chairman of the Supreme National Council in Beijing also collapsed on 8 November 1992. (IHT 31–10/01–11 and 09–11–92; UNdoc. S/24800)

Upon suggestions of sanctions against the Party of Democratic Kampuchea ("Khmer Rouge") such as closing the Thai-Cambodian 800-kilometer border and cutting off trade in logs and gems, the Thai Government said it would abide by any sanctions ordered by the UN, but cautioned that it would be difficult to enforce an embargo because trade was in the hands of private Thai businessmen and much of the border runs through mountains and forest. Besides the Thai foreign minister later backed away somewhat from full support, saying that any measures taken must be consistent with Thai law. (IHT 12 and 14/15–11–92;FEER 12–11–92 p. 12) According to the Thai side trade betweeen the outside world and the Cambodian factions was encouraged after the signing of the Paris peace plan, as an effective way to turn Cambodian parties away from hostilities. Nevertheless the UN Security Council on 30 November 1992 passed a resolution (No.792, with China abstaining) banning oil imports and lumber exports. It also threatened to freeze Khmer Rouge assets held abroad and to put an embargo on the exploitation of gems and minerals from Khmer Rouge areas. Accordingly the Supreme National Council of Cambodia imposed an embargo on logging exports. The Thai Government complied by ordering an end to cross-border trading with the Khmer Rouge. The order would apparently close the 27 crossing points on the border and shut down the cross-border logging and oil trade. (IHT 02,24/25 and 28–12–92 and 28–01–93;FEER 10–12–92 p.12) A month later, however, UN sources said that the Phnom Penh Government was violating the timber export ban with impunity and that, although being enemies the Phnom Penh Government and the Khmer Rouge were cooperating at the local level to continue exporting timber through Phnom Penh-controlled territory. (IHT 04–02–93).

A day after the UN resolution six UN soldiers were detained by the Khmer Rouge who released them only on 4 December 1992. The Khmer Rouge said they "arrested" the soldiers because "they were spying, taking photos and checking the coordinates on the map in order to help the Vietnamese and Phnom Penh forces." (IHT 5/6–12–92) Various other incidents of members of UN Forces being detained by the Khmer Rouge occurred thereafter which were condemned, *inter alia*, by the UN Security Council. It was later reported that the Khmer Rouge had warned the UN that it would not be responsible for UN peacekeeping troops who entered so-called semi-liberated areas

under Khmer Rouge control without prior permission. It also announced that it would not allow UN peacekeepers to set up checkpoints in parts of Cambodia under its control when the UN sanctions begin on 1 January 1993. (UNdoc. S/25003; IHT 24/25 and 29–12–92) In early April 1993 three members of the UN peace-keeping force and a Japanese volunteer were killed by the Khmer Rouge. (IHT 05 and 09–04–93) On 19 April a UN unit was again attacked and a UN soldier killed. (IHT 20–04–93) On 4 May 1993 a UN convoy was ambushed, raising the casualty toll among the UN peacekeeping force to 26. (IHT 05–05–93)

The Khmer Rouge said that it would boycott the projected elections, and it accordingly did not register as a contesting party. It contended that the elections could not be fair because of the alleged presence of large numbers of Vietnamese in Cambodia. A Khmer Rouge spokesman said that there were in fact "more than 40,000 Vietnamese soldiers and officers in disguise within the army, police and administrative structure of the Phnom Penh regime." (IHT 23/24-01,6/7-03-93; FEER 25-03-93 p. 30) (IHT 23/24-01-93)

In early March 1993 UN investigation teams found three Vietnamese soldiers serving with the armed forces of the Phnom Penh government. The latter denied that they were government soldiers and said they were members of a local militia who had married Cambodian women. The Phnom Penh Government had no objection to the repatriation of the men if they were found to have been Vietnamese soldiers. The Vietnamese foreign ministry issued a statement on 2 March 1993, stating that it was not responsible for the men because they had been demobilized eight to ten years ago, that they had become Cambodian of Vietnamese origin and that Vietnam had absolutely no jurisdiction over them, and that consequently the Vietnamese Government "cannot accept them back." On 9 March 1993 the UNTAC said that another five Vietnamese soldiers had been found in Cambodia in violation of the peace accord. (IHT 10–03–93)

On the other hand Vietnamese officials complained that thousands of ethnic Khmers from southern Vietnam crossed clandestinely into Cambodia to register ahead of the 31 January deadline to participate in the country's elections. Many of those who registered told officials after they returned to Vietnam that they now wanted to be considered Cambodian citizens, even though they were born in Vietnam and had never lived in Cambodia. (IHT 02 and 04–03–93; FEER 11–02–93 p. 9; UNdoc. S/25366)

In a statement of 26 March 1993 the Vietnamese ministry of foreign affairs emphasized that "UNTAC and the administrative structures in Cambodia" had the obligation to protect the ethnic Vietnamese residents in Cambodia. It referred to Article 16 of the Agreement on a Comprehensive Political Settlement which stipulates, *inter alia*, that "UNTAC shall be responsible during the transitional period for fostering an environment in which respect for human rights shall be ensured..." (UNdoc. S/25497)

Late January 1993 the Phnom Penh Government launched its largest military offensive against the Khmer Rouge since UN peacekeepers arrived in the country in 1991. UN officials condemned the offensive as the most serious violation of the cease-fire agreements and clearly going beyond self-defence. The Phnom Penh side justified its actions by saying that its sole goal was to reclaim territory lost to the Khmer Rouge since the 1991 peace accord and to protect farmers as they harvested their crops. The offensive was ended on 2 February 1993 but the troops were not withdrawn. (IHT 02,03,04 and 05–02–93)

On 8 March 1993 the UN Security Council unanimously adopted a resolution pledging to recognize the government that would emerge from the Cambodian elections,

regardless of whether the Khmer Rouge would join the election or not. (IHT 10–03–93)

On 14 April 1993 the Khmer Rouge took another step in distancing itself from the peace process by abruptly withdrawing its representative and his delegation from Phnom Penh. (IHT 15–04–93)

On 20 and 21 May 1993 a meeting took place at Singapore between senior officials of ASEAN countries, the US, Japan, Canada, Australia, New Zealand and South Korea, trying to work out a common strategy to strengthen a credible government that would emerge from the 23–28 May elections, in order to prevent another bloodbath in Cambodia. (IHT 30–10–92, 31–10/01–11–92, 09–11–92, 12–11–92, 14/15–11–92, 21–05–93; 02–12, 05/06–12, 24/25–12, 28–12 and 29–12–92, 23/24–01 and 28–01–93, 02–02, 03–02, 03–02, 04–02 and 05–02–93, 02–03, 04–03, 06/07–03, 10–03–93, 05–04, 09–04, 15–04 and 20–04–93, 05–05 and 21–05–93;FEER 12–11–92 p.12, 10–12–92 p.12, 11–02–93 p.9, 25–03–93 p. 30;UN Doc.S/24800,S/25003,S/25366,S/25497)

The general elections

At the end of six scheduled days of voting (23–28 May 1993) the turn out was approaching 70 per cent of the 4.7 million registered voters. (IHT 25–05–93) By the end of the voting nearly 90 per cent had cast their ballots. The head of the UN Transitional Authority in Cambodia as well as a delegation of international observers described the elections as "free and fair". (IHT 26–05–93) On 9 June 1993 the UNTAC announced that the Funcinpec (*Front Uni National pour un Cambodge Independent, Neutre, Pacifique et Coopératif* - United National Front for an Independent, Neutral, Peaceful and Cooperative Cambodia) had won most of the votes (45.2%) followed by the Cambodian People's Party (CPP) (38.6%) (IHT 25–05 and 26–05–93, 10–06–93)

Post-election developments

On 3 June 1993 Prince NORODOM SIHANOUK in an unexpected move declared himself President, Prime Minister and military supreme commander of a new transitional "national government of Cambodia." Within hours of the proclamation, however, the establishment of the new government was cancelled, allegedly because of the negative response from the Funcinpec party, led by one of the Prince's sons, NORODOM RANARIDDH. Another son, NORODOM CHAKRAPONG, had become a high official in the Phnom Penh Government and in the rival Cambodian People's Party after having defected from Funcinpec some time ago. (IHT 04,5/6 and 7–06–93)

On 10 June 1993 the CPP declared that the UN and foreign countries had fraudulently engineered the election results, and it was announced that the deputy Prime Minister of the Phnom Penh Government, Prince NORODOM CHAKRAPONG, had formed a secessionist movement in the eastern and north-eastern part of Cambodia to press demands for an independent inquiry into alleged voting irregularities. One of his central demands was the appointment of his father as Cambodia's supreme leader. Characterizing the developments, Prince SIHANOUK said: "This is a very Third-World situation." (IHT 11, 12/13 and 14–06–93) The secessionist movement collapsed on 15 June as its leader, Prince NORODOM CHAKRAPONG, fled across the border to

Vietnam. (IHT 16–06–93) Promised amnesty by his father, however, the prince returned to Phnom Penh on 16 June.

The new constituent assembly on 14 June 1993 proclaimed Prince NORODOM SIHANOUK as head of State. (IHT 15–06–93; FEER 24–06–93 p. 11)

On 16 June 1993 the two major political parties, Funcinpec and CPP, agreed to share power in an interim government under the new head of State. The government would rule until the newly elected assembly has drafted a constitution. (IHT 17–06–93) Agreement was reached on 18 June 1993 on how the power-sharing was to be realized. (IHT 19/20–06–93)

The new head of State said that the UNTAC might have to extend its stay until October 1993, despite the fact that according to schedule the UN forces were to leave three months after the election. The UN might be forced to stay on because Prince SIHANOUK said his wife, Princess MONIQUE, foresaw that August would be an inauspicious month to proclaim a new government. (IHT 19/20–06–93)

The head of State offered the Khmer Rouge to serve as an adviser to the interim government, which was accepted by the Khmer Rouge. (IHT 26/27–06–93) When in Bangkok for talks with the Thai foreign minister, Prince NORODOM RANARIDDH, joint leader of the interim government, said on 28 June 1993 that he would continue to talk with the Khmer Rouge despite the Western wish that they be eliminated, because this would lead to fighting. (IHT 29–06–93) The next day the Prince re-affirmed that the Khmer Rouge should be part of the national reconciliation and should be allowed to take part in a new unified army. (IHT 30–06–93)

During the first visit of a high-ranking US official in Cambodia in more than 20 years the deputy Secretary of State said that the US would not provide economic aid if the interim government included the Khmer Rouge. (IHT, 04–06, 5/6–06, 07–06, 11–06, 12/13–06, 14–06, 15–06, 16–06, 17–06, 19/20–06, 23–06, 26/27–06, 29–06 and 30–06–93; FEER 24–06–93 p.11)

CHEMICALS AND CHEMICAL WEAPONS

Indian exports to the Middle East

The US protested to India because it sold chemicals that could be used to make poison gas to States in the Middle East. A shipment of the chemicals was sent from India to Syria on a German vessel. The chemical could be used to make pesticides as well as nerve gas. American officials concluded that the shipment was intended for the Syrian chemical weapons programme and alerted the German authorities whereupon the latter had the chemicals sent back to India.

According to American sources the shipment was but the latest of several chemical sales by Indian companies in recent years that had continued despite repeated US protests.

On 23 September 1992 India announced that it was prosecuting the chemical company, United Phosphorous, for violating export rules. The Indian Ministry of External Affairs said that customs officials at Bombay had been instructed to investigate the case and that the company concerned would not be given fresh export licenses for another six months. (IHT 22 and 24–09–92)

Chemical plant and sprayer aircraft for Iran

The US Government decided not to authorize the sale by BP America to Iran of a chemical plant that would produce as a by-product a widely available chemical warfare agent, hydrogen cyanide. BP America had assured that the plant would be used to make acrylonitrile, a substance in manufacturing synthetic fibers. There were currently no controls on international sales of hydrogen cyanide and the existing draft treaty to eliminate the threat of chemical warfare would require only that anyone seeking to buy hydrogen cyanide pledge not to divert it to military uses.

Another proposed sale concerned airplanes designed to spray chemical perticides on agricultural crops. According to the planes' producer the aircraft could not be used for spraying chemical warfare agents without endangering the pilots. He also said that there was no evidence that Iran had attempted to misuse similar planes sold to Iran in 1975. If the sale was barred Iran would buy similar planes elsewhere. (IHT 06 and 07–01–93)

CIVIL WAR

See also: Afghanistan, Cambodia

Tajikistan

(*See also*: Borders)

Civil war erupted in 1992. In September 1991 President RAKHMAN NABIYEV, who had come to power as the leader of a revitalized Communist Party, was forced out of power by the Islamic Renaissance Party (IRP) and the secular Democratic Party. An interim president, AKBARSHAH ISKANDAROV, later made way for ALI RAKHMANOV in a move to reconcile the pro-communists and the IRP-Democrat alliance. Almost immediately after RAKHMANOV was chosen President, forces from the Kulyab region (southeastern Tajikistan)—where RAKHMANOV as well as NABIYEV come from—favouring the communist side, began a drive to capture the capital, Dushanbe, from the interim government. They were supported by neighbouring Uzbekistan which is worried about the spread of Islamic fundamentalism. The conflict has become mainly one between pro-communist clans dominating the Kulyab region and Islamic fundamentalists and Democrats from the southwestern region of Kurgan Tyube, with the Islamic faction receiving increasing support from Islamic parties in Afghanistan, Pakistan and Iran. There are historical rivalries between the clans of Kulyab and Kurgan Tyube. (FEER 28-01-93 p.18)

COMMERCIAL ARBITRATION

Iran v Siemens

Iran filed a complaint with the International Chamber of Commerce against the Siemens Company of Germany for failing to complete a nuclear plant at Bushehr. (IHT 03–08–92)

Commercial arbitration in Vietnam

Vietnam established a single International Arbitration Centre by merging its Foreign Trade Arbitration Council and its Maritime Arbitration Council. The new centre will have jurisdiction over all disputes concerning Vietnam's international economic transactions. (BLD 28–05–93)

Arbitration in Singapore-Vietnamese transactions
(*see*: International trade, *infra* p.404)

CULTURAL PROPERTY

Looting of Cambodian art treasures

It was reported that there had been a sharp increase in organized thefts of art objects from Cambodian temples, and even from the Angkor conservation centre in the town of Siem Reap where thousands of objects have been stored for safe-keeping. The pieces were being taken out of the country, mostly to or through Thailand. Thailand has not signed the 1970 UNESCO Convention for preventing trafficking in antiquities. It was suspected that the thieves were getting inside help in Cambodia. (IHT 19–05–93)

DIPLOMATIC AND CONSULAR RELATIONS
See also: Divided States: China, Sanctions, Territorial claims

Iran-United Kingdom expulsions

Iran decided to expel two Britons and an Indian who worked in the British embassy for being involved in 'illegal activities'. The orders came a day after the British Government decided to expel an Iranian diplomat in London. (IHT 17–08–92)

South Korea—Vietnam

The two countries normalized relations after suspension of South Korean-South Vietnamese relations in 1975. On 9 October 1992 South Korea opened a liaison office in Vietnam. During the visit of the Korean Foreign Minister to Vietnam in late December 1992 the two countries established full diplomatic relations. In May 1993 the Vietnamese Prime Minister paid an official visit to South Korea and agreements covering trade, aviation and protection of investment were concluded. (FEER 22–10–92 p.14, 07–01–93 p.12, 27–05–93 p.14)

Singaporean and Malaysian relations with South Africa

Singapore established a consular office in South Africa, Malaysia sent a diplomat in the guise of an official of State-owned Malaysian Airlines. (FEER 01–10–92 p.6)

Malaysia—Marshall Islands

Malaysia and the Marshall Islands established diplomatic relations on 4 January 1993. (NST 05–01–93)

Size of US mission in the Philippines

After the removal of the American military bases, the US was reported to reduce its diplomatic mission in the Philippines. The embassy was one of the largest US diplomatic missions in the world. The staff included about 350 Americans and 1,200 Filipinos. (IHT 18–12–92)

Reduction of Indian and Pakistani missions

As a retaliation for a recent demand by Pakistan that India reduce its Consulate-General staff in Karachi from 64 to 24, India asked Pakistan on 10 January 1993 to reduce the size of its High Commission staff in New Delhi from 150 to 110. It also refused a request that the home of MOHAMMED ALI JINNAH be turned over to Pakistan for use as a consulate building in Bombay. (FEER 21–01–93 p.14)

Rejection of Cambodian-South Korean diplomatic relations

It was reported that (then) Prince SIHANOUK rejected out of hand suggestions for establishing diplomatic relations between South Korea and Cambodia. The Prince had always maintained close relations with North Korea. (FEER 18–03–93 p.9)

Chinese consulate in Vietnam

For the first time since Vietnamese reunification in 1975, China in late May 1993 opened a consulate in Ho Chi Minh City. (FEER 17–06–93 p.14)

DIPLOMATIC INVIOLABILITY

Investigation into killings of Saudi diplomatic and consular officials in Bangkok

In 1989 a Saudi diplomat was murdered in Bangkok, followed by the killing in February 1990 of three more Saudi consular officials. [Later the same month a Saudi businessman who was close to the Saudi royal family was kidnapped and presumed also to be killed.]

In the past years there had been few signs that the Thai police had done their utmost in dealing with the investigation of the cases, resulting in a deterioration of Thai-Saudi relations. Saudi Arabia put fresh pressure upon the Thai Government, with an implied threat of a possible closure of the Saudi embassy. After the murders in 1990 it had stopped issuing visas to prospective Thai workers, and re-entry visas to those already in Arabia. As a consequence the number of Thai workers declined from as many as 300,000 to 20,000. The number of Saudi diplomats in the embassy was cut from 14 to four.

On 26 February 1993 the Thai Interior Minister stated that the official investigation had led to the conclusion that an international gang had been responsible for the killing of the diplomats and that the murders were in reprisal for religious riots in Mecca in 1987. [This referred to the demonstrations by Iranian pilgrims and their suppression by a Saudi police force] (FEER 11–02–93 p.16, 11–03–93 p.14)

DISARMAMENT

Asian attitudes toward nuclear non-proliferation

The Japanese Government had begun using its aid leverage to press India and Pakistan to accede to the Non-Proliferation Treaty while at the same time trying to bring China into multilateral discussions on South Asian regional security with the two countries. The initiative stemmed from the adoption last year by Japan of principles which would guide allocation of its foreign aid. The issue was first raised with the Indian Prime Minister on his visit to Japan in June 1992.

The Indian public response was that the Japanese initiative was welcome as a means of conveying the Indian views to a wider audience. India rejected the notion that South Asia presented a self-contained 'security paradigm'. Its longheld view is that it will not enter any nuclear arms control regime unless it is universal and non-discriminatory. A major barrier to Indian accession to the NPT had been China's unwillingness to forgo use of its nuclear capability in the region. The Indians asked why Japan, as the only victim of nuclear attack, could not accept the idea of a time-bound programme or the universal elimination of nuclear weapons. Pakistan repeated its well-known offer to forgo the nuclear option provided India did the same.

It was reported that Japan had asked the two countries as a first step to agree to more transparency in their nuclear development programme and had suggested to open facilities to inspection by neutral countries. The other element of the initiative was designed to build trust and reportedly consisted of a convocation of multilateral talks among India, Pakistan,

China and other interested parties. It was said that Japan hoped that China would be willing to enter into talks with India and Pakistan on a regional security arrangement in which a 'no-use' commitment would be made. (FEER 15–04–93 p.12)

DISCRIMINATION

Position of Honda in the US

The US Motor Vehicle Manufacturers' Association on 25 November 1992 asked the US Honda subsidiary to withdraw from membership. It said that it wished to focus on the interests of Ford, Chrysler and General Motors and that 'fair trade' creates a divide between domestic and foreign firms. (FEER 10–12–92 p.57)

DISPUTE SETTLEMENT

See also: Borders, Regional security, Territorial claims

Preventive diplomacy to reduce Spratlys tension

As part of the attempts to defuse the conflicting claims to sovereignty over the Spratly Islands in the South China Sea a process was initiated in early 1990 by Indonesia, designed to bring the claimant States together to discuss, in a series of quasi-unofficial workshops, not their conflicting claims of sovereignty but rather non-political issues such as the environment, navigation and marine research. These meetings should encourage formal talks on how to resolve the rival claims when conditions are ripe.

The first workshop on 'Managing potential conflicts in the South China Sea' was held in Bali in January 1990. It was attended by the six ASEAN States.

The second workshop, in Bandung in July 1991, was expanded to include participants from China, Taiwan, Vietnam and Laos, all taking part in their private capacity even though they included officials from the foreign ministries of all the countries involved, except Taiwan. The participants agreed on the peaceful settlement of disputes, on the exercise of self-restraint by the countries involved and on the delimitation of exclusive economic zones and continental shelves through negotiations.

The third meeting was held in June-July 1992 in Yogyakarta and concluded that joint development of the South China Sea's resources could resolve the current impasse regarding resource exploitation.

A fourth, four-day marine scientific research workshop was held in Manila, beginning 31 May 1993, with scientists and officials from nine countries attending. Among the topics on the agenda were fisheries research, biological diversity, non-conventional energy and meteorology. There was also a Philippine proposal for a joint oceanographic mission to the area of the South China Sea.

A next meeting was to be held in Indonesia later in 1993 and would deal with 'resource assessment in the sea'. (FEER 27–05–93 p. 30; The Nation [Bangkok] 01–06–93 p. A4)

DISSIDENTS

Defection of Chinese diplomat

The Chinese consul-general in St. Petersburg and his wife fled Russia and applied for political asylum in Sweden. (IHT 17–03–93)

DIVIDED STATES: CHINA
See also: Arms supplies

Visit by German Economics Minister to Taiwan but refusal of submarines sale

On 18 November 1992 Germany broke its ban on official contacts with Taiwan when the Economics Minister arrived to visit the island. But on 29 January 1993 the German Federal Security Council decided to refuse the sale of submarines and frigates to Taiwan. (IHT 30/31–01 and 05–02–93; FEER 03–12–92 p. 9, 11–02–93 p. 14)

Suspension of Sino-Niger diplomatic relations

The Chinese government lodged a strong protest with the Niger Government against the establishment of diplomatic relations between Niger and the government at Taiwan, and suspended its diplomatic relations with Niger.

Desperate for foreign financial assistance, Niger wavered for more than a month before finally deciding for recognizing the government in Taipei. The latter had made a $50 million aid offer against promises of a low-interest loan by China. (IHT 1/2–08–92)

Unofficial relations between Taiwan and Russia

Taiwan set up a 'Taipei-Moscow Economic and Cultural Coordination Commission' which would open a representative office in Moscow. A counterpart organization was set up by Russia, on the lines of the model used by Japan and the US for unofficial representation with Taiwan. The offices would issue visas and enjoy limited diplomatic privileges. (FEER 17–09–92 p.14; 24–09–92 p.17)

'Republic of China' consulate in Latvia

In 1991 Latvia was recognized by China and entered the UN. But within six months it had signed an agreement with Taiwan to upgrade its representative office in Riga to consulate status under its official name, the Republic of China. (FEER 24–09–92 p. 17)

Chinese premises in Seoul

Taiwanese attempts to sell the Chinese embassy building in Seoul before China moved in, provoked a strong protest from the local Chinese community which argued that the embassy site belonged to all of China. The compound had been established during the Qing dynasty in the nineteenth century. Apart from the embassy compound several other properties with an aggregate value of $1–2 billion would be transferred to the Chinese Government. Rival claims over some properties were expected to lead to disputes between the new Chinese embassy and members of the local Chinese community. (FEER 08–10–92 p.26)

Expansion of Taiwanese investments on the mainland

The Mainland Affairs Council of the government at Taiwan approved a proposal allowing investment by service industries on the Chinese mainland, although through third parties in order to respect the prohibition on direct contacts. However, it was said that many service companies had already invested in China in defiance of government policy. (IHT 26–10–92)

Israel-Taiwan unofficial trade offices

Contacts were established between the government at Taiwan and Israel which would lead to the opening of unofficial trade offices in Tel Aviv and Taipei. (FEER 19–11–92 p.13)

'Informal' Japan-Taiwan discussions

A few weeks after the visit of the Japanese Emperor to China the Japanese Chief Cabinet Secretary met with the chairman of Taiwan's Council for Economic Planning and Development for an 'informal' dinner and discussions in Tokyo. (FEER 26–11–92 p.14)

Taiwan-US high level contacts

The US Trade Representative arrived in Taiwan on 30 November 1992 as the first cabinet-level US official to visit the island since the US derecognized the Taipei authorities in favour of the central government at Beijing. The Chinese news agency said that 'this obviously is in violation of the US government's commitment banning ranking officials from visiting Taiwan, part of the People's Republic of China.' On the other hand an official of the foreign ministry at Taipei said that since 1991 Taipei's foreign minister had been allowed to make four visits to the US. (IHT 02 and 04–12–92)

Upgrading of French Institute office at Taipei

It was announced that the French Institute, the French representative office in Taipei, had become entitled by the French Government to issue tourist visas directly, following a similar practice of other unofficial offices, such as those of Australia, Britain, Canada, Germany, and the US. Besides, a press bureau would be added.

Unlike his predecessors, who were retired diplomats, the current director retained his active status at the French Foreign Ministry. (IHT 11–02–93; FEER 04–03–93 p.16)

Mainland - Taiwan high level talks
(*See also*: Selected Documents)

After preparatory talks a historic meeting between senior representatives of the two sides took place in Singapore on 27 and 28 April 1993. The participants were the chairman of the 'Straits Exchange Foundation' (SEF) in Taiwan and the head of the Chinese 'Association for Relations Across the Taiwan Straits' (ARATS). It was the highest level of contact since the end of the Chinese Civil War in 1949.

The mainland side wanted an agreement on open direct trade and transport links as a way of hastening reunification, but Taiwan feared that such links might lead to a further increase of Taiwanese exports to, and investments on the Chinese mainland that would make Taiwan overly dependent on the mainland. On the other hand the Taiwanese proposed a pact to safeguard their investments in China or a revision of a Chinese 22-point guideline on Taiwanese activities on the mainland, but this was not considered timely by the mainland side unless Taiwan first agreed to ease restrictions on Taiwanese investments in China, allow mainland businessmen to visit Taiwan, open its labour market to mainland workers and bolster Chinese imports to Taiwan. It was finally agreed to leave out references to investment protection and economic exchanges in the joint communiqué and to defer these matters to future discussions.

The meeting ended on 29 April 1993 with the signature of a Joint Agreement and three agreements, on compensation for lost registered mail, the use and verification of certificates of authentication of documents, and the establishment of a systematic communication channel. The latter agreement outlined a schedule for contacts between the two organizations. The joint communiqué set forth the topics the parties would like to deal with in the future. These included fighting crime, repatriating illegal immigrants, protection of intellectual property, fisheries disputes, judicial cooperation and the promotion of exchanges across the Taiwan Strait. (IHT 12, 27, 28, 29 and 30–04–93)

Recognition of Mongolia by Taiwan

It was reported that the government at Taiwan (under its name Republic of China) was on the verge of recognizing Mongolia as an independent State. The Chinese Nationalist Government first recognized Mongolia in 1946, after committing itself to such recognition in a treaty of friendship with the Soviet Union in 1945, thereby fulfilling a Soviet precondition for entering the war against Japan. In 1952 the treaty

was renounced by the government at Taipei as the Soviet Union had allegedly broken its pledge not to aid the Chinese Communist Party. The recognition of Mongolia was then considered by the Taipei authorities as annulled. (FEER 20–05–93 p. 9, 03–06–93 p. 15)

Taiwanese trade offices on the mainland

According to the Taiwanese semi-official China External Trade Development Council Taiwanese trade offices would be set up by the end of 1993 in Beijing and Shanghai. (IHT 23–06–93)

Taiwanese efforts to rejoin the UN

The government at Taiwan was pressed by the legislature to take the initiative to rejoin the United Nations. It issued instructions to its overseas offices to promote the case for Taiwan's 'participation', while avoiding the term 'membership'. (FEER 03–06–93 p.15)

DIVIDED STATES: KOREA

Diplomatic relations between South Korea and China

In view of the expected establishment of diplomatic relations between the Republic of Korea and China, Taiwan responded by announcing that it would cut its links with South Korea. China would continue to recognize North Korea, but the latter strongly opposed the Chinese recognition of South Korea.

Economic trade between China and South Korea reached $5.8 billion in 1991, far more than Chinese trade with North Korea. Trade between South Korea and Taiwan was slightly more than $3 billion in 1991.

The formal announcement of the establishment of relations took place on 24 August 1992 with the issue of a joint statement. The statement called for an exchange of ambassadors and required South Korea to break diplomatic relations with the authorities at Taiwan. The statement said that China respected the desire of the Korean people for quick reunification through peaceful means and that it supported these efforts, but added that they must reach that goal 'by themselves'.

The first contacts between China and South Korea took place in the early 1970s by way of table-tennis friendship games. Then in the spring of 1983 the hijacking of a Chinese airliner to Seoul provided the occasion for the first official contact. The head of the Chinese civil aviation administration negotiated the return of the aircraft and the passengers but not the hijackers. These negotiations paved the way for a series of secret diplomatic contacts. In 1985 the crew of a chinese torpedo boat mutinied and sailed off to South Korea. This time the negotiations resulted in the return to China of the mutineers and the ship.

Meanwhile informal trade links began to grow. In 1988 China took part in the Seoul

Olympics, and when China began preparing to host the 1990 Asian Games in Beijing, South Korean companies bought up advertising billboards at the games stadium worth some $25 million, thus partly underwriting the games. In October 1990 the two countries set up trade missions in each other's capitals. The South Korean mission in Beijing was staffed with senior diplomats and was an embassy in all but name.

In April 1992 the South Korean foreign minister went to China to attend a meeting of ESCAP and preparations were made for an agreement on normalization. (IHT 24 and 25–08–92; FEER 03–09–92 p. 9)

Sino-South Korean dialogue on North Korea

On his visit to China that started on 27 September 1992 the President of South Korea stated publicly that he wanted to enlist China in his efforts to force North Korea to become more open and flexible, particularly on the issue of opening its nuclear installations to mutual inspections. The Chinese President was quoted as supporting the peace process on the Korean peninsula and the removal of all nuclear weapons from the region. But he warned that too much international pressure might slow rather than advance the reunification. (IHT 29–09–92)

Opening of travel routes between North and South Korea

The two countries agreed on 28 July 1992 to open at least two sea routes to allow travel and possibly the exchange of goods. The agreement also provided for opening an overland route between the two sides. On 11 March 1993 South Korea said that it would lift a ban on business travel to North Korea. But this would not include approval of economic cooperation and investment, which would remain banned until suspicions about North Korean nuclear weapons development are resolved. (IHT 12–03–93; FEER 06–08–92 p. 12)

Implementation of the Reconciliation Treaty

The Prime Ministers of North and South Korea concluded three protocols on 17 September 1992 by way of implementing the Reconciliation Treaty of December 1991. They did not, however, succeed in reaching agreement on reciprocal nuclear inspections nor on the issue of reuniting families divided since the Korean War.

The protocols established the framework for four commissions which will deal with a broad range of projects, including military, economic, political, social and cultural cooperation.

Later in the year North Korea on 3 November 1992 rejected proposals for talks on establishing a military hotline and arranging exchange visits by war-divided families because of the planned South Korean-US military exercises scheduled for 1993. The exercises were cancelled in 1992 after the two Koreas signed their non-aggression pact in December 1991. (*see* 2 AsYIL 303) On the other hand South Korea threatened to suspend economic cooperation unless North Korea apologized for a spy ring uncovered

by South Korea and accepted mutual nuclear inspections. (IHT 18 and 19/20–09–92, 04–11–92)

Withdrawal of US troops

After a 'Phase One' reduction of 6,987 since 1990 there were still 37,413 US troops in South Korea in 1992. A decision on a planned 'Phase Two' cut of 6,500 by the end of 1995 was postponed in 1991 over concern that North Korea was trying to develop nuclear weapons. A South Korean-US communiqué of 8 October 1992 reaffirmed the deferment until the problems relating to the suspected North Korean nuclear weapons programme would be solved. (IHT 08–10–92; FEER 22–10–92 p.14)

Price of reunification

South Korea's finance ministry issued a report according to which reunification by the year 2000 with the absorbtion of the North Korean economy would cost $980 billion. The report was based on a study done two years after Germany's reunification. South Korea's gross national product is $280 billion. Consequently the report suggested a much more restrictive unification process, which would include initially limiting travel between the two sides to those families separated by the Korean War. (IHT 29–01–93)

Distorted reports on North Korea

The South Korean foreign ministry criticized Western news coverage of North Korea on alleged large-scale troop movements and incidents with the Chinese as 'gross exaggerations and distortions'. (IHT 03–05–93)

ECONOMIC COOPERATION AND ASSISTANCE
See also: Environmental pollution and protection

Asia-Pacific Economic Cooperation forum
(*see*: 1 AsYIL 289; 2 AsYIL 306)

At its annual meeting the APEC forum, now comprising 15 members (US, Japan, Canada, China, Taiwan, South Korea, Hong Kong, Australia, New Zealand and the ASEAN member States) agreed on 10 September 1992 to establish a permanent secretariat in Singapore. (*see*: State practice of Asian countries)

Meanwhile Japan and other Asian countries at the same meeting expressed concern that a planned North American Free Trade Area might harm their trade and divert investment away from Asia. (IHT 10 and 11–09–92).

Japanese Official Development Aid policy
(*see also*: Disarmament, *supra* p. 362)

A White Paper on the subject stressed that disbursements of ODA would be linked to the records of recipient countries on military spending (including development and manufacture of weapons of mass destruction and missiles), arms sales, democracy (including respect for human rights) and market reforms (Four Principles). These principles were previously tentatively set out as aid guidelines in April 1991.

In the foreign ministry's latest ODA annual report, however, it was admitted that Japan had avoided applying the Four Principles to Indonesia, Thailand and Peru. It said that as improvements in democratic development had occurred in those countries, Japan saw no reason to reconsider its aid policy towards them.

In the fiscal year 1991–1992 Japan provided $11 billion in development aid, compared with $9.4 billion from the US. Taking the aid in terms of percentage of GNP Japan is in the middle among industrial countries, 0.32 per cent in 1991–1992, far short of the 0.7 per cent target set by the UN.

While 95 per cent of American aid does not have to be repaid, most Japanese aid is in the form of credits, although more than 90 per cent of them are no longer tied to purchase of Japanese goods and services. (IHT 22–04–93; FEER 15–10–92 p. 20)

Resumption of Japanese aid to Vietnam

After three postponements earlier in the year under pressure of the US (its most important trading partner) Japan informed the US in late October 1992 that it would resume economic aid to Vietnam despite the still existing US-led embargo.

Japan on 6 November 1992 extended a big 30-year commodity loan ($370 million) at an interest rate of 1 per cent and a 10-year grace period. The condition of a settlement of about $170 million in outstanding loans made by Japan to the former South Vietnamese government was fulfilled as the remainder of the loan was repaid, reportedly with a bridge loan provided by Japanese commercial banks. Vietnam had cancelled principal and interest payments when Japan suspended aid disbursements in protest at the Vietnamese invasion of Cambodia. It was not clear whether Japan's decision to resume aid would imply stopping to vote with the US to block international development bank lending to Vietnam. (IHT 29–10 and 7/8–11–92; FEER 19–11–92 p. 14, 26–11–92 p. 64)

Japan–China

Japan was the first country to restore official assistance to China sixteen months after the Tiananmen incident. Since 1980 it had extended more than $8.3 billion in assistance for infrastructure and energy related projects. Japanese banks held some 60 per cent of China's overseas debt of $60.6 billion.

Resumption of Korean aid to Russia

South Korea prepared to resume its aid to Russia, after having granted $3 billion in economic assistance in 1990 and then cut off the remainder in December 1991 because Russia had failed to pay interest on the loans. (IHT 18–11–92)

Vietnamese rice for Cuba

Vietnam mounted a campaign to raise funds to buy 10,000 tons of rice for Cuba in view of the Cuban support for Vietnam during the latter's war with the US. (FEER 10–12–92 p.6)

Japanese aid to Central Asian republics

It was reported that Japan is laying the groundwork to become the leading donor to the five Central Asian republics of Kazakhstan, Turkmenistan, Uzbekistan, Kyrgyzstan and Tajikistan. It began exploring its interest in the republics in May 1992 when the Japanese foreign minister visited the region, followed by a high level Finance Ministry delegation touring the republics in October 1992. In December Japan, overcoming French and US opposition, succeeded in putting the five republics on the OECD list of development assistance countries, thereby allowing Japanese assistance to be defined as development aid. Japan also led a drive to admit the republics to the Asian Development Bank although they were already members of the European Bank for Reconstruction and Development. (IHT 16–12–92)

Thai-Indochinese infrastructural network

According to Thai newspaper reports Thailand was to propose the building of a road and related infrastructure linking Thailand and Indochina with Japanese assistance. Such a network would help draw the Indochinese States into the international trade and investment system and would boost tourism. (IHT 2/3–01–93)

Japan's role in providing aid to Russia

Japan invited foreign ministers of the Group of Seven in April 1993 to discuss an aid package for Russia. The move would reflect the pressure Japan is facing to be more forthcoming on aid to Russia and be aimed partly at deflecting a French call for an emergency meeting of G-7 leaders on assistance to Russia. According to Japanese officials, despite the Japanese position on the disputed islands of the 'Northern Territories' a multilateral aid plan to Russia would be acceptable, as opposed to bilateral assistance. At the meeting which took place on 14–15 April 1993 Japan agreed to contribute $1.8 billion to the aid package, $600 million more than what had been planned a few days previously, because of pressure from the other G-7 countries. The

Japanese contribution included $320 million in grants. The remainder was largely made up of trade insurance and export credits. Previously Japan had committed $2.7 billion in aid to Russia, of which only about $800 million had been dispensed.

Despite this willingness of Japan to participate in aid to Russia and while it seemed to be prepared to separate the question of aid from that of the disputed islands, the Japanese foreign minister a month later responded in a negative way to a US proposal to create a $4 billion fund to help privatize State-owned enterprises in Russia, saying that Japan would not provide more money than it had already committed, because of the lack of progress on the territorial dispute. (IHT 18 and 20/21–03–93, 14 and 15–04–93, 23 and 25–06–93)

Refusal of World Bank loan conditionality

In the 1950s India developed a plan to harness the Narmada River in western India by building a series of dams and canals in its basin. The first of these dams is the Sardar Sarovar project for which the World Bank had granted a $450 million loan.

In an unexpected move India waived the remaining $170 million of the loan. At the centre of the issue were World Bank 'benchmarks', or conditions, that India said infringed on the country's dignity as an independent nation. (FEER 15–04–93 p.15)

Japanese loan to Iran

Japan announced a $357 million loan to Iran for the first phase of construction of a hydroelectric plant on the Karun River in Southern Iran. Japan was the first developed industrial country to resume lending to Iran since the 1980–1988 Iran-Iraq War. (FEER 10–06–93 p.14)

ECONOMIC COOPERATION ORGANIZATION

Quetta Plan of Action

At a meeting at Islamabad the membership of the organization was expanded to include all five former Soviet Central Asian republics, bringing the number of members at ten. The organization also created preferential tariff arrangements and a development bank.

The ECO met in Quetta, Pakistan, early February 1993 and issued the 'Quetta Plan of Action for ECO'. The plan called for setting up road, rail and air links and the development of ports. An ECO airline and transport company would eventually be formed. Visas, tariffs, customs duties and other restrictions on the free flow of people and goods would first be standardized and slowly abolished. Oil and gas pipelines and power transmission lines were to be laid across the region and beyond for trade in energy. By June 1993, when the ECO summit would take place in Istanbul, the ECO Trade and Development Bank would have opened for business. (FEER 17–12–92 p.64, 25–02–93 p.19)

EMBARGO
See also: Boycott, Economic cooperation and assistance, Sanctions

Embargo on supply of 'dual use' technology to Iran

Out of concern about Iran's military build-up the US began a diplomatic campaign to stop the major industrialized countries from selling militarily useful technology to Iran. Western governments had thus far been united in their official opposition to direct, large-scale military or nuclear sales to Iran but, according to news reports, had been less stalwart and not united on policy questions concerning 'dual use' technology. For example, Japan in a statement expressed its reservations about the US plans. Also, the US was seen as undermined by its own military and high-technology transfers to Saudi Arabia and the smaller Gulf states. The US diplomatic initiative was referred as the first ever to target global sales of 'dual use' technology to a single Third World country, instead of aiming at blocking sales to groups of States, such as the former Soviet bloc or countries that are alleged to support terrorism.

It was reported that the US was to meet with the other six of the G-7 countries on 20 November 1992 to persuade them to follow its wishes. It would be the first time that the G-7 countries would specifically discuss the matter of exports to Iran and the similar sales to Libya, Iraq and North Korea. The US concern drew a response from the Iranian president who said that the West was just trying to alarm Iran's neighbours in order to sell them more weapons.

The US Congress had approved corresponding measures barring all US exports of high-tech goods to Iran. Previously the US Commerce Department had no authority to block exports to Iran of 'dual use' equipment. (IHT 11 and 19–11–92)

Supply of US passenger planes to Iran

The US Government was reported to be reviewing a request by Boeing Co. and General Electric Co. to pursue sales of passenger planes in Iran, in view of the existing US ban on trade with Iran. Jet aircraft and engines are on a list of items that cannot be sold to Iran because it is one of several countries that Washington considers to be sponsors of international terrorism. The US ban extends to any products in which more than 10 per cent of the value of the components is made in America. In 1992 the US lifted the ban to allow the Airbus consortium to sell two aircraft to Iran, according to the US State Department as a gesture to Iran for its help in the 1991 release of the US hostages in Lebanon. (IHT 10/11–04–93)

Modification in COCOM policy

At its meeting on 24 November 1992 the Coordinating Committee for Multilateral Export Controls (COCOM) allowed the successor States of the USSR to attend for the first time and to receive increasingly sophisticated Western technology provided they impose effective export controls. It was reported that by making such proposals the US

and its allies were seeking to enlist the cooperation of those States in preventing sensitive technology reaching so-called 'countries of concern to the international community'. [Membership of COCOM includes all NATO members except Iceland, plus Australia and Japan] The proposed system would include a guarantee that the equipment would be used for civilian ends, allowing Western countries to make spot checks and the introduction of a comprehensive export control system capable of ensuring that a country to which sensitive goods are being sent is indeed the end user. (IHT 25–11–92)

Jet engines for China

A US inter-agency committee reached a tentative agreement to allow the export of jet engines to the Chinese military. The sale could proceed provided that their electronic controls were not too advanced and would meet technical specifications to be drafted by the Defence Department. (IHT 07–01–93)

Softening of US embargo on Vietnam

Since the JES Air case (*see* 2 AsYIL 370) the US trade sanctions in respect of Vietnamese air services were eased in so far that US-built aircraft were allowed to stay overnight in Vietnam and run domestic services as extensions at the beginning or end of international services. But the foreign owners must still retain control of the aircraft.

In response to Vietnam's cooperation in determining the fate of Americans missing in action in the Vietnam War the US Government decided to allow American companies to sign contracts and open offices in Vietnam to prepare for a lifting of the trade ban. The contracts could be executed when the embargo would be lifted. As the first US company that started to operate officially in Vietnam since the end of the war in 1975 an American consulting firm, the Vietnam America Trade and Investment Consulting Co., inaugurated its representative office on 24 April 1993.

In June 1993 senior foreign policy advisers recommended the US president that the US allow the IMF to re-finance Vietnam's debt and thus give Vietnam access to global capital markets. The IMF was scheduled to vote on the matter on 12 July 1993.

Before 14 September 1993 the American president also had to decide on extension of the embargo. (IHT 15–12–92, 27–04–93, 23–06–93; FEER 08–10–92 p. 66, 24/31–12–92 p. 10)

Alleged violation of Iraqi oil embargo

The US protested to Iran about a large shipment of oil from Iraq in violation of international sanctions. While Iran insisted that it was respecting the trade embargo, US intelligence sources concluded that the shipment was too large to have taken place without the knowledge of the Iranian Government. (IHT 29–03–93)

EMIGRATION
See: Immigration

ENVIRONMENTAL POLLUTION AND PROTECTION
See also: International trade

Malaysian-Indonesian Joint Committee on the Environment

It was reported that the two countries would sign an agreement to set up a Joint Committee on the Environment (JCE) to address pollution problems at their mutual border. The Committee would form a mechanism for technical cooperation, especially in facing environmental disasters. The need for such cooperation became apparent from problems faced in battling oil spills following recent collisions in the Straits of Malacca. (*see*: Sea traffic, p.444) The JCE would also provide a forum to discuss other environmental problems, such as air pollution, faced by the two countries. Hitherto, Malaysia had such an arrangement only with Singapore. (NST 16-02-93)

Formation of an International Forestry Organization

Malaysia took the initiative on 17 February 1993 at a Global Forestry Conference in Jakarta to propose the formation of an international organization to address all issues pertaining to the world's forests. The proposal was made on behalf of developing countries and was based on a collective decision made by India, Indonesia, China and Malaysia after deliberations at UNCED in June 1992. The proposed organization could be either a new body formed under the auspices of the UN or an extension of the existing International Tropical Timber Organisation (ITTO), an agency which handles tropical forest management under the UN.

There is as yet no platform to discuss the implementation of the Statement of Principles on Forest as agreed at UNCED. Moreover, while ITTO had already formulated guidelines and set a timeframe for sustainable tropical forest management, there is currently no multilateral forum to address issues of temperate and boreal forest management. A study by the World Wide Fund for Nature (WWF) had shown that temperate and boreal forests were also under threat of destruction and that these forests were as important as tropical forests from the perspective of, *inter alia*, biodiversity conservation and environmental protection. (NST 15–02 and 18–02–93; STAR 15–02–93)

Reduction of pollution by exhaust fumes

At an Asia-Pacific energy conference held at Singapore in early May 1993 and co-sponsored by the International Herald Tribune and the Oil Daily Group, East Asian oil-industry officials said that their governments had no plans to follow the West in imposing tax increases on oil products to raise revenues and reduce pollution and global

warming. According to them Asian States prefer to concentrate on tightening pollution standards, such as cutting the harmful lead and sulfur content of oil products. (IHT 04 and 05–05–93)

Pollution buy-off by forest protection

A US company, the New England Electric System announced its plan to offset carbon-dioxide emissions at its US plants by preserving rain forests in Malaysia. It would spend $450,000 on a 3-year programme to discourage Malaysian loggers from cutting entire sections of forest to get at certain kinds of trees. (FEER 20–08–92 p.67)

Timber trade
(*see*: International trade, *infra* p.408)

Acid rain in Japan

There were strong indications that cross-border pollution from China and Korea contribute to acid rain in Japan. Increased consumption of coal for accelerated economic expansion raises the level of sulphur dioxide, which causes acid rain.

A report by the Japanese Central Institute of Electric Power Industry of October 1992 estimated that China generates 50 per cent of the sulphur ion emissions that cause acid rain in Japan, with Korea producing 15 per cent and Japan the remaining 35 per cent.

Growing awareness of the problem had led the Japanese Government to revise its overseas development assistance programme for China. The next loan package would focus on environmental issues. (FEER 04–02–93 p.16)

Radioactive waste in the Sea of Japan

According to reports by *Greenpeace* the Russian Navy had continued the practice of the former Soviet Navy of dumping radioactive waste and contaminated components from nuclear submarines in the Sea of Japan, but accurate data were not available. It was said that Russia had continued dumping until at least December 1992. (FEER 18–03–93 p.21)

South Korea and Russia agreed to execute a joint survey of the Sea of Japan to assess the damage caused by the dumping of two decommissioned nuclear reactors and solid radioactive waste by Russia from 1966 to 1992. (IHT 12–04–93)

Japanese-South Korean Ecology Agreement

It was reported that the two countries would shortly sign an ecology agreement, involving the exchange of information, the promotion of joint research, cooperation on questions such as climate change, biological diversity, acid rain, pollution of the Sea of Japan, and protection of migratory birds. (BLD 25–06–93)

Ban on trade of rhinoceros horns and tiger bones

Being party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora since 1981, China declared illegal the sale, purchase, import, export and carriage of the two items and ordered that they no longer be used in medicines. This measure was apparently taken in response to the fact that the US Secretary of the Interior had tightened pressure on China and Taiwan to halt such trade by issuing a certification to the president that the trade diminishes the effectiveness of the 1973 Convention. Under the so-called PELLY Amendment that could lead to trade sanctions. (IHT 07–06 and 11–06–93)

EXTRADITION

New extradition legislation in Malaysia

By the Extradition Act of 1992 the Extradition Ordinance 1958 and the Commonwealth Fugitive Criminals Act were repealed. The Act was based on the 1966 Commonwealth Scheme relating to the Rendition of Fugitive Offenders. (BLD 1992 No.22)

FINANCIAL CLAIMS

Implementation of settlement in the Bhopal case

The Supreme Court of India on 16 October 1992 cleared the way for payment of compensation to the victims of the 1984 gas leak from the Union Carbide plant, under a settlement reached earlier. The court approved the transfer of $470 million paid by the company to a welfare commissioner who will dispense the funds. (FEER 29–10–92 p.22)

Philippine claim against Westinghouse Electric Corp.

The Philippine State sought annulment of a 1974 contract for construction of a $2.2 billion nuclear power plant in Bataan, claiming that Westinghouse bribed MARCOS government officials in order to win the project.

The plant was built by Westinghouse during the MARCOS regime in 1976 and completed in 1985. It was never commisioned. The AQUINO Government mothballed the project because of alleged defects and a lack of safety measures. Its uranium fuel remained stored, checked regularly by the IAEA.

The Philippine Government rejected a tentative compromise reached in March 1992 and ordered the case to be pursued in US courts. On 19 May 1993 the court cleared Westinghouse of the charges. (FEER 17–12–92 p.67, 10–06–93 p.70)

Iranian frozen assets in the US
(*see*: Inter-state relations, infra p.402)

FISHERIES

Thai-Vietnamese agreement on release of fishermen
(*see* 2 AsYIL 314)

The Thai and Vietnamese Prime Ministers agreed to release each other's fishermen who had been detained for illegal fishing. Vietnam held several hundred Thai fishermen, while Thailand held some 30 Vietnamese. (FEER 06–08–92 p.12)

Whaling

Japan and Norway urged to lift the existing moratorium on commercial whaling that had been in effect since 1986. They argued that the moratorium, introduced to revive stocks that had been depleted by excessive whaling was no longer needed for certain types of whales, such as the minke whales. Before the annual meeting of the International Whaling Commission at Kyoto in May 1993 the Japanese commissioner had said that Japan might leave the Commission if the moratorium was extended.

The Whaling Commission's scientific committee had estimated that there were 760,000 minkes—a relatively small whale—in the Southern hemisphere. Yet the Commission in 1992 decided not to allow resumption of any whaling until it had approved other necessary measures, like monitoring and inspecting whaling ships. The 1993 meeting finally decided to extend the moratorium, although Japan was authorized to catch about three hundred minke whales in the Antarctic, ostensibly for research purposes.

During the 1993 annual meeting of the Commission the Commission's technical committee voted in favour of a French plan to create a whale sanctuary in the Antarctic region south of 40 degrees latitude for a period of 50 years. Japanese officials argued that the idea of a whale sanctuary in fact represented the imposition of one nation's morals on another. For Japan whaling is part of its tradition and a ban on commercial whaling amounts to foreign interference. The meeting put off voting on the French proposal and deferred a decision to the next meeting in 1994. At the same meeting a Japanese request for a limited coastal catch was rejected by the Commission.

According to news reports in May 1993 Japan finally seemed to have decided not to withdraw from the IWC. (IHT 04, 12, 14 and 15/16–05–93;FEER 27–05–93 p.16)

'Self-abstention'

On 14 August 1992 China, Japan, Poland, South Korea, Russia and the US agreed to a two-year 'self abstention' policy beginning in 1993, under which there would be a ban on fishing of pollack and associated stocks in the Doughnut Hole of the Central Behring Sea.

Illegal fishing in Malaysia

Seven Thai nationals were fined a total of RM (Malaysian Ringgit) 700,000 by the Kuantan (Pahang) magistrate's court on 27 February 1993 for illegally fishing in Malaysian waters. (STAR 28–02–93)

FOREIGN INVESTMENT

Singapore—Vietnamese agreement on the promotion and protection of investments

The agreement was concluded on 29 October 1992 and entered into force on 25 December 1992. The agreement provides for a definition of 'investment' for the purposes of the agreement, MFN treatment, free transfer of earnings, currency, and interests and dispute settlement. As to expropriation it has been provided that this has to be in accordance with law and on a non-discriminatory basis. Compensation shall be effectively realizable and without unreasonable delay. Full compensation ('the value immediately before expropriation') is envisaged.

North Korea's first foreign investment law

North Korean unveiled its first foreign investment law on 20 October 1992. It had been adopted by the Standing Committee of the Supreme People's Assembly on 5 October 1992.

The new law will allow foreign investors to establish equity and contractual joint ventures within North Korea, and set up and operate wholly foreign-owned enterprises in a free economic and trade zone. Foreign-funded enterprises would receive preferential treatment, including reduction and exemption of income and other taxes, favourable conditions for land use and preferential supply of bank loans.

In 1991 North Korea announced the creation of an economic zone in Najin and Sonbong, in North Hamgyong Province, and said that the ports of the two towns and adjoining Chongjin would be free trade ports. (IHT 21–10–92)

Taiwan—British Aerospace joint venture

A memorandum of understanding was signed in Taipei in September 1992 under which BAe would spin off its regional airline manufacturing assets and set up a new company. Taiwan Aerospace Corp.(TAC) would then buy half the new company.

The agreement followed the failure of the 29 per cent Government-owned company to complete an agreement for the purchase of 40 per cent of the commercial business of McDonnell Douglas Corp. This agreement fell through because of marketing and financing problems surrounding the projected MD-12 aircraft. (IHT 21–10–92)

Malaysian development projects in Iran

Ekran Bhd., a Malaysian cable and construction company, signed a memorandum with Iranian officials on 14 December 1992 to take on six development projects, five of which were to be sited on the Qeshm Island free-trade zone and one in Tehran. The contract was signed in early April 1993. The value of the projects was estimated at $4 billion.

Kuala Lumpur-based Technology Resources Industries was to install a cellular-telecommunications network on Qeshm Island. Technology Resources would hold 40 per cent of the joint venture and the remaining 60 per cent would be held by the Qeshm Free Trade Authority. (FEER 07–01–93 p.61, 10–06–93 p.62)

Malaysian investment guarantee agreements

Malaysia and Taiwan signed an investment guarantee agreement on 18 February 1993. The lack of such an agreement had been a major deterrent towards more Taiwanese investments in Malaysia. Approved Taiwanese investments in Malaysia were valued in excess of RM 14.7 billion.(STAR 19–02–93)

The next day a Malaysian-Hungarian investment guarantee agreement was concluded. The agreement not only protected investments, including those made prior to the agreement, but also provided for the settlement of investment disputes through the International Centre for Settlement of Investment Disputes. (NST 20–02–93)

Kazakhstan–Chevron joint venture
(*See also*: Oil and gas)

Kazakhstan and Chevron Corp. agreed in May 1992 to a 50–50 joint venture to develop the Tengiz and Korolev(Korolyov) oil fields on the northeastern coast of the Caspian Sea. Income from the field would be divided 20(Chevron)—80(Kazakhstan). The investments in field development and processing plants are estimated to be about $20 billion during the whole lifespan of the project, estimated to be about 40 years.(IHT 30–12–92) On 6 April 1993 the 40-year agreement creating the joint venture, *Tengizchevroil*, was signed. (IHT 30–12–92,07–04–93, 10–06–93; FEER 22–04–93 p. 77)

Chinese investments abroad

The Chinese State-owned Capital Steel Corp. bought the Peruvian iron company *Hierroperu SA* in December 1992. In the mid-1980s China International Trust and Investment Co.(CITIC) bought a timber operation in Seattle and a huge aluminium smelter in Australia. The same company bought a steel mill in Delaware, USA a few years later. Besides there had been purchases of industrial plants which were dismantled and reconstructed in China. (IHT 31–12–1992/01–01–93)

Japanese purchase of US computer technology-related company

The outgoing US Government on 26 January 1993 approved the sale of a unit of an American company to a Japanese company, Nakamichi Peripherals. It involved a unit of Applied Magnetics Corp., the only American company producing the main component for computer laser disk drives and the information processing technology for the Trident and Patriot missile guidance systems. It was reported that the new administration was faced with the question of reconsidering the decision but decided to allow the purchase. (IHT 27–01–93, 10–06–93 p.71)

Oil exploration in China

China decided on 17 February 1993 to allow foreigners to explore for oil in onshore areas, including part of the (southeastern) Tarim Basin in the Taklamakan desert. In March 1993 it was reported that three Japanese companies and British Petroleum Co. would launch a joint venture to develop oil fields in the Tarim Basin.

In 1991 the China National Petroleum Corp. (CNPC) had signed an agreement with Japan National Oil Corp. to explore a 30,000-square-km area in the southwestern part of the Tarim Basin. And late 1992 CNPC signed an agreement with Exxon to act as technical contractor for exploration work. Originally, this was the extent of foreign participation allowed by the CNPC, but apparently China decided it could not afford to wait.

Previously China had opened 11 on-shore areas in southern provinces. (IHT 18–02–93, 11–03–93; FEER 04–03–93 p.44)

Foreign investments in China

It was reported that China had approved foreign direct investment worth $57.5 billion in 1992, which was three times as much as in 1991 and more than the total foreign investment from 1979 to 1991. According to estimates at least three-quarters of the 1992 investment commitments were made by companies owned by Overseas Chinese. These companies are also the leading investors in Vietnam. (IHT 23–04–93)

The US firm Levi Strauss announced that because of the alleged human rights violations in China it would not make direct investments in China and it would phase out its use of Chinese subcontractors, which accounted for about 2 per cent of its production. But it would continue buying Chinese fabric. (FEER 13-05-93 p.75)

Indonesia—Exxon natural gas project

Indonesia came a step closer to the conclusion of an agreement on a huge natural gas project in the South China Sea in May 1993 by agreeing to a bigger share for Exxon than the normal 30 per cent. The cost of developing the gas is expected to be high because about 70 per cent of the gas would be carbon dioxide. The cost of investment was about $17.5 billion based on 1992 calculations, but including operating costs it

could reach $40 billion. (IHT 15/16–05–93) On 8 July 1993, however, Pertamina, the Indonesian State oil company, said that development of the field would not proceed. The Minister for Mines and Energy said, *inter alia*: "The project has been canceled because it is not economic for the government at present. The project will not give benefit to us. But we may be able to develop it for ourselves in the future."

The problem appeared to be the difficulty of disposing of massive amounts of environment-unfriendly carbon dioxide. This carbon dioxide was to be stripped from the gas. The gas would then be reinjected into aquifers beneath the seabed before being shipped to the consumers at a later time.

The Indonesian side said it had not been able to reach an understanding with Exxon on environmental and legal issues related to the project. The two parties had been unable to agree who would be responsible for the gas once it had been put back into the ground, who would deal with the problem if the gas escaped from the aquifers, who would own oil or natural gas that Exxon might inadvertently discover while drilling the injection wells into the undersea aquifers. Moreover, Indonesia was believed to be reluctant to give Exxon assurances that it would not unilaterally change the financial terms of gas development in the future. (IHT 15/16–05–93, 10/11–07–93)

GENERAL AGREEMENT ON TARIFFS AND TRADE

Taiwanese observer status and application for membership

Taiwan applied for membership in January 1990. On 29 September 1992 GATT granted observer status to Taiwan and a formal working party was set up to settle the terms for the island's full membership. The GATT Council chairman said on that occasion that the Council would "adopt the protocol for the People's Republic of China before examining the report and adopting the protocol on Chinese Taipei."

The Taiwanese application was made under Article 33 of the GATT as a "separate customs territory", a provision originally designed for countries preparing for independence from colonial rule but never before used for application for membership. (FEER 08-10-92 p.83,22-10-92 p.58)

Resumed talks on Chinese participation

Sino-US talks on the issue of Chinese membership of GATT which were suspended after the Tiananmen incident in 1989 were resumed in early March 1993, before the GATT meeting in that month. Generally speaking the US had been requiring the fulfillment of five conditions:(1) a unitary national trade policy, so that imports receive the same treatment at every entry point; (2) full transparency, so that all regulations, licence requirements and quotas are specifically spelled out; (3) elimination, over time, of non-tariff barriers to trade; (4) a commitment to move to a full market-price economy; and (5) until that is done, a temporary "safeguard system" allowing other countries to protect themselves against surges in Chinese exports. According to the Assistant US Trade Representative China had accepted the two last requirements in 1989 but refused to accept them now.

So far as the US is concerned GATT membership for China would not defang the annual MFN debate (*infra*, p.407). A US law (stipulating that Communist countries are not automatically eligible for MFN status) would take precedence in the US over an international agreement (such as GATT).

China argued that their economy had undergone great changes in the past four years and should not be subject to such special conditions.

As to the US suggestion that if China were to join the GATT a monitoring system should be set up to ensure that it lived up to its obligations and its schedule for market reforms, the Chinese Trade Minister said that China would not submit to such monitoring in exchange for admittance. (IHT 01–02–93, 01–03, 03–03 and 19–03–93; FEER 22–10–92 p.58, 11–03–93 p.56)

HIJACKING OF AIRCRAFT

Chinese aircraft hijacked to Taiwan

After a Chinese passenger plane which was bound from the southern city of Shenzhen to Beijing was hijacked to Taiwan on 6 April 1993 the Taiwan authorities immediately returned the plane and the 205 passengers and crew but decided to try the hijackers in Taiwan. (IHT 07 and 08–04–93)

HONG KONG AND MACAU

The airport issue

The deadlock in Anglo-Chinese discussions on the financing of the project seemed to be broken when the Hong Kong Government accepted a Chinese suggestion in September 1992 that the colony inject more money from its fiscal reserves in order to eliminate the need of a proposed contingency fund of 21 billion Hong Kong dollars designed to assure lenders that the project would be able to repay its debts. The Hong Kong Government offered to inject 40 billion Hong Kong dollars in additional equity into the project, substantially reducing the level of its long-term debt. However, the Chinese side criticized the offer, because instead of tapping Hong Kong's huge fiscal reserves, the government would raise funds from the proceeds of land sales that would otherwise go to the post-1997 government.

On 15 October 1992 China rejected fresh plans for financing, but according to the British side, did not put forward alternative ideas. In any case the Chinese warned not to proceed until an overall financial package had been agreed upon, and on the occasion of the official visit by the British Governor to China the Director of the Hong Kong and Macau Affairs Office said that China would not assume responsibility after 1997 for debts or contracts linked to the planned airport if construction would start without China's consent. In spite of these warnings the Hong Kong Government announced on 19 November 1992 that it would award a contract to a Japanese-led consortium for the

enlargement of an island to house the terminal and two runways. The tender award was to expire at the end of the month. The financing was approved by the Legislative Council by a vote of 27 to 25. On 26 February 1993 the government awarded another contract to build a tunnel and road network to a subsidiary of a French company. (IHT 18–09, 19/20–09 and 24–09–92, 16–10 and 24/25–10–92, 20–11 and 28/29–11–92, 27/28–02–93)

Activities of Chinese security forces in Hong Kong waters

For the twelfth time in 1992 Chinese security forces had entered waters under Hong Kong jurisdiction on 25 September 1992. They boarded a Hong Kong police ship and held the crew under control of weapons for some time. When the Hong Kong government expressed its grave concern the Chinese Border Liaison Office said it would apologize if any Chinese officers had taken any "improper action".

According to other reports Chinese security units had detained at least 15 ships bound for Vietnam in Deep Bay in the northwestern corner of the colony, over which both Hong Kong and China claimed jurisdiction. The Chinese authorities claimed they were cracking down on smugglers. Ships and crews were detained and the cargo confiscated. (IHT 25–09–92; FEER 10–09–92 p.14, 08–10–92 p.14).

Governor's proposals for political reform
(*see* 2 AsYIL 321)

On 7 October 1992 the Governor announced a host of political and social welfare proposals for the period till 1997. Under the plan the voting age would be lowered to 18 from 21, a series of municipal councils would be entirely directly elected, and 30 so-called functional constituencies, which represent various professional groups in the Legislative Council, would be broadened to include a much higher number of voters. Each of Hong Kong's 2.7 million workers would get one vote to select a representative of the workplace. That would increase by a factor of 5 the number of voters participating in that part of the election. Besides the Governor said he would recompose the Executive Council (the "cabinet") so that it would no longer include sitting members of the Legislative Council.

The following day a Chinese Government spokesman asserted that the proposals violated the 1984 Joint Declaration by not consulting China, a view contrary to that of the Governor, according to which the plans are consistent with the Joint Declaration as well as the Basic Law. In 1985 China advanced the concept of "convergence" under which British proposals for political reform in the colony had to converge with Chinese policy for Hong Kong after 1997, a concept accepted by the British. (IHT 08, 09, 10/11 and 15–10–92; FEER 17–12–92 p.17) On 16 November 1992 the Chinese Vice-Premier implicitly warned that China may not honour the 1984 Joint Declaration if Britain would not back off from its reform plans. (FEER 26–11–92 p.10) During his visit to Vietnam in early December 1992 the Chinese Prime Minister said: "The essence of this problem is not whether we want democracy or not, but whether there should be good faith in abiding by the commitments." (IHT 03–12–92)

On the occasion of the first official visit by the Governor to China the director of the Hong Kong and Macau Affairs Office said that if the proposed policy changes would be enacted in spite of the Chinese objections, China would replace Hong Kong's government, legislature and judiciary by forming these organs of the post-1997 government in accordance with the regulations of the Basic Law. He also said that China would not assume responsibility after 1997 for debts or contracts linked to the planned airport if construction would start without China's consent. (IHT 24/25–10–92)

On 28 October 1992 China and Britain released secret correspondence between the countries' foreign ministers and other officials in 1990 on the conduct of government in Hong Kong. According to the Chinese side the documents showed that a confidential deal had been reached on key elements of the 1995 legislative elections, under which the UK agreed to model the elections on the Chinese post-1997 electoral blueprint for Hong Kong. According to other interpretations the correspondence shows that the two sides attempted to agree on plans for legislative elections before and after the take-over that would "converge" for a smooth transition, but the exchange appeared inconclusive. The letters showed at one point that the British foreign minister agreed in principle that the Electoral Committee in 1995 would conform to the 1997 model, but had put forward five principles for fair elections to be enshrined in the Basic Law. According to a Hong Kong government official the negotiations were broken off because China would not agree to more directly elected seats and the Basic Law was published without the five principles. (IHT 29–10–92; FEER 12–11–92 p.13)

The Hong Kong Legislative Council on 11 November 1992 endorsed the Governor's proposals in general by a majority vote but the Chinese side reiterated that the Council was only a consultative body to the Governor that had no right to overthrow agreements between Britain and China. (IHT 13–11–92) On 12 January 1993 the Governor presented his plan in legislative form to the Executive Council (IHT 12–01–1993) and on 13 January 1993 the Legislative Council voted against a motion that would have urged the Governor to consult with China before proposing any political changes. (IHT 14–01–93) Later the Executive Council delivered the British proposals in legislative form to the Chinese Government for examination before the Hong Kong Government would give them to the Legislative Council for debate and possible enactment.

After diplomatic exchanges between the British and Chinese Governments in February on whether there should be talks on the existing disagreements (IHT 18–02–93) it was reported on 8 March that China was prepared to resume talks with Britain on Hong Kong on two conditions: that Britain would carry out any agreement reached by the two sides, and that it exclude any Hong Kong citizens from the discussions. British officials had insisted that Hong Kong officials sit in on the talks and that local legislators have the final word on any Chinese-British deal. (IHT 09–03–93) On 11 March 1993 China put forward a proposal for talks, leading to a postponement of an announcement by the Governor to the Legislative Council which would expectedly have included a formal introduction of the democratization bill. (IHT 12–03–93)

As the differences between the Chinese and British sides on whether the British delegation should include Hong Kong officials were not yet solved the next day the democracy bill was finally published on 12 March 1993, but the governor did not set a date for presenting the bill to the legislature. (IHT 13/14–03–93) Responding to this British move China threatened on 17 March 1993 to set up a second power centre in

Hong Kong in the years before it takes over the territory in 1997 and said that it might be forced to set up a new government structure in 1997. (IHT 18–03–93)

Responding to a suggestion by the British foreign minister the Chinese foreign minister said on 23 March 1993 that the time was not ripe for a meeting on the dispute. (IHT 24–03–93) Finally the two countries agreed on 13 April 1993 to begin talks again, scheduled to begin on 22 April. According to the deputy governor of Hong Kong there were plans to give Hong Kong government officials a "support" role in the talks as "suitable for both sides." (IHT 14–04–93) A second round of talks was later announced for 28 April 1993. (IHT 27–04–93)

The Joint Liaison Group had its first full meeting on 21 June 1993 after six months of stalemate. The three-day meeting ended in acrimony, leaving a continuing logjam on deciding a host of technical issues. (IHT 08–10, 09–10, 10/11–10, 15–10, 24/25–10 and 29–10–92, 13–11 and 25–11–92, 12–01, 14–01 and 18–01–93, 09–012–03, 13/14–03, 18–03 and 24–03–93, 14–04 and 27–04–93, 22 and 24–06–93; FEER 12–11–92 p.13)

Hong Kong Government contracts after 1997

China declared in a six-paragraph statement of 30 November 1992 that all government contracts, leases or agreements which are not approved by the Chinese Government would be invalid after the reversion to Chinese rule in 1997. The immediate response of the Hong Kong Government was that the declaration violated the 1984 Joint Declaration as well as the Basic Law, arguing that "[a]ccording to the Basic Law, contracts which are valid under Hong Kong's existing laws will continue to be valid and recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene the Basic Law." On the other hand, the Chinese statement said, "According to the Sino-British Joint Declaration, Britain's administrative power over Hong Kong will terminate on 30 June 1997, and it will then have no right to handle any affairs after that date. Accordingly, all contracts, leases and agreements signed or ratified by the Hong Kong British Government will be valid until 30 June 1997."

In accordance with the above policy China on 21 May 1993 endorsed a 12-year pay-television franchise, a 15-year extension to a licence for the local utility, and a landfill project. (IHT 01–12–92,22/23–05–93; FEER 10–12–92 p.8)

Bank of China to issue banknotes

The Hong Kong Government announced on 12 January 1993 that the Bank of China would begin issuing Hong Kong banknotes in 1994, joining the two British banks that so far possessed this right. It would issue about ten per cent of the value of the currency in circulation. Currently about 86 per cent of notes are issued by the Hong kong Bank, a unit of the London-based Hong Kong and Shanghai Banking Corp., while the remaining 14 per cent are issued by Standard Chartered Bank.

In accordance with the current loosely linked rate of 7.8 to the US dollar the issuing banks are required to deposit one US dollar with the government for every 7.8 Hong Kong dollar they issue. Insofar as every bank has to pay US dollars to obtain banknotes, every bank is in effect a note-issuing bank. Hence the Bank of China issuing

notes is purely symbolic — it will be issuing its own pieces of paper instead of somebody else's. (IHT 13–01–93)

Special Advisory Council

The National People's Congress of China approved the establishment of a Special Advisory Council on 31 March 1993 to prepare for the return of Hong Kong. Earlier China had said that it would set up a panel to prepare for the reabsorbtion of Hong Kong in 1997. (IHT 01–04–93; FEER 08–04–93 p.13)

Nationality of Hong Kong residents of Indian subcontinent origin

While the vast majority of ethnic Chinese in Hong Kong are regarded by China as Chinese citizens, the Indian minority of some 7,000 people is in danger of being rendered effectively stateless after 1997 because Britain refused to restore to them full British citizenship that all Hong Kong British subjects had before they were deprived of that status through a series of (British) immigration and nationality law changes since the 1960s.

India holds that no special treatment should be given, and acquisition of Indian citizenship would require a five-year residence in India. Recently, the Chinese Government indicated that the ethnic Indians can, if they wish, apply for Chinese nationality after 1997. It was suggested by some circles that the persons concerned should be allowed to apply for Chinese nationality now, rather than wait until 1997, since they are already living in a territory that China claims as its own. (FEER 22–04–93 p.29)

Macau Basic Law

The Macau Basic Law Drafting Committee submitted its final draft to the Chinese Government on 16 January 1993. (FEER 28–01–93 p. 14. Text of the Basic Law in *Beijing Review* Vol. 36, No. 18, 3–9 May 1993)

HOT PURSUIT

India—Myanmar
(*see*: Inter-state relations)

Indonesia—Singapore
(*see*: Piracy)

Iranian air strikes against crossborder rebel stronghold

For the first time in more than a year Iranian war planes on 25 May 1993 bombed two bases up to 100 kilometers inside Iraq used by the *Mujahidin Khalq*, the main Iranian opposition group. The bombing was carried out allegedly in response to recent rebel attacks in Iran. The Iranian Government defended the air strikes as legitimate defence. In a letter to the UN Secretary-General Iran said the operation was "brief, necessary, proportionate, purely defensive." Iranian military sources held Iraq responsible for the raids because it had failed to heed earlier Iranian warnings to halt the "transborder aggression".

In response to the angry Iraqi reaction Iranian officials emphasized that Iran was not renouncing the UN-brokered cease-fire and wanted trouble-free relations with Iraq. Iran also announced that it planned to release 100 Iraqi prisoners of war on 27 May 1993. (IHT 26 and 27–05–93)

HUMAN RIGHTS

See also: Aliens, Association of Southeast Asian Nations, (Non-) Interference in internal affairs

Implementation of resolution 1992/40 of the UN Commission on Human Rights: Chinese view

The resolution (28 February 1992) was entitled "Regional arrangements for the promotion and protection of human rights in the Asian and Pacific Region". At a request of the UN Centre for Human Rights some states forwarded their views, among which was China. In its reply of 28 September 1992 it was observed, *inter alia*: "Every country is making its own efforts to promote the general enjoyment of human rights. The Chinese Government considers that different countries' differing views on human rights and choices of measures to protect them in the light of the individual circumstances and special features of each need to be acknowledged and respected. A pattern of human rights safeguards evolved in any one region will only suit that region, and cannot be treated as a standard to be imposed on other countries and regions...

The Asian region has its own characteristics. Hence the Asian region neither should nor can slavishly imitate the regional human rights protection mechanisms of other regions. Asian countries can, by means of increased contacts and interchanges, increase their mutual understanding, and, subject to equality, reciprocal respect and non-interference in one another's internal affairs, together explore the implications of and channels for increasing international cooperation in human rights, in order to contribute to the promotion and protection of human rights in the region."(UNdoc.E/CN.4/1993/31)

Suspension of Sino-US human rights dialogue

In response to the US sale of jet fighters to Taiwan China suspended its formal dialogue on human rights with the US. China decided in December 1990 to open the

dialogue, thereby acknowledging that human rights were a valid topic of discussion among officials of the two countries. There was some speculation that the new Chinese approach might still permit discussions about human rights with members of the US legislature and other Americans who are not government officials. (IHT 25–11–92)

Proposal for a World Institute for Poverty Eradication

The establishment of a World Institute for Poverty Eradication (WIPER) was proposed by Malaysia at the Afro-Asian Rural Reconstruction Organisation (AARRO) conference in February 1993.

WIPER would be an independent body, organized on the lines of the Red Cross, supported by the government and financed by the private sector. The Malaysian WIPER would serve as a model body for other AARRO member countries, each of which would eventually have a WIPER so that AARRO would have a network whereby poverty eradication programmes could be coordinated. (NST 09–02–93 and 10–02–93)

Regional UN activities in the field of human rights

A seminar on national, local and regional arrangements for the promotion and protection for human rights in the Asian region was organized by the UN Division of Human Rights, in Colombo from 21 June to 2 July 1982. Among the views expressed at this seminar was the need to take into account the economic, social and political conditions as well as the specific needs of the Asian region; the need to be both selective and innovative, and to choose those aspects best suited to the region.

From 7 to 11 May 1990, the UN Centre for Human Rights organized in Manila the first Asia Pacific workshop which examined, *inter alia*, the question of regional institutions and arrangements for the promotion and protection of human rights. The workshop emphasized the role played by the Universal Declaration as a source of inspiration for national and international endeavours for the protection and promotion of human rights and fundamental freedoms, the efforts of the international community to help to realize these rights, particularly through the existing United Nations human rights machinery, as well as the importance of constructive and well-informed public opinion for the universal enjoyment of the rights and freedoms enshrined in the various international instruments. (UN Doc. A/CONF.157/ASRM/2)

Second Asia-Pacific Workshop on Human Rights Issues

The Workshop was held at Jakarta from 26 to 28 January 1993 as a follow-up of a seminar on regional arrangements for protection and promotion of human rights in late 1991. It was organized by the UN Centre for Human Rights in cooperation with the Indonesian Government. The central objectives of the workshop were, *inter alia*: (1) to increase awareness among countries of the region of international human rights standards and procedures and of the role of States in implementing human rights norms; (2) to inform about available mechanisms to assist States in fulfilling obligations

under various international human rights instruments; (3) to promote bilateral cooperation on human rights in the region; (4) to discuss the establishment of regional arrangements for protection and promotion of human rights; (5) to facilitate dialogue on the 1993 World Conference on Human Rights. The Report of the Workshop was submitted for the attention of the Regional Meeting for Asia of the World Conference on Human Rights, held at Bangkok on 29 March to 2 April 1993 (*see infra*).

The Chairman's concluding remarks included the following passages:

"...While human rights principles are universal and standards have been negotiated and accepted at the international level, responsibility for the implementation of these norms primarily rests at the State level.... It is interesting and instructive to note that human rights are dealt with in the Charter under the heading of 'International Cooperation'. Accordingly, the promotion and protection of human rights should be pursued in a spirit of cooperation and mutual respect and in a non-confrontational way.... Commitment to the principle of indivisibility will promote international cooperation and avoid unproductive confrontation...[T]he individual and the collective aspects of human rights must be considered concurrently and in a balanced manner...Matters which should be taken into account in establishing regional mechanisms in Asia and the Pacific include the geographical complexity, diversity and vastness of the countries which form the region as well as their different historical background and levels of political stability, economic prosperity and social development.... A step by step strategy should be adopted in establishing regional machinery for the promotion and protection...A first step could be the setting up of sub-regional machinery for human rights information dissemination. This could be followed, for example, by the establishment of an Asia Forum which could enhance regional exchange of ideas and experiences aimed at promoting human rights activities..." (UNdoc.A/CONF.157/ASRM/3 of 16–03–1993)

Asian preparatory meeting on human rights

An Asian preparatory meeting for the World Conference on Human Rights was held at Bangkok from 29 March to 2 April 1993. Forty-nine countries and observers from other regions attended the meeting. In his opening statement the Thai Prime Minister said, *inter alia*:

"...For Asia to succeed and play a more prominent role on the world stage, we must ensure that our peoples are provided with their rights and freedoms as set forth in the Charter of the United Nations and the Universal Declaration of Human Rights.... I believe that the path towards these ideals lies through economic development, democratization and social justice.... This Conference should serve to underline the fact that there is only one set of fundamental human rights for whatever part of the world. It should also eliminate the misconceived idea that human rights in a more economically developed region of the world are superior to those in a less economically developed region. Perception of rights do not exist in pure air. It is a result of complex interactions between several groups in the society. Therefore, it is natural that approaches to the implementation of fundamental human rights vary because of differences in socio-economic, historical, cultural backgrounds and conditions. The promotion of universality of human rights would be more effective if

there is a clear understanding and recognition of such differences. Changes to human rights must emerge primarily from within and not imposed from the outside. Human rights should also evolve at their own pace if they are to be peaceful and sustainable."

The Meeting resulted in the adoption, without a vote, of a Final Declaration, to be known as "The Bangkok Declaration" (*see infra,* Selected Documents). (IHT 01–04–93; UNdoc.A/CONF.157/ASRM/5; A/CONF.157/ASRM/8)

Japan's position regarding human rights in Asia

(*See also*: Economic cooperation and assistance, *supra* p.370)

Although joining in the Final Declaration of the Preparatory Meeting in Bangkok (*see supra*) Japan issued a separate statement explaining that Japan does not actually support the more controversial positions adopted in the document. It specifically objected to the so-called 4th operative paragraph which rejected "any attempt to use human rights as a conditionality for extending development assistance". On the other hand, Japan likes to think of itself as playing a moderating role on human rights.

Japan broke ranks with most Asian States when it sided with the Western countries by taking the position that acting on human rights abuses is no interference in internal affairs and arguing that human rights should never take second place after economic progress and development. (IHT 19/20–06–93; FEER 17–06–93 p. 22)

IMMIGRATION AND EMIGRATION

See also: Migrant workers

Influx of aliens into Malaysia

It was reported that Malaysia was attempting to stem the tide of aliens entering the country. Indonesians accounted for the overwhelming majority of these immigrants: the number of Indonesian workers in Malaysia was estimated at over 1 million. A registration drive in early 1992 resulted in the determination of 320,000 cases of illegal immigrants who were granted amnesty and allowed to work in the plantation and construction sectors. It was estimated in 1992 that another 100,000 failed to register and could be deported. Indonesia was reported to be preparing to receive back 250,000 deportees.

It was reported in April 1993 that the number of illegal immigrants who did not register and were at large in Malaysia was 224,000. (FEER 06–08–92 p. 21; IHT 22–04–93)

Influx of Chinese into Myanmar

It was reported that there had been a massive influx of Chinese from the border province of Yunnan into the city of Mandalay. Some 23,000 were known to have settled

in 1992, and another 27,000 were expected in 1993. Most of the migrants were businessmen. (FEER 06–05–93 p. 9)

Illegal immigrants in Pakistan
See also: (Non-)Interference, *infra* p.404

Pakistan announced on 4 January 1993 that it would deport all illegal immigrants. Newspaper reports estimated the number at 1.5 million, most of them coming from India, Bangladesh, Sri Lanka, Egypt, Sudan and Saudi Arabia. It was expected that the measure could affect thousands of Arab Muslims who fought in the Afghan civil war. (IHT 05–01–93) Meanwhile it was reported that Iran offered visas through its Peshawar consulate. (FEER 24–06–93 p. 9)

Illegal Chinese immigrants

The Chinese foreign ministry said on 10 June 1993 that the liberal asylum policy prevailing in some countries actually worked to encourage illegal emigration. The spokesman repeated China's assertion that illegal immigration was an international problem requiring international cooperation, and said that China was determined to stamp out its illegal flow of emigrants. (IHT 11–06–93)

INSURGENTS
See also: Borders

Insurgencies in Myanmar
(*See also*: Borders)

The central government of Myanmar has been fighting ethnic insurgencies for the past 40 years, practically right from the time of Myanmar independence. There were signs that these conflicts may come to an end, with the cooperation and pressure of China and Thailand. Meanwhile the Carter Center in Atlanta, Georgia, seemed also to be sending signals to the warring factions to try to find a solution to the conflicts.

After an uprising of rank-and-file of the army of the Communist Party of Burma (CPB) in early 1989 the central government responded favourably to a request for a truce, thereby allowing the former CPB forces (which were then split into four different ethnic armies) to retain their weapons and control over their respective areas.

This became the model for similar deals with (1) the Shan State Army in September 1989, and, in early 1991, with (2) the Pa-O National Army (in southern Shan State), (3) the Palaung State Liberation Army and (4) the Shan State-based 4th Brigade of the Kachin Independence Army (KIA).

It was reported that the remaining three brigades of the KIA in Kachin State proper had come under Chinese pressure to negotiate peace along the same lines. Talks between the KIA and the central government were held in January and early March 1993. A unilateral cease-fire agreement was reached on 8 April 1993, according to which both

sides would confine their respective forces to certain designated areas in Kachin State. The Kachins insisted that whereas the other deals were "business deals" the present one was supposed to be the first step towards more comprehensive peace talks between the central government and all ethnic rebels.

The State Law and Order Restoration Council (the central government) would probably decline to talk to fronts such as the Democratic Alliance of Burma (DAB), an umbrella organization comprising nearly 20 different ethnic rebel armies and underground groups. (FEER 01–04–93 p. 28, 22–04–93 p.9)

Peace talks in the Philippines

Agreement to begin talks before the end of June 1993 was announced after a meeting in Jakarta on 14–16 April 1993 between NUR MISUARI, leader of the (Muslim) Moro National Liberation Front (MNLF) and a Philippine government panel. The talks would deal with the question of self-government for Islamic provinces in Mindanao. The government agreed to allow the Organization of the Islamic Conference (OIC) to act as a facilitator at the talks which would be held somewhere in Mindanao.

The talks would be based on the implementation of the 1976 Tripoli Agreement which ended years of bloody hostilities. The Agreement promised autonomy for 13 Mindanao provinces and allowed the MNLF to establish its own security force.

The MNLF had repeatedly accused the government of failing to implement the agreement. The MNLF had opposed the 1990 government-organized referendum because of alleged disconformity with the Tripoli Agreement. In that referendum only four Muslim-dominated provinces (Lanao del Sur, Maguindanao, Sulu and Tawi Tawi) voted to join the now-formed Autonomous Region of Muslim Mindanao.

The MNLF had been largely moribund since MISUARI and then president AQUINO signed a second peace accord in 1986. (FEER 06–05–93 p. 28)

INTELLECTUAL PROPERTY

China joins Copyright Convention

China notified the UNESCO on 31 July 1992 that it had decided to join a global copyright convention. On 14 October 1992 Chinese officials announced that a start would be made with the implementation of two international pacts, namely, the Berne Convention on Protecting Literary and Artistic Works and the Universal Copyright Convention. (IHT 1/2–08–92)

Taiwan-US dispute on copyrights

Taiwan and the US ended talks on 9 December 1992 without reaching agreement on US charges that Taiwan had failed to protect foreign copyrights. The US accused Taiwan of violating a bilateral pact of 1989 prohibiting the import from third countries

of US-made laser disks containing films and music. The Taiwanese side denied the charges, saying that free imports of copyrighted items did not violate the 1989 agreement and that Taiwan would not revise any laws to accommodate the US demands. (IHT 10–12–92) On 8 April 1993 Taiwan agreed to accept the US demand, but only in principle and although it asked that products for non-commercial purposes be allowed to be imported even without prior approval from the copyright holders. (IHT 09 and 10/11–04–93)

The 1989 Agreement was only partly ratified by the Taiwan parliament in January 1993, but on 22 April 1993 the Taiwanese legislature finally gave its approval to the treaty in its entirety. (IHT 23–04–93; FEER 06–05–93 p.14)

The US also contended that Taiwan had failed to create an inspection system to prevent exports of pirated computer software and demanded that Taiwan protect patents on US pharmaceutical products registered before 1986. Taiwan was only willing to protect the drug patents from 1986 onward.

Taiwan had revised its copyright law in May 1992 to strengthen protection for foreign films, music recordings and computer software. (IHT 10–12–92) Nevertheless the US issued an ultimatum on 10 June 1993 demanding that Taiwan pass new laws on intellectual property before 1 July 1993. (IHT 10–12–92, 09–04, 10/11 and 23–04–93, 11–06–93; FEER 06–05–93 p. 14)

Indian-US dispute over patent protection of pharmaceutical products

The Indian Institute of Chemical Technology (IICT) had discovered a process for manufacturing the (Aids-inhibiting) drug AZT, different from that used by the US producer Burroughs Wellcome, US subsidiary of the London-based Wellcome Foundation. The process was licensed to the local drug firm Cipla which would consequently be able to market the product at a quarter of the price of Burroughs Wellcome's imports. IICT also set up deals with the Brazilian firm Labogan and the local Lupin Laboratories.

The Indian activity is legal under Indian law. The 1970 Indian Patent Act does not afford protection to original producers of health, drugs and foodstuffs if substitute products are manufactured through different processes, making drug prices in India the cheapest in the world. The discoverer of a drug can take out Indian patents on all conceivable processes but the Wellcome Foundation had not done so. However, Cipla would not be able to export its product to countries which have a patent on AZT.

As a result of the Indian-US dispute on intellectual property rights the US had already withdrawn developing country preferences on imports of Indian drugs and chemicals. (FEER 01–10–92 p. 78, 10–12–92 p.7)

INTER-STATE RELATIONS: GENERAL ASPECTS

Pakistan-Uzbekistan

On the occasion of a visit by the Uzbek President to Pakistan the two countries on 13

August 1992 concluded three agreements on investment and cooperation in postal and telegraphic services, power generation and irrigation. (FEER 27–08–92 p.12)

India-Pakistan

The two countries on 19 August 1992 signed agreements prohibiting the use of chemical weapons and setting out a code of conduct on the treatment of diplomats. They also ratified an agreement on advance notice of military exercises, manoeuvres and troop movements and permitting overflights and landings by military planes. (IHT 20–08–92)

As a result of a dozen explosions in Bombay on 12 March 1993 tensions between India and Pakistan heightened as individual Indian officials charged that Pakistan had played a role in the bombings. It was reported that the US intervened vigorously to calm tensions because US diplomats feared that India might take military action against Pakistan by way of response. (IHT 16–04–93)

India-Central Asia

The Indian Prime Minister made a four-day official visit to Uzbekistan and Kazakhstan in May 1993. This reflected a policy decision to promote links with secular political forces in the new Central Asian republics. (FEER 03–06–93 p.14)

China-US

China warned the US on 3 September 1992 that it might withdraw from arms-control talks and withhold its cooperation at the United Nations unless the US revoked its decision to sell F-16 fighter jets to Taiwan. (*see* Arms supplies) In lodging the strong Chinese protest the Vice Foreign Minister said to the US Ambassador that the deal would "lead to a major retrogression in Chinese-US relations and [would] inevitably cause a negative impact on Chinese-US cooperation in the United Nations and other international organizations." He also said that "China would find it difficult to stay in the meeting of the five permanent members of the UN Security Council on arms-control issues". [The five UN Security Council members which are also the world's main weapons producers, agreed in 1991 after the Gulf War to clamp down on the arms race to Third World "dangerous" countries and to exercise closer supervision of arms exports to the Middle East.] The Chinese Foreign Minister, referring to the US decision to sell F-16 jet fighters to Taiwan in violation of the 1982 accord, said: "In arms control, good faith is first and foremost. Without good faith there would hardly be any arms control."

In late November 1992 it appeared that China had also suspended its formal dialogue with the US on human rights, in response to the sale of jet fighters to Taiwan. (*see* Human Rights)

Other strains in the relationship came from China's growing trade surplus with the US (second only to Japan's), the fact that China seemed not to have fully kept a promise (allegedly made to the US Secretary of State in 1991) to allow all dissidents to leave

China, and the slow pace in which China was implementing an agreement on curbing the export of goods made with prison labour.

On the other hand the US Commerce Secretary went to China in mid-December 1992 to restore the annual cabinet-level economic talks which had been suspended since the 1989 rift. It was generally thought that this mission was partly to balance a visit to Taiwan in early December by the US Trade Representative. (IHT 04–09 and 17–09–92, 25–11–92; FEER 10–12–92 p.11)

China-Laos

Although China had supported the Lao communists against the former regime, relations between the two countries deteriorated after the communist victory in 1975 when Laos aligned itself with Vietnam and the Soviet Union and particularly when Laos sided with Vietnam following the latter's intervention in Cambodia in 1978. Ties began improving with mutual visits by the leaders of the two countries in 1989 and 1990 and the conclusion of several economic agreements. (FEER 06–08–92 p.14)

Thailand-Laos

Relations between the two countries began improving after the brief war over a disputed border area in early 1988 and the subsequent collapse of the Soviet Union. Mutual visits by the countries' leaders resulted in a mutual troops withdrawal from the disputed area, a reduction of Thai tariffs on Lao agricultural exports and a Thai aid offer to provide technical training.

Unresolved issues are the disputed points along the long common border and the 45,000 Lao refugees living in camps in Thailand. Contrary to the Thai desire to be no more than a country of provisional refuge, by May 1992 only 10,315 refugees had returned home under a voluntary repatriation scheme initiated by the UNHCR. (FEER 06–08–92 p. 15)

Thailand-Vietnam

The two countries signed agreements on 23 December 1992 on eliminating double taxation and on the establishment of a long-term credit fund to help Vietnam buy Thai goods. (FEER 07–01–93 p. 63)

US-Laos

The two biggest issues straining US-Lao relations have been the opium production in Laos and the issue of US servicemen missing in action in the Indochina War. Laos agreed to more joint searches for the servicemen, and opium output had fallen by 27 per cent in 1990 and 1991 compared with 1989. In November 1991 the US agreed to upgrade diplomatic relations to ambassadorial level, and US companies emerged as the

second largest foreign investors in Laos thanks largely to two oil-exploration contracts. (FEER 06–08–92 p.15).

Japan-Russia

The Russian President on 9 September 1992 abruptly postponed an imminent visit to Japan, scheduled for 13–18 September. According to a brief announcement the decision to postpone was made "taking into account the existing circumstances and following an exchange of views with the leadership of the Russian Government, the Supreme Soviet and the Security Council." It was reported that the President told a cabinet meeting on 10 September that the visit had been delayed for a number of reasons, and in particular, because natural gas contracts with Japan (and Korea) had not been ready to be completed. (IHT 10 and 11–09–92)

The visit, rescheduled in April 1993 when Russia proposed a visit for May, 1993, was again put off on 5 May 1993. According to a presidential spokesman the visit was postponed by mutual agreement till the autumn (IHT 06–05–93) but according to Japanese officials they first heard about the cancellation over television rather than through diplomatic channels. According to the same sources the reason for the failure of the first as well as the second trip was essentially the same: Russia was not prepared to talk about the disputed islands. (IHT 15–04–93, 07–05–93)

In both countries conflicting claims to four islands north of Japan had swelled into heated issues of national honour, blocking any compromise and any chance of a meaningful visit. Naval officers say Russia needs the strait between the islands to send nuclear submarines into the open Pacific. (IHT 10 and 11–09–92, 15–04–92, 06–05 and 07–05–93)

North Korea-US

(*see also*: Nuclear capability, *infra* p. 431)

According to newspaper reports the North Korean Government sent an appeal to the United States on 8 September 1992 for a major improvement in relations and a series of high-level meetings, but the US State Department repeated its insistence on a much stronger regime of inspections of the Korean nuclear installations before moving toward closer ties. The appeal was not the first in its kind and was in accordance with North Korean efforts to negotiate with the US apart from South Korea. (IHT 18–09–92)

The first high-level meeting between the US and North Korea since the Korean War was held in New York in January 1992. The US then affirmed that it would upgrade its dialogue with North Korea only after the latter had worked out a satisfactory bilateral inspection regime with South Korea, and that improvement of relations would depend on North Korean ending its exports of ballistic missiles and missile technology and paying greater respect for human rights and the resolution of bilateral issues such as US servicemen missing during the Korean War (IHT 18–09–92; FEER 01–10–92 p. 9).

China-South Korea
(*See also*: Divided States: Korea, *supra* p.367)

The two countries signed a normalization agreement on 24 August 1992, some 42 years after Chinese volunteers crossed the Yalu River to fight the US-backed South Korean forces. (FEER 03–09–92 p. 9–10)

The President of South Korea made his first official visit to China from 27–30 September 1992 after the establishment of diplomatic relations between the two countries. The visit produced wide-ranging economic agreements, covering trade and investment and scientific and technological cooperation. It was reported that the South Korean president won China's implicit agreement to use its good offices to get North Korea to permit bilateral inspections of its nuclear facilities. (IHT 01–10–92; FEER 03–09–92 p. 9–10, 08–10–92 p.10)

China-South Africa

While there was Chinese support for the ANC idea that formal relations would await the establishment of a South African interim government with black participation the two countries started the exchange of informal representatives. (FEER 15–10–92 p.12)

Japan–China
(*see also*: World War II)

The Japanese Emperor visited China from 23–28 October 1992, being the first Japanese Emperor ever to do so. The visit took place on the occasion of the 20th anniversary of the normalization of Sino-Japanese relations in 1972 but according to Japanese government officials the broader purpose was part of Japan's "consistent and sustained effort to put behind us the troubles rooted in the last war." In his official speech the Emperor "deplored" the "unfortunate period" in which Japan "inflicted great sufferings on the people of China".

The only official war reparations China ever received were 34 warships presented in 1947 when the remnants of the Japanese fleet were parcelled out among the four main World War II victors. When Sino-Japanese diplomatic relations were established, China renounced reparation claims. However, a number of private claims against the Japanese State and Japanese companies for war reparations are still pending.

China was considered to have accepted an expanded international and regional role for Japan when the General Secretary of the Chinese Communist Party during his visit to Japan in April 1992 said: "The Chinese Government and people...support Japan in playing a positive role in the defence of peace in Asia and the world and in promoting the common prosperity of all countries." (IHT 24/25–10–92;FEER 13–08–92 p.11,29–10–92 p.18;FEER 05–11–92 p.13)

Papua New Guinea—Solomon Islands

At a meeting held at Port Moresby on 26 February 1993 the foreign ministers of the

two countries agreed to conclude a framework treaty which was to be called "Special Agreement Guiding Relations between the Independent States of Papua New Guinea and Solomon Islands". The ministers also signed an agreement on interim arrangements for border surveillance and administration pending the conclusion of a Basic Agreement on Border Arrangements. (UNdoc.A/48/111–S/25394 of 10–03–93)

ASEAN and Vietnam and Laos

Vietnam and Laos signed the ASEAN Treaty of Amity and Cooperation in 1992 and became observers at its annual meeting of foreign ministers. (IHT 24/25–10–92)

Senior officials of Vietnam and ASEAN countries on 22 February 1993 endorsed a plan that would enable Vietnam to join ASEAN, possibly within a few years. The report cautioned against any attempt to seek the kind of close-knit economic and political union as envisaged in Western Europe. The report said that because it is such a diverse region Southeast Asia must "strive to be, not a supranational community...but a community of different nations and different peoples with their own identities". (IHT 23–02–93)

Japan–North Korea

The normalization talks began in January 1991 but collapsed on 6 November 1992 as the North Korean side refused to discuss the case of the woman who, according to Japan, was abducted 13 years ago from Japan and forced to tutor North Koreans (*see* 2 AsYIL 330), and another woman convicted of the 1987 bombing of a South Korean airliner over Myanmar. (IHT 7/8–11–92)

Iran and Iraq–US

According to senior US officials the US Government had concluded that the leadership of Iraq and Iran would remain hostile to the US for the foreseeable future and that new steps should be taken to isolate both States. The policy was said to also reflect advice given to the US by Middle East leaders. Contrary to past US practice of building up one state in hopes of balancing the other's military and political influence the new objective would be to ensure that both countries remain equally weak for an indefinite period. (IHT 24–05–93)

The vice-president of Iran said on 27 May that Iran would be ready for direct talks with the US if the latter ended its freeze on Iranian assets. (IHT 28–05–93)

South Korea–Russia

The Russian President made his first Asian visit to South Korea from 18–20 November 1992 during which three agreements were signed: a basic relations treaty providing a legal framework for closer economic, political, scientific and cultural

cooperation, a military agreement on exchange visits and a double taxation agreement. The Russian President suggested that Russia would no longer honour a 30-year old Soviet pledge to defend North Korea in case of war, and said that Russia would no longer provide military aid to North Korea. (*see infra*, p.402) Further, he formally apologized for the Soviet support for the North during the Korean War and for the 1983 incident whereby a Korean Airlines plane was shot down by a Soviet jet fighter. (IHT 19 and 21/22-11-92;FEER 03-12-92 p.15)

Vietnam–France

The President of France arrived in Vietnam on 9 February 1993 as the first Western head of State to visit the country since the end of the Vietnam War. He pledged to overturn the US economic embargo and said that France would intervene to restore Vietnam's eligibility for IMF and World Bank loans. It was also reported that France would double its direct financial aid to Vietnam in 1993 to $65 million and that the president had agreed to consider the Vietnamese request to cancel its $290 million debt to France. In 1992 France was Vietnam's third largest donor after Japan, which resumed credits in November 1992, and Sweden which never cut its aid.

The visit resulted in six agreements on economic, legal, medical and cultural cooperation, among which an agreement on double taxation and another on the upgrading of the Vietnamese legal system.

Referring to the Indochina War the president said it "appeared to me to be a mistake" and he found it satisfying that France was the first Western country "to show its desire for reconciliation." Comparing to the reconciliation with the former enemies in Europe he said: "Why not do the same elsewhere?" (IHT 10 and 11–02–93;FEER 11–02–93 p.12,25–02–93 p.11)

Vietnam–China

The Chinese Prime Minister visited Vietnam from 30 November to 4 December 1992, the first such visit in more than two decades. The Prime Minister denied that China wanted to expand its influence in the region and also that China planned to buy an aircraft carrier from Russia or Ukraine.

The visit resulted in four agreements mutually guaranteeing foreign investment and encouraging economic, scientific and cultural cooperation. Besides there was a Chinese interest-free credit of $14 million. (IHT 01 and 03-12–92;FEER 17–12–92 p.23)

China–Russia

The Russian President visited China from 17 to 20 December 1992. Describing the nature of the visit he marked a new stage in relations that emphasize economic and security cooperation and forsake ideological disputes. The two sides signed 24 joint statements, documents and memorandums of understanding. Among these was a joint declaration on basic principles, that is, in essence, a non-aggression pact. Besides there

were agreements on trade and economics, educational and scientific exchanges, border security, military and technical cooperation, arms sales and nuclear power. The two sides agreed to build a nuclear power station for which Russia would give a $2.5 billion credit. (IHT 19/20–12–92)

Japan–US

A spokesman of the Japanese foreign ministry said on 12 January 1993 that "Japan and the US are entering a new phase where we are going to pursue an equal partnership" and that Japan would not give in to US pressure on global and bilateral issues, including sensitive trade talks. "As an equal partner, many see Japan asserting itself a little more strongly *vis-a-vis* the US." (IHT 13–01–93)

In a demonstration of the cool stance of the US Government toward Japan, American officials served notice that the Japanese Prime Minister should not expect to meet the new US President until after Japan had taken concrete steps to help ease the huge trade imbalance between the two countries. (IHT 29–01–93) A striking shift of emphasis in the US-Japanese relationship was reported to have taken place as ministers of the new US Government exclusively dealt with economic matters during their first meeting with their Japanese counterparts without in any respect linking it to security issues. (IHT 14–04–93)

Reacting to the meeting between the Japanese Prime Minister and the American President in mid-April 1993 (*see*: International trade) Japanese Government and opinion leaders proclaimed the birth of a more equal and more combative era of US-Japan relations. (IHT 13–0 and 29–01–93, 14–04 and 19–04–93)

India–Russia

During the visit of the Russian President to India in January 1993 the two countries signed ten agreements, the most important ones being a new Treaty of Peace and Friendship (replacing the 1971 Treaty), an agreement on defence cooperation and one on India's debts. Agreement was reached on the supply of spare parts and conventional weapon systems (*see*: Arms supplies), the sale of a long-range rocket (*see*: Missile technology) and on a settlement of the problem of Indian debts to Russia which had arisen as a result of the sharp drop in the value of the ruble. (IHT 29–01–93;FEER 11–02–93 p.18)

India–Southeast Asia

It was said that the visit by the Indian Prime Minister to Thailand in early April 1993 was a significant step in a new Indian economic and political thrust into ASEAN, replacing its previous Soviet-oriented policy. Consequently, during a press conference the Indian Prime Minister reportedly took pains to identify with ASEAN by pointing out shared Asian values, such as in the field of human rights. Since 1992 India had become a South Asian "dialogue partner" of ASEAN. (FEER 22–04–93 p.16)

India–Myanmar

The change of policy also had its impact on the Indian attitude towards Myanmar. In the past years India had been highly critical of the Myanmar government's treatment of dissidents but it was now turning to a line of "constructive engagement" as had been done by ASEAN.

Cooperation between the two countries is needed in managing their common border against drug trafficking, smuggling, and insurgency. As a result of the visit by the Indian Foreign Minister in late March 1993 informal cooperation between the border forces of the two sides was to be put on an official footing and both sides would extend to each other facilities for transborder pursuit of rebels.

There are about 14,000 Myanmarese political refugees in India. In April 1993 the Indian government decided to put all these refugees to government-run camps on the Indo-Myanmar border. (FEER 06–05–93 p.12)

Asia–Russia

In a speech to the Indian parliament on 29 January 1993 the Russian president urged a realignment of Asia's largest states—thereby referring to Russia, India and China—in a "major force" to balance US and European interests. (IHT 30/31–01–93)

Iran's attitude towards the outside world

The President of Iran granted his first news conference with foreign reporters in two years on 31 January 1993. In it he said that a resumption of diplomatic relations with the US would require "some goodwill gestures", "some signal of goodwill in practice and not in theory." One such gesture would be the freeing of billions of dollars in Iranian assets frozen in the US. Iran demanded $11 billion for military equipment ordered by the late Shah before the 1979 revolution. The relations were severed after Iranian militants seized 52 hostages in the US embassy in November 1979.

As to Iraq the President said that although he saw the regime of President Saddam Hussein as a destabilizing force in the region, he opposed US intervention:"We do not think the solution is that a power like the US comes to the region and takes control of the fate of the Iraqi people. We suspect the intentions of the US and the West." (IHT 01–02–93)

North Korea–Russia

Russia had proposed and North Korea had agreed to amend their 1961 friendship treaty to reflect the changing international situation, in particular with regard to the Russian commitment to intervene on behalf of North Korea in the event of armed conflict. (IHT 6/7–02–93)

It was later reported that North Korea agreed reluctantly to a Russian demand not to employ Russian nuclear scientists and engineers. The demand was reportedly caused

by Russian concern about allegations that North Korea was developing a nuclear bomb and was accompanied by a threat to sever ties. (IHT 18–02–93)

Iran–Arab States

Algeria severed diplomatic relations with Iran, accusing it of trying "not only to destabilize Algeria but the whole of the Muslim world and to undermine the image of Islam in the world." Algeria had already recalled its ambassador from Tehran in January 1992, and the mutual diplomatic representations were reduced in November 1992.

It was later reported that Egypt and Algeria had stepped up denunciations of Iran, asserting that it was supporting Islamic rebels in their countries. (IHT 29–03–93,10/11–04–93)

Iran–Russia

On 29 March 1993 the two countries announced the conclusion of three agreements. The first established the framework for regular political consultation between the foreign ministers and the exchange of diplomatic delegations. The second is a consular agreement providing for, *inter alia*, the abolition of visa requirements for diplomatic and service passports. The third is a declaration of principles on which economic and political cooperation will take place. (BLD 16–04–93)

North Korea–China

It was reported that Chinese attempts to persuade North Korea to cancel its announced withdrawal from the Nuclear Non-proliferation Treaty (*see*:Nuclear capability) had run into fierce resistance: North Korea refused to receive a Chinese high-level delegation planned to take part in birthday celebrations for the North Korean President, suspended travel permits for several North Korean delegations that were to have visited Beijing for normal exchanges, and increased its guard force on its side of the Chinese border. (IHT 28–04–93)

(NON-)INTERFERENCE IN INTERNAL AFFAIRS

See also: Broadcasting, Specific territories within a State:Kashmir

Rejection of protest over arrest of dissident

China rejected US and French protests over the arrest of a dissident. The Foreign Ministry spokesman said that the man was a Chinese citizen and that he had broken Chinese law after his return from exile in the US. "This is not a matter for the US nor is it a matter for France. Their protests are unreasonable." (IHT 04–09–92)

Expulsion of militant Muslims
(*see also*: Immigration, *supra* p. 392)

The Acting Prime Minister of Pakistan told the meeting of the Organization of the Islamic Conference foreign ministers on 25 April 1993 that Pakistan would expel militant Islamic fundamentalists of foreign nationality who, he said, were using Pakistan as a base to engineer violent uprisings in their homelands. This was because "Pakistan cannot allow its territory to be used for any undesirable act against another State." (IHT 26–04–93)

Alleged Pakistani involvement in Bombay bombing

As a result of a dozen explosions in Bombay on 12 March 1993 tensions between India and Pakistan heightened as Indian officials charged that Pakistan had played a role in the bombings. The bombings caused the death of at least 250 people, 1,400 people injured and heavy damage to the stock exchange building.

On 21 April 1993 and again on 14 May the Indian Home Minister gave a statement on the matter in parliament, referring to a conspiration involving a Dubai-based smuggler and a Bombay family. Some 20 underworld figures had been recruited in Bombay and sent to Pakistan for training, while explosives and arms had been landed at fishing villages near Bombay. (FEER 06–05–93 p.14)

It was reported that the US intervened vigorously to calm tensions because US diplomats feared that India might take military action against Pakistan by way of response. (IHT 16–04–93, 15/16–05–93; FEER 06–05–93 p.14)

INTERNATIONAL TRADE
See also: Association of Southeast Asian Nations

Singapore-Vietnam agreement on maritime transport

A maritime transport agreement was concluded (on 16 April 1992) to foster greater cooperation and strengthen trading links between the two countries. The agreement was the fifth shipping agreement entered into by Vietnam, the others being concluded with France, Malaysia, China and Thailand. Singapore remained by far the largest trading partner of Vietnam. Under the agreement vessels of both countries will be accorded MFN status. For the first time an arbitration agreement allowing for the prevailing rules of the Singapore International Arbitration Centre (SIAC) to apply in an arbitration had been provided. A similar arbitration clause was included in a later trade agreement which was concluded on 24 September 1992, which also allowed for arbitration according to the rules of the Vietnamese International Arbitration Centre.

Sino-US trade tension

The US announced on 21 August 1992 that it had drawn up a "hit list" of $3.9

billion worth of Chinese exports for punitive tariffs unless the two sides would reach an agreement by 10 October 1992 about American access to the Chinese market by way of the lifting of various non-tariff barriers. It was the largest such list ever published by the US. According to the assistant US trade representative the list had been designed with two criteria in mind: one was to avoid harm to American users of Chinese products by picking product areas in which China was not the sole supplier. The second was to minimize the impact on the Hong Kong economy. The US had begun an investigation of Chinese practices believed to affect US exports under Section 301 of the US Trade Act. (*see* 2 AsYIL 333)

If the US trade representative would have determined by 10 October that Chinese trade practices were harming US commerce, the US would impose tariffs of up to 100 per cent on Chinese exports. On 9 September 1992 China for its part threatened to hit $4 billion of US imports with punitive tariffs in case of US action.

The US wanted China to publish all its laws and regulations pertaining to foreign trade, many of which were not publicly available, and to eliminate restrictive import bans, quotas and licensing that US officials said had prevented American products from being sold in China. As to quotas and licensing requirements the question was when rather than whether China would eliminate them. The transparency question was more difficult to solve as it would require China to publish a huge body of unwritten trade regulation and nationally standardize rules which were currently regionally divergent. Besides the US trade representative demanded that the principle of transparency include a statement of the Chinese export objectives and import priorities.

On 10 October 1992 the two sides finally signed a trade agreement that will phase out most Chinese import licenses, quotas and other controls, and that averted a US-China trade war. China agreed to remove 75 per cent of its existing licensing controls, quotas and other non-tariff barriers within the first two years of the agreement. China is also required to make public all internal laws, policies and guidelines dealing with exports and imports. Under the agreement the US should be able to sell China more goods and thereby reduce a growing trade deficit with China that threatened to reach more than $17 billion in 1992. US exports grew an average 25 per cent during the past two years and China had become one of America's fastest-growing export markets.

In late November 1992 the Chinese Government indicated that it would offer the same terms it agreed to in the Sino-US agreement to the rest of its trading partners worldwide.

In its effort to speed up its re-entry into the GATT and by way of fulfilling the trade agreement concluded with the US in October 1992 China on 15 December 1992 announced its largest reduction of imports tariffs ever. By 31 December a reduction of 7.3 per cent of the general import duties would be effected and, besides, it promised to cut its overall level to 15 per cent comparable to that of other developing countries in the GATT. It was also announced that China would reduce the need for licences on two-thirds of imports within two years, and that all documents on trade management would be made public in a year, after which the government would only implement regulations that are on public record. (IHT 22/23 and 24–08–92, 10–09–92, 12–10–92, 30–11–92, 16–12–92, 21–04–93; FEER 22–10–92 p.56)

Resumption of Sino-US Trade Forum

Regular Sino-US ministerial-level trade talks that were started in the eighties in a Joint Commission on Commerce and Trade and were suspended after the Tienanmen incident were to be resumed in December 1992. (IHT 30–11–92)

Sino-US dispute over inter-modal transport market

The US shipping giant Sea-Land believed it had been promised a licence to operate its own container trucks between Hong Kong and Guangzhou (Canton), starting from 1 March 1993, but it appeared later that the Guangdong provincial authorities were threatening to renege on the promise.

There were indications that Sealand got caught in a bureaucratic wrangle as the Sino-US shipping agreement under which the licence would have been issued and which was extended in September 1992 was concluded and implemented by different Chinese authorities.

China had long placed strict limits on the access of foreign shippers to its markets but in 1991 US carriers won the right to open branch offices and operate feeder lines into Chinese ports. (FEER 25–02–93 p. 49)

South Korean-US "Presidents' Economic Initiative"

The presidents of the two countries signed an agreement on 2 October 1992 under the name of Presidents' Economic Initiative, under which South Korea would dismantle non-tariff barriers to US exports by the end of 1993 as well as enact legislation to protect the intellectual-property rights of US companies. In return the US promised to facilitate high technology investments by US companies in South Korea.

The talks began in January 1992 when the US President asked Korea to engage in market-opening negotiations similar to the Structural Impediments Initiative with Japan (*see infra*, p. 411), and on 7 August 1992 a package of recommendations was initialled. (FEER 20–08–92 p. 58, 22–10–92 p. 50)

The replacement of non-tariff barriers and the Japanese and Korean ban on rice imports (*see*: AsYIL, Vol. 1 p. 316, Vol. 2 p. 336)

The Director-General of the GATT called on Japan for an across-the-board conversion of non-tariff import barriers to tariffs, but the Japanese Government objected against it, particularly with regard to the import of rice. It cites the necessity of maintaining self-sufficiency in its staple grain as the reason for the ban.

South Korea received a similar suggestion to end its ban on rice imports and to allow outsiders to supply up to five per cent of the country's consumption. He suggested the replacement of the ban by the introduction of very high tariffs which would allow the minimum market access of 3–5 per cent. The Korean ban is explained by the heavy dependence of its farmers on the rice crop.

The Japanese Prime Minister said in a news conference on 12 December 1992 that his government was formulating a policy that would both protect farmers and prevent a failure [of the Uruguay Round of talks under the auspices of GATT]. He proposed a two-tier tariff plan, under which the first 10 per cent of imports would be subject to very low tariffs and the following 20 to 30 per cent to very high tariffs. Under the Japanese Food Control Law virtually all rice imports are banned. (IHT 02 and 05/06–09–92, 23–11–92, 14–12–92)

US most-favoured nation treatment for China
(*see also*: AsYIL Vol. 1 p. 318, Vol. 2 p. 334)

The US President on 29 September 1992 vetoed a bill in which the US Congress required that extension of the MFN status for China be dependent on human rights in China. The President said that he shared the goals of the legislature but that it could "throw thousands of Americans out of work." On 30 September 1992 the presidential veto was overruled by the House of Representatives. (IHT 30–09 and 01–10–92) It was reported that legislation had been re-introduced in the US Senate that would demand China make "significant progress" in human rights, free trade and other areas to gain renewal of its MFN status in June 1994. (IHT 24/25–04–93) (IHT 5/6–06–93)

Meanwhile American companies vigorously lobbied for extension of the MFN status of China. Trade analysts estimated that exports to China created about 150,000 jobs in the US. In 1992 China spent $7.47 billion in the US, and exported for an amount of $25.68 billion. (IHT 8/9–05–93)

On 28 May 1993 the US President by executive order renewed MFN-status for China for another year, but attached conditions to further extensions beyond June 1994. Two mandatory conditions were (1) that China grant freedom of emigration to its people and (2) that it comply with a 1992 bilateral agreement which was supposed to end exports to the US of products using prison labour. In addition five areas were listed in which China must make "overall, significant progress": (1) adhering to the Universal Declaration of Human Rights, (2) releasing and accounting for political prisoners, (3) ensuring humane treatment of prisoners, including allowing access to prisoners by international humanitarian and human rights organizations, (4) protecting Tibet's "distinctive religious and cultural heritage", and (5) permitting international radio and television broadcasts into China. It was expected that China would honour the prison labour agreement anyway and free emigration is one of the existing requirements governing the granting of MFN-status to Communist countries.

Apart from the executive order the president wrote in a letter to Congress that next year the government would also consider whether China had made "overall, significant progress" in a number of other areas, including: stopping forced abortion and sterilisation, ending religious persecution, seeking to resume dialogue with the Dalai Lama on Tibet, and ceasing the jamming of Voice of America broadcasts. The executive order distinguished MFN renewal from arms proliferation and trade issues, which would be negotiated separately. In three separate accords in 1992 China agreed to limit its exports of ballistic missile technology, to protect foreign copyrights and trademarks, and to lower tariffs on a broad range of goods. (IHT 30–09–92,01–10–92,24/25–04–93,8/9–05,26–05,28–05,29/30–05 and 31–05–93,5/6–06–93;FEER 10–06–93 p.13)

NOTE: Under 1974 legislation, "non-market" economies are eligible for MFN-status only if the president annually certifies that open trade would advance the cause of human rights. Congress has 90 days to disapprove of the president's decision. The President, in turn, has the authority to veto the disapproval, subject to a two-thirds overrule by both House and Senate.

Cancellation of Sino-US aircraft lease agreement

New China Air, the Chinese all-cargo airline canceled an agreement to lease 4 Boeing 737s from the American company BWWY Ltd., a New-York-based company. It did so after Chinese Government officials had warned "to consider that if we chose Boeing we would have to take into account the unpredictable nature of the relationship between the US and China." New China Air would lease the aircraft from Lufthansa instead. (IHT 10/11–10–92)

ASEAN response to Austrian action on tropical timber

Malaysia protested to GATT on 4 November 1992 on behalf of ASEAN against Austrian efforts to have tropical timber products labelled. The Malaysian minister for primary industries recalled that Austria itself produces 12 million cubic meters of temperate timber products. The Malaysian protest stated, *inter alia*, that the Austrian action was "an attempt to unilaterally decide what constitutes sustainably managed forests when there is still no international consensus on the criteria and determination of sustainably managed forests." (IHT 06–11–92)

Japanese car exports to the European Community
(*see* 1 AsYIL 322)

Japan and the European Community in late 1992 and again in early February 1993 failed to agree on a forecast for new-car demands in the EC in 1993 in order to determine the level of Japanese exports. They could not agree either on a modification of the export-monitoring system for the period between 1993 and 1999.

A monitoring agreement was initially introduced in 1986 and used a demand forecast. The accord was updated in July 1991 for a seven-year transition period from the start of the integrated EC market in 1993 and an end to export restraints in 1999, but doubt remained as to whether the production levels of Japanese producers in Europe would be considered a factor in determining export volumes. Under the existing agreements quotas for the Japanese car imports in Italy, Spain, France and Britain would be abolished in 1993. In spite of the existing arrangements Japan agreed in April 1992 to cut its car exports to Europe by about six per cent from 1.26 million in 1991.

In early March 1993 agreement was finally reached on a forecast of a contracting EC car market in that year, implying a reduction of Japanese exports, but parties still differed over the magnitude of the decline and, consequently, of the cut in Japanese exports. On 1 April 1993 the parties agreed on a common estimate of a decline in

demand by 6.7 per cent in 1993 compared to 1992. Under EC pressure Japan agreed to reduce its 1993 exports to the EC by practically 9.4 per cent, considerably more than the percentage fall of demand. The allowed number would be 1.09 million, compared with 1.19 million in 1992. Two months after the April 1993 agreement, the EC in early June again requested urgent talks to negotiate stricter limits on Japanese car exports to the Community, because of pessimism about the depth and duration of the recession in Europe.

Among the twelve EC members seven did not restrict Japanese imports, while the five that do (France, Italy, Spain, Portugal and Britain) only imported 340,000 in 1992 and were scheduled to lift that number to nearly 400,000 in 1993. The bulk of a considerable further export cut would then have to come in the seven open markets. The April agreement, however, was based on an understanding that the supply of Japanese cars would not be restricted in the open markets. (IHT 02–12 and 03–12–92,03–03–93,04–06–93;FEER 15–04–93 p.67)

Voluntary export restraints

Japan announced on 8 January 1993 that it would extend for another year its "voluntary export restraints" for cars to the US at 1.65 million cars for the year beginning April 1993. It was not expected to please US car producers who had been seeking tighter limits. In 1992 the limit was cut from 2.3 million vehicles to 1.65 million but exports were expected to be below the ceiling, as they were in recent years. This was the result of the shifting of production to factories in the US. (IHT 09/10–01–93)

Chinese textiles export to the US
(*see* 2 AsYIL p. 335)

The US Customs Service announced that it would offer a series of seminars in Hong Kong and China in January 1993 to teach textile manufacturers how to comply with American import laws. This followed a 19-month investigation of China's textile export practices, resulting in indictments of evasion of duties and import quotas.

The US later decided to cut China's textile quota in retaliation for illegal shipments. China said that the measure violated Sino-US textile agreements and that China was considering submitting the case to arbitration. The US said that Chinese companies each year shipped $2 billion of low-cost garments in violation of US quotas by attaching fake third-country certificates of origin and re-exporting them. China had tried to stop such transshipments by punishing dozens of companies for engaging in transshipping. (IHT 24/25–12–92,17/18–07–93;FEER 08–10–92 p.83)

Conditions of Sino-North Korean trade

China announced on 29 December 1992 that beginning in 1993 all trade with North Korea must be paid for in cash rather than in barter. China is North Korea's largest trading partner, followed by Japan, the former Soviet Union and Iran. (IHT 30–12–92)

Japanese response to dumping

Japan on 29 January 1993 announced for the first time that it would impose anti-dumping duties. It would impose these duties on imports of ferrosilicon manganese from Chinese companies that it said was sold in Japan at unfairly low prices. China regretted the decision and threatened some kind of retaliation. According to a MOFERT (Ministry of Foreign Economic Relations and Trade) spokesman the decison was made "without consideration of some true and reliable information."

According to a Japanese trade official the Japanese decision was the first of what would become an increasingly common tactic as Asian countries push to open Japan as an export market. The risk for Japan is that the move could backfire. Japan had for a long time pointed to its low general tariff levels and to the fact that it had never resorted to anti-dumping duties to argue that its markets were more open than those of the US or the EC. (IHT 30/31–01–93)

EC dumping investigation into Asian imports

The European Community announced on 10 March 1993 that it had opened dumping investigations into imports of television camera equipment from Japan and electronic components from Taiwan and South Korea, that could lead to punitive duties. The Community defines dumping as selling goods abroad for less than their production cost or less than their home-market prices. On 11 March 1993 the EC said it had imposed provisional anti-dumping duties on bicycle imports from China after an EC inquiry had found a 34.4 per cent difference in the sale price of Chinese bicycles in the Community and in China, and concluded that bicycle imports from China had eroded profitability and undermined investment of EC manufacturers. (IHT 11–03 and 12–03–93)

Asian-African competition in the cocoa market

Producers and consumers of cocoa met in Geneva early March 1993 to agree on measures to support prices, which had fallen to their lowest levels. Cocoa had been depressed by huge stocks built up after a rapid expansion in production in the late 1980s. Production in Indonesia had risen ten-fold in the last ten years to about 215,000 tons a year and Malaysia had doubled its output. African exporters are led by the Ivory Coast with annual output of around 730,000 tons and Ghana with 280,000 tons. Indonesia is neither a member of the International Cocoa Organization of producing and consuming countries nor of the Cocoa Producers' Alliance. The talks centered on a plan to withhold up to 350,000 metric tons from the market but the two sides failed to agree on who should pay for the programme and what prices it should aim at. (IHT 09–03–93)

Draft of US Asian trade policy

It was reported that the US was drafting a trade policy toward Japan, China and South East Asia that would combine aid to American high-technology industries with the opening of Asian markets for these products. The new policy of supporting specific exports would be a sharp departure from the former administration's approach of seeking across-the board trade liberalization which sometimes benefited other countries as much as American companies. Under the new policy trade would become an integral part of US economic and national security concerns. The new policy would not include severe trade restrictions as desired by the automobile and textile industries. It may be tempered by diplomatic and military concerns and consequently lead to a less or a more restrictive trade policy. (IHT 12–03–93)

US Trade and Investment Framework Agreements

The US held talks with Malaysia on the possibility of concluding a TIFA. It already had such an agreement with Singapore (*see* 2 AsYIL 336) and was preparing another with Brunei. Worldwide the US already had 22 TIFAs which are low-key bilateral agreements which provide a framework for consultations. (FEER 03–12–92 p. 6)

Japan-US Structural Impediments Initiative negotiations

The S.I.I. trade negotiations were launched in 1989 (*see* 1 AsYIL 320) and represented the political ascendancy of the "revisionist" school of Japanese studies in the US. This view holds that "Japan is different" and must be made more like the US before its chronic trade surpluses can be trimmed. Meanwhile some important sectors of the US industry were moving in the opposite direction. Instead of complaining about Japan's differences, American companies are teaming up with Japanese ones precisely to get a foothold in the Japanese market. (IHT 04–08–92)

Japanese-US trade

The relative success of the US-Japanese semiconductor trade agreement (*see* AsYIL Vol. 1 p. 321 and Vol. 2 p. 339) under which the market-share of US and other non-Japanese manufacturers had increased from 8.6 to an expected level of 20.2 per cent at the end of 1992 might encourage the US to demand specific market-share goals in other industries in which Japan's market is considered closed. Japan appeared worried about this step toward "managed trade". The call in the 1986 semiconductor agreement for US and other non-Japanese manufacturers to gain 20 per cent of the Japanese market had been regarded by the US as a Japanese commitment while Japan regarded it only as an expectation. It was recalled that in the original agreement of 1986 the call was not even contained in the agreement itself but in a secret side letter and that it was only in the renewed agreement of 1991 that it was put into the main text. The Japanese semiconductor market is about $20 billion a year.

The US Advisory Committee for Trade Policy and Negotiations, a panel comprising about 40 top businessmen, recommended in February 1993 that the US should press Japan to agree to "temporary quantitative indicators" in sectors where invisible import barriers persisted. These indicators should "reflect a level of global imports which would result if commercial considerations were the sole determinant of the level of [Japanese] imports" in a particular sector.

Speaking of US-Japanese trade the US president said on 23 March 1993: "...we're sometimes in a position of trade deficit, but we're often in a position of trade surplus, with the EC. We once had huge trade deficits with Taiwan and South Korea, but they have changed now quite a bit...But the persistence of the surplus the Japanese enjoy with the US and the rest of the developed world can only lead one to the conclusion that the possibility of obtaining real equal access is somewhat remote."

The US-Japanese trade problems were the main subject of discussion when the Japanese Prime Minister visited the US in mid-April 1993. The two leaders disagreed sharply on "results-oriented" trade negotiations, particularly those setting numerical targets for Japanese imports of US goods. They did agree on the need to create a new framework within three months to address "structural and sectoral issues" that would replace both the SII negotiations (*see* above) and the moribund Market-Oriented Sector-Specific ("Moss") talks. The Japanese argue that US businesses had under-utilized opportunities created by the SII talks and that the US Government was never serious about structural reforms it undertook to implement, such as cutting the budget deficit, increasing industrial competitiveness and improving education and training.

According to the US Secretary of Commerce in late April 1993 the US and Japan were working on two new trade agreements. One would aim at reforming the structure of the Japanese economy to make it easier for foreign companies to compete; it would be the successor to the so-called Structural Impediments Initiative. The other, a so-called "strategic export initiative", would try to improve market access in specific sectors.

In a "Japan paper" spelling out goals for a new economic relationship with Japan, American presidential advisers in May 1993 recommended the US President to adopt a confrontational economic policy that would challenge Japan to cut its worldwide trade surplus by 50 per cent over the next three years. If followed the policy could usher in a tense period in relations between the two countries. US officials said on 27 May 1993 that in an attempt to end criticism that the US is selfishly trying to help only American companies, a new US trade strategy toward Japan would press for increased imports in Japan from all countries. Under this new approach the US might press Japan to increase imports of certain goods by a specific amount without these additional imports having to come from the US. Meanwhile Japan was laying the groundwork to resist such demands. Japan would propose strict ground rules for talks with the US to take place in June 1993, that would exclude, *inter alia*, the setting of numerical targets from the discussions.

The Japanese Prime Minister had already warned earlier that Japan would not accept a trade policy requiring Japan to meet specific targets for increased imports of American or other products, as such policy would be tantamount to managed trade. Meanwhile the Japanese Ministry for International Trade and Industry released a report on 20 May 1993, containing an impassioned defence of Japan's trade system and rebutting charges that Japan's markets are uniquely difficult to penetrate and its

economic system inherently tilted toward running huge surpluses of exports over imports. [On 13 April 1993 Japan announced a $116.5 billion programme to stimulate its economy but declined to set aside a specific portion for the purchase of imported goods].

Despite the apparently firm Japanese position, some American officials said they saw an opportunity to wrest concessions because Japanese officials were allegedly usually eager to minimize foreign disapproval when the world's spotlight was turned on them, such as at the G-7 meeting.

New US proposals for trade relations were submitted on 8 June 1993, including numerical targets for reduction of Japan's trade surplus and for increasing imports of specific products, but without automatic retaliation if the targets were not met. The proposal called for Japan's current account surplus to be reduced to between 1 and 2 per cent of Japan's economic output in three years compared to about 3 per cent now. It also called for an increase in Japan's imports of manufactured goods by about one third. The proposal would be subject of negotiations aimed at establishing a new framework for Japanese-US trade. (IHT 18–03,22–03 and 24–03–93,13–04,14–04,17/18 and 24/25–04–93,21–05,22/23–05 and 29/30–05–93,09–06–93;FEER 01–04–93 p.80, 29–04–93 p.15)

Access to Japan's construction market

On 30 April 1993 the US launched an offensive to obtain better access to the Japanese construction market. Unless Japan took action within 60 days to improve access for US contractors, Japanese companies might be banned from participating in US public works projects. Japan uses a system in which officials designate a limited number of bidders for each project. As the deadline of 30 June approached there was no easing of the access yet, but it was not expected that the US would introduce retaliatory measures in view of the impending G-7 meeting early July. (IHT 03–05–93,29–06–93)

Access to Japan's supercomputer market

The US started a review of the 1990 US-Japan Supercomputer Agreement, under which Japan was to open up its bidding procedures. The review is to be completed by 31 May 1994, implying that by then Japan should have bought several US computers. While using the term "comparable market access" the US in fact demanded pre-determined shares of the market. The US share of the European supercomputer market was about 85 per cent, against 11 per cent in Japan. (FEER 13–05–93 p.74)

Sino-South Korean trade

Bilateral trade reached a value of $8 billion in 1992, up 39 per cent from 1991 and more than double the level in 1990. By the end of 1992, 443 South Korean investment projects had been approved. Much of the Korean trade and investment is directed toward the Chinese province of Shandong, opposite Korea. (IHT 07–04–93)

Japanese trade surpluses

Over the past four years Japan's trade surplus with the countries of East and South East Asia more than doubled, to $42 billion in 1992 from $18 billion in 1989, while the surplus with the US declined in the same period, to $43.7 in 1992 from $45 billion in 1989. Japan's exports to East Asia—$116.4 billion in 1992—was exceeding those to the US, $95.9 billion. The issue *vis-à-vis* Asia is particularly complicated because many of the States in that region are also quite protectionist, maintaining the inconsistent position of relying heavily on exports while keeping their own markets relatively closed to others. (IHT 14–04–93)

Japan-Chile trade

Japan and Chile had been quietly enhancing economic and political ties in the last two years. Since 1991 Japan had become Chile's largest export market, and Japanese investments were increasing remarkably. Japan could use Chile, along with Mexico, to circumvent tariff barriers in the Latin American market.

Impact of violation of worker rights on international trade: US-Indonesia

The US Trade Representative (USTR) warned Indonesia that its exports to the US may become ineligible for low tariffs under the US General Scheme of Preferences because of alleged violations of worker rights.

In June 1992, Asia Watch and the International Labour Rights Education and Research Fund (ILRERF), a pro-labour non-governmental organization, separately petitioned the US Trade Representative (USTR) to investigate Indonesian labour practices. Under US law the president must end low tariff benefits under the US General Scheme of Preferences (GSP) to a trading partner which is not "taking steps to afford internationally recognized worker rights." These rights include freedom of association, the right to organize and bargain collectively, a ban on forced labour, restrictions on child labour and acceptable conditions of work.

In April 1993 the GSP subcommittee, a mid-level inter-agency group led by the USTR, took up the Indonesian case with the majority favouring putting Indonesia in the "pending" category. The case then went up to a higher-level trade policy review group where the hardliners would face opposition from the Departments of State and Defence. (FEER 06–05–93 p.9,13–05–93 p.13)

Sino-EC trade

China and the EC held trade talks on 27–30 April 1993, the first top-level discussions in nearly four years. Unlike the US the EC appeared to keep trade relations at a more strictly business level without attaching human rights conditions. In 1992 the EC trade deficit with China had widened to an estimated $12 billion. (FEER 13–05–93 p.71)

JAPAN'S MILITARY ROLE

Japanese participation in UN peace-keeping in Cambodia

Japan on 8 September 1992 formally accepted a UN request for 600 soldiers, 75 police officers and eight cease-fire monitors to join the Cambodia mission. This would be the first deployment of ground troops abroad since World War II. Because of opposition in Japan the government agreed to a compromise limiting the military's duties mainly to rear-echelon work such as construction. (IHT 09–09–92)

Doubts arose about the extent to which Japan was prepared to bear the physical consequences of participation in UN forces when a Japanese policeman was killed in Cambodia in May 1993. The Japanese Government made considerable efforts to have the remainder of the civilian policemen withdrawn from dangerous areas to the capital Phnom Penh. (IHT 12–05–93)

Participation in UN force for Africa

The Japanese Government said in early December 1992 that Japan would not participate if the UN decided to send forces to Somalia. A foreign ministry spokesman said that the location is remote from Japan, that Japan's capacities were limited, that Japan had not been asked to play a part in the joint force and that there were legal restraints: the situation which existed in Somalia did not seem to satisfy the requirements of the new law authorizing Japanese participation.

On 26 March 1993, however, the government said that Japan would send military personnel to join UN peace-keeping operations in Mozambique. A Foreign Ministry official said the decision should dispel the impression that Japan was concerned primarily with Asia. "What we are saying is that Japan's concern is more global, that we are ready to go wherever there is a need." After a government fact-finding mission to Mozambique it was decided that the conditions for Japanese participation in UN peace-keeping efforts there had been met, and on 27 April 1993 Japan said that it would send 53 military personnel. (IHT 03–12 and 5/6–12–92,27/28–03–93,28–04–93)

Modification of the peacekeeping law

The Japanese foreign minister called for a change in the peacekeeping law to allow Japanese forces abroad to play a military role. He said this was needed "to change the way of interpretation about the constitution so that Japanese soldiers can rush out to help people overseas and settle international disputes." However, when the ruling party planned to open formal discussions in parliament on amending the 1947 constitution the Prime Minister said he did not support such plans, saying that Japan must not repeat its mistakes. (IHT 04–01 and 19–01–93)

Protection of Japanese UNTAC volunteers

Concerned about loss of municipal public support for its first venture in peacekeeping, the Japanese Government had quietly asked the UNTAC to guarantee the safety of Japanese election observers in Cambodia or deploy them only to comparatively safe areas of the country. A Japanese civilian volunteer was killed in an incident in April 1993, and since then the government had been sharply criticized for allowing Japanese civilians to travel into disputed areas of the Cambodian countryside without armed UN escorts. (IHT 29–04–93)

JOINT DEVELOPMENT

Agreement on "Northern Growth Triangle"
(*see* 1 AsYIL 329)

Malaysia and Thailand agreed on 7 January 1993 to study the possibility of and to work toward a new "growth triangle" along with Indonesia, linking southern Thailand, northern Malaysia and northern Sumatra and allowing the three countries to tap each other's labour, technology and natural resources. The idea of the triangle was first suggested by Malaysia in 1991. The countries involved planned to ask for ADB assistance in realizing the plan. Among the projects currently discussed were a joint deep-sea fish canning company, trilateral cooperation in the timber and furniture industry and expanded ferry services. (IHT 08–01–93;FEER 21–01–93 p. 59,03–06–93 p.9)

Joint gas exploration in the Gulf of Thailand

The Malaysia-Thailand Joint Authority (MTJA, *see* 2 AsYIL 343) was reported entering into discussions with contractors of the joint development area (JDA) on 14 January 1993 concerning the proposed joint gas exploration. Exploration work is expected to start three years after the production sharing contracts are signed.

The JDA, located in the Gulf of Thailand, is a designated overlapping area on the continental shelf of Malaysia and Thailand and covers an area of about 7,200 sq. km. It is about 130 km off Kota Bahru in Kelantan, Malaysia and 120 km off Narathiwatt in Thailand. The MTJA was established under the laws of both Thailand and Malaysia in January 1991 (1 AsYIL 160) and is empowered to assume all rights and responsibilities on behalf of the two governments for the exploration and exploitation of non-living natural resources in the JDA. All costs incurred and benefits derived by the MTJA from activities carried out in the JDA would be equally shared by the two governments. (NST 08–01–93)

"New silk road"

Mitsubishi Corp. and China were reported to contemplate doing a feasibility study for a 6,700- kilometre natural gas pipeline that would run from Turkmenistan through Uzbekistan and Kazakhstan to Xinjiang in Western China. From there gas would be shipped to Japan. (IHT 11–02–93)

Increase of state holding

The government of Papua New Guinea settled a dispute with foreign mining companies on the price to be paid for increased participation by the State in the Porgera gold mines. It was agreed that the State, which already had a 10 per cent stake, would buy an additional 5 per cent share from each of its three Australian partners, so that each of the four partners would thus have a 25 per cent stake. The Porgera gold deposit is one of the richest gold discoveries in the world in the last half-century. (IHT 18–03–93)

Tumen River project
(*see*: AsYIL Vol. 1 p. 329, Vol. 2 p. 342)

China, Russia and North Korea agreed in principle to lease out land for 20 years for the $30 billion port and industrial project along the Tumen River. According to the UN-sponsored plan the land, which straddles the three countries, would be managed by an independent, international corporation. (FEER 27–05–93 p.71)

Malaysia-Vietnam

The two countries agreed on 4 June 1993 to share the costs and proceeds from oil exploration in a disputed area of the South China Sea. The area is a 2,200-square km zone southwest of Vietnam and north of Malaysia's east coast and was called "common waters". (FEER 17–06–93 p.67;BLD 25–06–93)

JUDICIAL ASSISTANCE

Chinese treaties on judicial assistance

China has entered into bilateral treaties on the matter with 15 States: France, Poland, Mongolia, Belgium, Italy, Spain, Russia, Turkey, Cuba, Thailand, Ukraine, Kazakhstan, Belarus, Egypt and Bulgaria. The treaties provide for cooperation in civil and commercial matters, including the handing over of judicial documents, investigation of evidence and the enforcement of jugments. (BLD 25–06–93)

JURISDICTION

See also: Hong Kong

Backing of the death penalty edict against Salman Rushdie

A majority of the Iranian parliament supported a speech by the State's Religious Leader in which he said that the religious death order against the author four years ago because of his book "The Satanic Verses" must be carried out. However, the parliamentary speaker said on 29 April 1993 that Iran had no intention of sending hit men to carry out the death sentence. (IHT 18–02–93,30–04–93)

Attacks on merchant ships on the high seas

On 2 February 1993 the Japanese freighter *Yusho* was steaming through international waters near the Sakishima Islands some 200 km northwest of Taiwan, en route from Taiwan to Osaka, when an unmarked vessel fired shots at the *Yusho*. Two hours later the same unmarked boat fired at the Panama-registered cargo ship *Orange Ocean*. It refused to identify itself when challenged by a Japanese coastguard cutter but after it was stopped by the cutter the uniformed crew admitted to be Chinese police officers on an anti-smuggling mission. The Japanese embassy in Beijing lodged a protest and received an apology. Yet less than 24 hours after the apology another unmarked vessel fired at the Vladivostok-bound Russian cargo ship *Sukhinichi* near the Japanese island of Ishigaki, of the Sakishima group. Japanese officials confirmed the vessel that fired the shots was Chinese. (FEER 18–02–93 p.21)

LAW OF THE SEA

Raising of the flag of the host state by a visiting warship

A disagreement arose as to the question whether a visiting foreign warship is required to raise the host State's flag upon entering the latter's port. The incident occurred when a French warship visited Haiphong for the first time since the end of French colonial rule in 1954. According to Vietnamese officials it was standard practice for all foreign ships entering Vietnamese ports to fly the Vietnamese flag, but, on the other hand, it was said that international naval protocol would not seem to contain such requirement. (IHT 25–11–92)

LITIGATION

Iranian claim against the US

On 2 November 1992 Iran filed in the Registry of the International Court of Justice an Application instituting proceedings against the US with respect to the destruction of Iranian oil platforms by US warships in 1987 and 1988. (ICJ Communiqué No. 92/26)

MIGRANT WORKERS

See also: Passports and visas

Reverse migration of Japanese-Brazilians

An increasing number of Japanese-Brazilians are leaving Brazil to find employment in Japan. Two years ago Japan adopted a law that almost automatically grants children and grandchildren of emigrants three-year work visas. The number of visa-issues at the Japanese consulate at Sao Paulo jumped from 8,602 in 1988 to 61,500 in 1991. (IHT 15/16–08–92)

Bangladeshi to Taiwan

Bangladesh took the initiative to export skilled and semi-skilled labour to Taiwan. (FEER 20–08–92 p.12)

Foreign workers in Korea

In July 1992 South Korea granted an amnesty for 55,000 illegal foreign workers, more than one-third of whom were ethnic Koreans from China. At the same time the government implemented a new policy providing up to 10,000 visas to enable companies to import foreign workers for on-the-job training. The amnesty and visa schemes reflected a shift in government policy towards limited accommodation of foreign workers. According to immigration department estimates there were about 70,000 foreigners working in South Korea. (FEER 27–08–92 p.58)

Chinese workers as part of purchase agreement

One of Indonesia's largest pulp and paper producers had hired about 700 workers from China as part of a purchase agreement for equipment for coal-fired power plants. Because of strong objections in Indonesia the company had to apologize in parliament and to start sending back the workers. As foreign workers must be shown to have special skills lacking in the domestic market, Indonesian labour union officials

questioned the fulfillment of this requirement with each of the huge number of workers. Besides, the Defence Minister told a parliamentary working committee, "In fact, the main cause of the problem is not the numbers of the foreign workers in itself, but more their country of origin and the ethnic origin of the project owners." (FEER 01–10–92 p. 18)

Numbers of illegal workers

The following numbers were reported regarding illegal workers in the various Asian States: **Singapore** had between 200,000–300,000 undocumented workers, the bulk of whom are Malaysians from over the border. This would be on top of about 30,000 Indians, Malaysians and Chinese who were being assimilated. Some 60,000 of the undocumented workers came from the Philippines, Sri Lanka and Thailand. In the **Malaysian** peninsula alone, nearly 470,000 migrants declared themselves during an amnesty that ended the summer of 1992. In addition, there existed roughly 140,000 Indonesians living illegally in Sabah and another 10,000 in Serawak. **Thailand** was home to some 200,000 illegal workers, of whom some 110,000 were from Myanmar who had been granted "open-door" work permits. 1992 figures from **South Korea** put the number of illegals at 46,000, of which the largest group were Filipinos (17,650), Chinese (9,737) and Nepalese (5,000). **Taiwan** had some 60,000 illegal workers from countries as diverse as Bangladesh, Iran and the Philippines. The biggest attraction, not surprisingly, is **Japan**, where the illegal population in 1992 was estimated at nearly 280,000. It was estimated that nearly 2.7 million foreign workers will be needed by the turn of the century to meet the labour demand, and the Tokyo Chamber of Commerce and Industry was reported to be lobbying for an open quota of 600,000 jobs for foreigners in 1993.

The numbers indicated that the migrants from the region were no longer opting for the four traditional destinations of the past: the US, Canada, Australia and New Zealand. (FEER 29–04–93 p.23)

MILITARY BASES

Russian access to the Cam Ranh Bay base
(*see* AsYIL Vol. 1 p. 332, Vol. 2 p. 346)

Contrary to earlier reports the Vietnamese foreign minister denied any negotiations with Russia on renewed Russian access to the base. (FEER 06–08–93 p.11)

Return of Philippine bases

The US on 30 September 1992 formally turned over the Subic Bay base to the Philippines. The last 1,700 American troops withdrew to Cubi Point Naval Air Station on the western edge of the complex and would leave by the end of November. This last withdrawal took place on 24 November 1992. (IHT 01–10–92,25–11–92)

Russian bases in Mongolia

Mongolia refused to allow Russia to retain any of the former Soviet bases in its territory, unless for strictly civilian purposes. Russia had requested to retain several signal stations to monitor China. (FEER 17–12–92 p.8)

MILITARY COOPERATION

South Korea—Japan

The Chairman of the South Korean Joint Chiefs of Staff announced to parliament on 21 October 1992 that South Korea would seek a gradual expansion of military ties with Japan as a result of the rapidly changing military situation in the region. (IHT 22–10–92)

US access to Philippine military installations

The US and the Philippines agreed on 6 November 1992 that US warships, aircraft and troops would continue to have access to military installations in the Philippines even after the US withdrawal from its military bases in that country. This could be interpreted as continued preferential access to the former US military facilities. It was reported that the president preferred an access agreement which would allow the US only a contingent of less than 100 American military advisers who would officially be classified as "consultants". (IHT 7/8–11–92;FEER 29–10–92 p.9,19–11–92 p.14)

US—Philippine Mutual Defence Treaty

Apart from the above limited agreement, military cooperation between the two countries after the withdrawal of the US from its military bases in the Philippines is governed by a 1951 Mutual Defence Treaty.

This Treaty states that an armed attack on either party would require each "to meet the common dangers in accordance with its constitutional processes." To this statement was attached the following: "An armed attack on either of the parties is deemed to include an armed attack on the metropolitan territory of either of the parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific."

The Philippines' metropolitan territory, according to the 1898 Treaty of Paris between Spain and the US, basically includes its territorial waters but does not include the Philippines' continental shelf claim.

On the occasion of the hand-over of the last remaining part of the bases the Philippine president called for a review of the Mutual Defense Treaty "in the context of the Post-Cold War era." (IHT 25–11–92;FEER 26–11–92 p.20)

Chinese naval visit to India

During the visit by the Indian Defence Minister to China in July 1992 the two countries agreed on the first visit by a Chinese warship to India some time in 1993. Agreement was also reached to develop military academic, scientific and technological exchanges. There were speculations that the efforts to build up a naval relationship were aimed at defusing mutual concerns over the expanding presence of both navies in Asian waters, such as the development of close naval cooperation between China and Myanmar. (FEER 12–11–92 p.30)

Sino—Myanmar cooperation

According to Western intelligence reports China recently not only supplied several patrol boats to Myanmar, but also trained Myanmarese sailors and helped to build naval port facilities, such as a new base on Hanggyi Island at the mouth of the Bassein River and the upgrading of facilities on Great Coco Island near the (Indian) Andaman Islands. (FEER 12–11–92 p.30)

Singaporean military training in Bangladesh

Bangladesh agreed to allow Singapore to train some of its military aircrew in Bangladesh. It was not clear how Bangladesh would be compensated for the use of its facilities. Singapore's army maintains extensive overseas military training facilities in Brunei and Taiwan and the air force conducts regular exercises in Australia. (FEER 11-02-93 p.9)

Thai-US military manoeuvers

It was decided that after a suspension for the past two years the two countries would resume joint military manoeuvres in Northern Thailand in May 1993. (IHT 12-03-93)

Resumption of US military aid to Malaysia and Indonesia
(*See also*: Sanctions, *infra* p.443)

The US Congress had cut off military training aid to Malaysia because of its refusal to give first asylum to Vietnamese boat people beyond the 300,000 that were already in Malaysia, and the aid to Indonesia was cut off because of the shooting of Timorese demonstrators in 1991. The US started emphasizing resumption of the aid as it was becoming involved in regional security consultations with ASEAN. (*see*: Regional security) (FEER 03-06-93 p.18)

MINORITIES
See also: Insurgents, Migrant workers

Ethnic Nepalese in Bhutan
(*see* 2 AsYIL 349)

In a "letter to the Editor" [of the *International Herald Tribune*] the First Secretary of the Royal Bhutanese Embassy at New Delhi wrote, *inter alia*:

"Bhutan's population of about 600,000 comprises two broad ethnic groups, the Drukpas of the North, the original inhabitants, and the Lhotshampas of the South, who are recent immigrants of Nepali origin.

The first influx of Nepali immigrants into Bhutan took place in the first half of this century. In 1958, these immigrants were granted citizenship as a one-time measure only. Over the past three decades, a continued influx of illegal economic migrants has raised the number of ethnic Nepalis in Bhutan to almost a third of the total population.

Bhutan became aware of this serious threat to its stability and security when agitation by ethnic Nepalis for a separate State was launched by the Gurkha National Liberation Front in the mid-1980s in neighboring areas of India.

A nexus of illegal immigrants and a section of the southern Bhutanese people with vested interests bitterly opposed the efforts of the government to curb illegal immigration...."

According to the letter the dissident (Nepali) groups enticed ethnic Nepalis (from Bhutan) to come to camps in Nepal and register as "Bhutanese refugees", and that in response people in southern Bhutan had been leaving the country. As to the alleged "cultural cleansing" the letter denied any campaign to force people to wear the national dress and speak the Dzongkha language, and emphasized that the policy of promoting the national dress and language was endorsed by the southern Bhutanese people in large public meetings. (IHT 06–10–92)

Korean minority in Japan

Contrary to Koreans who have migrated to other countries, most of the 600,000 Koreans in Japan have chosen to remain Korean nationals. According to figures of the Japanese Justice Ministry, 161,212 Koreans had acquired Japanese nationality since World War II. (IHT 29–01–93)

Uzbekistan and Tajikistan

As a result of the new borders drawn in 1925 when Turkestan and the Republics of Bukhara and Khorezm were dismembered, ethnic entities were divided whereby ethnically Uzbek cities like Khozhent were put in Tajikistan and Tajik cities like Samarkand and Bukhara became located in Uzbekistan. Tajiks are Iranian, Uzbeks are Turkic. (IHT 16–02–93)

Vietnamese in Cambodia
(*see*: 2 AsYIL 293; *see also*: Cambodia)

The killings of Vietnamese during the past year, culminating in the mass murder in March 1993 revived memories of the programme organized in 1970 by the LON NOL government after the overthrow of Prince NORODOM SIHANOUK at that time. Large numbers of Vietnamese were killed by the military and the police, and most of the minority, estimated at 500,000, were put in concentration camps, from which many were expelled to South Vietnam.

There is no certainty as to the number of Vietnamese—either Cambodian citizens or unauthorized immigrants. The Khmer Rouge asserted that there are more than 2 million, of whom 1.3 million have obtained Cambodian citizenship under the Phnom Penh Government and consequently entitled to vote. The KNPFL or Buddhist Liberal Democratic Party contended that there are 1.5 million Vietnamese, while the Phnom Penh Government cites numbers from 120,000 to 500,000. While many of the Vietnamese are migrants who entered the country to find work following the Vietnamese invasion in 1979, other families have been in Cambodia for generations.

Both the Khmer Rouge and the KPFNL maintained that the Phnom Penh Government had remained under Vietnamese control despite the departure of the Vietnamese army in 1989. The policies of both groups are rooted in deep-seated ethnic and racial antagonism. (IHT 12–03–93)

The recent crusade against the Vietnamese seemed to enjoy a degree of passive support. The political parties were unwilling to publicly condemn the Khmer Rouge killings. (Then) Prince NORODOM SIHANOUK was one of the rare Cambodian politicians to express condemnation, but while expressing his compassion for the Vietnamese civilians in a message on 15 March, he said neither he nor the UN was able to contain "this thirst for murdering the Vietnamese... In these conditions the best service to the innocent Vietnamese civilians residing in our country is to advise them to return to their country—that is the Socialist Republic of Vietnam."(FEER 08–04–93 p. 22)

As a result of the assaults against ethnic Vietnamese thousands of them started to flee their homes. Hundreds of fishing boats carrying ethnic Vietnamese families headed south down the Mekong River towards Vietnam. The exodus was called the largest in Indochina for more than a decade. It was believed that hundreds of thousands of people could eventually go.(IHT 12–03–93, 02–04–93; FEER 08–04–93 p. 22, 15–04–93 p. 21)

Rohingyas
(*see* 2 AsYIL p.347)

Contrary to the persecution of the Rohingya over the past five decades, the Buddhist and Muslim communities in the region have coexisted amicably for the previous 1,000 years or so. The turning point occurred during World War II, when inter-communal tensions were either created or exacerbated when the Arakanese Buddhists—as well as the Burman nationalists—sided with the Japanese, while the minorities remained loyal to the British.

In 1942 mobs of militant Buddhists attacked Muslims in northern Arakan, some

80,000 of whom fled to (British-held) East Bengal. In 1948, after Myanmar independence, discontent among Muslims in Arakan led to the Mujahid rebellion. An extensive government campaign in 1954 resulted in many Muslims fleeing to the then East Pakistan. In 1961 the last remaining Muslim mujahids surrendered. The situation reached a new phase when in 1978 some 200,000 Muslim refugees streamed across the border. In early 1992 a second major exodus of Rohingyas took place when nearly 300,000 crossed the Naaf River that marks the Myanmar-Bangladesh border. As a result of the cyclical waves of repression and flight many Rohingya exiles have been attracted by the more radical Muslim groups.

As a result of what is called the Diaspora of Myanmar Rohingya Muslims to the Middle East there are reportedly more than 20,000 in the UAE (Dubai, Sharjah and Ajman), as many as 200,000 in Saudi Arabia, between 1,500–2,000 in Qatar, and 3,000–5,000 in Jordan, apart from more than 200,000 in Pakistan. The largest concentration of Rohingyas in the Middle East is in the Saudi Arabian desert towns of Nakasa and Jarwal, close to Mecca. (FEER 28–01–93 p.23–24)

Korean Russians

Following the Japanese occupation of Manchuria the Korean minority in the Russian Far East were seen as a potential fifth column by the Soviet authorities. With little advance notice, 180,000 Korean residents of the Pacific coastal regions were deported *en masse* in 1937. They resettled in various Central Asian regions of the former Soviet Union.

Although they generally lived peacefully among a Muslim environment for decades, rising nationalism in the wake of the collapse of the Soviet Union made the 280,000 Koreans no longer welcome in the new Central Asian States. In Tajikistan 6,000 ethnic Korean residents were among the refugees who fled into neighbouring States because of the civil war.

In an effort to find a solution a law was reportedly being drafted by the Russian Parliament, under which the Koreans may be able to return to their traditional homeland on the Siberian Pacific coast. The law would offer Russian citizenship to Koreans living in all the former Soviet republics and would permit them to settle anywhere they want in Russia. It was expected that the law would be passed later in 1993 but subject to conditions placed by regional authorities to protect ethnic European Russian interests. (FEER 11–03–93 p.26)

MISSILE TECHNOLOGY
See also: Arms supplies

Supply of M-11 missiles by China to Pakistan

According to US intelligence reports China exported to Pakistan M-11 missiles capable of carrying nuclear weapons. There was, however, disagreement among US intelligence officials about whether the Chinese missiles spotted in Pakistan fulfilled the

requirements of the Missile Technology Control Regime. [In late 1991 China stated its intention to abide by the Missile Technology Control Regime, an international accord prohibiting the export of missiles with a range of more than 300 km (185 miles) and a payload of more than 500 kg. (*see* 2 AsYIL 349)]

Under US law passed in 1990 the US Government is required to retaliate by imposing sanctions if the missiles proved to be a violation of the MTCR. Last year the US froze exports of high-speed computers to China as a reaction to Chinese export of launchers for M-11 missiles to Pakistan. It was reported that the present sale had also led to the postponement of the sale of a supercomputer to China that was to be used for weather forecasting. (IHT 5/6–12–92, 07–05–93; FEER 17–12–92 p.14, 07–01–93 p.6)

North Korean long-distance missile

North Korea in late May 1993 successfully tested a new missile, the Rodong-1, with a range of about 1,000 kilometers. (IHT 12/13–06–93)

Indo - Russian rocket contract
(*see*: 2 AsYIL 350; *infra* p. 442)

On the eve of his visit to India in January 1993 the Russian President said that although the West, and especially the US, had taken a guarded view of the Russian sale of rocket technology to India, Russia was committed to honour the contract.

The US-Russian dispute over the sale of rocket engine technology to India flared again later. Consultations took place in late June 1993 to try to find a solution. The US seemed particularly concerned about the included sale of production know-how and other technology along with the rockets themselves. (IHT 27-01-93, 24-06-93)

MUSLIM SOLIDARITY

Malaysian policy in respect of Muslim interests

As the first among the ASEAN States Malaysia closed its embassy in Belgrade and froze its diplomatic ties with Yugoslavia because of the situation in Bosnia, for which Malaysia put the responsibility with Yugoslavia.

The Malaysian move was consistent with its policy in other international cases involving a Muslim element: Malaysia was the first country to allow the Islamic Alliance of the Afghan Mujahideen to set up a representative office in early 1984, and in 1991 Malaysia deviated from the common ASEAN understanding not to interfere in the affairs of neighbouring countries by protesting to Myanmar over the treatment of Muslim Rohingyas. (FEER 20-08-92 p.12, 27-08-92 p.9)

Iranian weapons for Bosnia

Croatian authorities intercepted a plane-load of Iranian arms and personnel at Zagreb airport early September 1992, intended for delivery to Bosnia. (IHT 11-09-92)

NARCOTICS PROBLEM

Arrangements with the US

Under an existing arrangement with the US, countries like India and Turkey could supply the US market for opium with 80 per cent of their production in return for a promise that they prevent the diversion of their opium harvest towards the illegal drug trade and, in the case of India, make substantial efforts to stop the transit of narcotics from Pakistan, Afghanistan, Myanmar, Thailand and Laos.

The 80-20 rule was up for review in 1993. The US Drug Enforcement Administration (DEA) suspected that the opium yields in India were far above the amount allowed by the government while illegal traffickers offered prices 73 times higher than the government price.

India sells about 700 tons of opium and barters another 220 tons to foreign drug companies in return for codeine. Each of the 142,000 licensed opium farmers in India must sell a fixed amount to two government opium factories. (FEER 22-10-92 p.44)

Regional law enforcement

According to French Foreign Ministry sources law enforcement agencies from a number of countries met to discuss a global strategy in the war against drugs. Under this informal agreement the US was put in charge of operations in Latin America, France in Africa, Germany in the Pakistan-Afghanistan "Golden Crescent" and Japan in the Myanmar-Thailand-Laos "Golden Triangle". (FEER 07-01-93 p.6)

NUCLEAR CAPABILITY

Iranian nuclear programme
(*see also*: Arms supplies, *supra* p.348)

Iran and China agreed on the purchase of a 300-megawatt nuclear plant. The agreement was disclosed during a visit by the Iranian President to China in September 1992. The IAEA would be allowed to inspect the nuclear power plant. China was already building a small nuclear research reactor in Isfahan. (*see* 2 AsYIL 356) Russia agreed to sell two 440-megawatt nuclear power reactors to Iran.

The US Government was opposed to any State helping Iran to develop a nuclear programme, whether peaceful or not, and had repeatedly urged China to stop

cooperating with Iran in its nuclear programme. [In 1990 Iran and China signed a ten-year agreement for scientific cooperation and the transfer of military equipment and technology].

On 27 November 1992 the Iranian Deputy Foreign Minister stated that Iran had no need for nuclear weapons and described reports that Iran was planning to acquire nuclear weapons as "a lie and a plot."

A draft CIA report concluded that Iran was making progress on a nuclear weapon by the year 2000, but there was continuing debate among US intelligence experts on Iran's military build-up. (IHT 03–08–92, 12/13–09 and 25–09–92, 01–12–92)

Japanese plutonium transport
(*see* 2 AsYIL 357)

The ship specially outfitted to carry out the planned plutonium transport from France to Japan was the *Akatsuki Maru*. The US Government formally approved of the plan in a letter to the US Congress, and notified its intention to provide security help including surveillance by spy satellites. [The US approval was required because the plutonium had been reprocessed from spent uranium fuel rods originally provided by the US to Japan for use in conventional nuclear reactors].

In addition to earlier opposition from several States, such as South Africa and Chile, to the passage of the ship through sea-routes near their coasts, the Malaysian foreign minister expressed objections against an eventual passage through the Straits of Malacca. These objections were shared by Indonesia and Singapore but there were doubts as to their right to deny the ship free and innocent passage through territorial waters which are used for international navigation. While admitting that Indonesia could not close international sealanes Indonesia had called on—even pressed—Japan not to use Indonesian waters, particularly the narrow Straits of Lombok.

After taking a route round Africa and Australia the ship turned to the north through the waters separating Australia and New Zealand, passed between Hawaii and the Marshall Islands and arrived safely at Tokai on 5 January 1993.

The idea of importing the plutonium is the result of a 30-year-old plan to create a self-sustaining source of nuclear power (nuclear cycle) by reprocessing nuclear wastes from Japanese (uranium) power plants and using the resulting (much more dangerous) plutonium as new fuel in specially converted conventional reactors as well as in "breeder reactors" which generate electric power and "breed" additional plutonium at the same time.

Eventually Japan would reprocess the fuel in Japan itself, for which purpose it is building a reprocessing plant at Rokkasho that will be operational by about 2030. But for the next 15 to 20 years it planned to rely heavily on reprocessing plants in England and France under a $4 billion contract. The imported plutonium was intended for use in the already existing Monju fast-breeder reactor which was scheduled to become operational in 1993.

However, there had developed a world oversupply of plutonium and ordinary nuclear fuel made from uranium had become far more plentiful and far less expensive than some decades ago. Besides, surprised about the strong international criticism of the first shipment government officials said on 13 November 1992 that they would review

the plans of future transports to Japan. Yet the modification or termination of the plutonium programme would be extremely difficult since Japan had built a huge industry around it with huge investments in breeder-reactor technology. Moreover, the existing contracts with Britain and France had made these countries' reprocessing facilities highly dependent on the Japanese business.

The plutonium also offers the Japanese the capability to develop nuclear weapons. The shipment put Japan in some odd diplomatic quandaries, forcing it to argue that it should possess nuclear materials and technology that it wants to deny to other countries that lack nuclear weapons, like North Korea. (IHT 19–08 and 22/23–08–92, 16–09–92, 06–10–92, 09–11 and 10–11–92, 14/15–11–92, 17–11–92, 28/29–11–92, 08–12–92, 06–01–93; FEER 03–09–92 p.20, 08–10–92 p.12–13)

Inspection of North Korea's nuclear activities
(*see also*: Divided States: Korea)

Despite the peace accord between South and North Korea (*see* 2 AsYIL 409) the two countries failed to remove the greatest obstacle to normalization of relations, reciprocal nuclear inspections. The implementation of the 1991 Joint Declaration had been deadlocked over the South Korean demand for "challenge inspection". North Korea had rejected the demand on the ground that IAEA inspection (*see infra*) had allegedly resolved the issue. For its part North Korea had demanded to inspect US military bases in South Korea and examine all the records pertaining to the withdrawal of US nuclear weapons from that country.

In September 1992 the South Korean President said he had become convinced that North Korea's "determination to develop nuclear weapons has become weaker", marking a reversal from assessments some months earlier by the US CIA that North Korea might be only months away from building an atomic weapon. It was reported that the IAEA inspections had also proved that fears about a large factory being ready to start reprocessing plutonium were not correct.

Pursuant to the 1992 Safeguards Treaty North Korea had submitted an [initial] report on nuclear material subject to safeguards under the agreement.(*see* 2 AsYIL 355) It admitted that it had reprocessed nuclear fuel from a research reactor to produce a tiny amount of plutonium for research purposes.

Inspections (seven of which were carried out during the period till May 1993) were begun in May 1992 to verify the correctness of the information contained in the report and to assess its completeness. These inspections led to inconsistencies between the Korean declarations and the inspections' findings. Laboratory analysis of the plutonium samples given to the IAEA revealed there were three different reprocessing instances instead of one. It was said that after plutonium has been extracted from used uranium fuel it breaks down into neptonium and there appeared to be neptonium of three different ages in the sample. These results appeared inconsistent with North Korean declarations on the timing and the number of batches that had been processed. The most important gap in the knowledge about the North Korean programme was caused by continuing inability of the international inspectors to have access to the natural uranium core of the 5 MW(e) experimental reactor which had been in operation since 1986. By comparing it against its operating records one could determine the number of

spent fuel rods that had been removed and perhaps reprocessed to make plutonium.

Besides, North Korea had refused an IAEA request of 9 February 1993 to visit two additional sites that Western intelligence agencies suspected were nuclear waste treatment sites and linked to an alleged North Korean nuclear weapons programme. The suspicion was based on spy satellite photographs and chemical evidence. The refusal was motivated by the alleged military nature of the buildings and the alleged absence of any involvement with nuclear activities, and was connected with the continuance of the US-South Korean military training exercises. Furthermore North Korea complained that the two sites were not part of the agreed list of plants subject to inspection.

When confronted with the North Korean refusal the IAEA (through resolutions of the Board of Governors of 25 February and 18 March 1993) demanded a "special inspection". This procedure had never been used before and is intended to make possible an inspection of a site that a State had not declared to be a nuclear one. North Korea was initially given one month to allow inspection but the period was later extended till 31 March.

Thereupon North Korea responded on 12 March 1993 by announcing its withdrawal from the Nuclear Non-proliferation Treaty, taking the US-South Korean joint military exercises (which it referred to as "a nuclear war rehearsal") as the cause of its decision. It said it would remain outside the treaty until the IAEA halted its attitude and until the US nuclear threat was removed.[Under the NPT the nuclear installations of a State remained open for inspection for 90 days after its withdrawal]

As to the reactions from some other States, Russian diplomatic sources warned that North Korea should not be forced to comply with inspection requests and should be allowed some room to manoeuver. China reacted by declaring that it "holds that [the problems] should be settled properly through consultations in a manner conducive to the universality of the Nuclear Nonproliferation Treaty." Bringing the case before the Security Council would "complicate things." South Korea on 15 March started imposing economic countermeasures but emphasized simultaneously the need to resolve the dispute in a peaceful manner. It planned to renew talks with the North on mutual nuclear inspections (which had broken down in January 1993 because of the US-South Korean military exercises) and agreed with the US to apply a "stick and carrot" approach.

As the deadline set by the IAEA passed on 31 March 1993 the IAEA Board of Governors adopted a further resolution on 1 April 1993 reporting the situation to all members of the Agency and to the Security Council and the General Assembly of the UN. Among the 35 members 28 voted for the resolution, 2 (China and Lybia) voted against and India, Pakistan, Syria and Vietnam abstained. Subsequently, the Security Council on 11 May 1993 adopted Resolution 825(1993) (by a vote of 13–0, China and Pakistan abstaining), calling upon North Korea "to comply with its Safeguards Agreement with IAEA as specified by the IAEA Board of Governors' resolution of 25 February 1993" and requesting the Director General of IAEA "to continue to consult with the Democratic People's Republic of Korea with a view to resolving the issues which are the subject of the Board of Governors' findings".

Talks were started again between the IAEA and North Korea. No solution was reached in regard to the IAEA demand for inspection of the two suspected sites. In April 1993 the IAEA requested permission for urgent activities relating to the maintenance and replacement of safeguards equipment and for observance of the

refuelling of the 5 MW(e) reactor. Agreement was obtained for the former, while the refuelling of the reactor was postponed.

Meanwhile US and North Korean diplomats had begun "back channel" talks in Beijing to seek a solution of the crisis, later followed by formal negotiations starting early June 1993. The US side would require North Korea to strictly adhere to the NPT, implement fully the South-North Korean bilateral accords barring enrichment or reprocessing fissible material for nuclear weapons, including mutual inspections, and allow IAEA to carry out inspection of the suspected sites. On the other hand the US would be prepared to promise not to attack North Korea with nuclear weapons, raise the possibility of additional talks on future political and economic cooperation and terminate the annual US-South Korean military exercises. For its part the North Korean ambassador to the UN said that North Korea would return to the NPT if five conditions were met: the US-South Korean joint military drills should be cancelled, North Korea should be permitted to inspect US military installations in South Korea, a US pledge not to launch a nuclear attack, the removal of the US nuclear umbrella from South Korea and a pledge to respect North Korean socialism.

Hours before the North Korean withdrawal from the NPT was to take effect on 12 June 1993 the North Korean Government decided "unilaterally to suspend, as long as it considers it necessary, the effectuation of its withdrawal".(IHT 18–09,19/20–09,02–11–92, 14–01,02–02,09–02,11–02,13/14–02,23–02,27/28–02,05–03,13/14–03,16–03,18–03,19–03,24–03,31–03,01–04,02–04,16–04,19–04,22–04,04–05,10–05,13–05,26–05,12/13–06,14–06,29–06–93; FEER 01–10–92 p.8–10,25–03–93 p.10,03–06–93 p.12; UN-doc.S/26456).

Supply of nuclear reactors by Canada to South Korea

The Atomic Energy of Canada Ltd announced the sale of two reactors to the Korea Electric Power Corp. which had previously already bought two other reactors from Canada, one of which was completed in 1983. South Korea already operated six *Westinghouse*-made reactors and several others made by the French *Framatome* SA. The Canadian-designed reactors would use the waste from the American models as their fuel.(IHT 21–09–92)

Japan juxtaposed to North Korea and South Korea

The US as well as Japan had been demanding the dismantlement of a secret nuclear reprocessing plant under construction about 60 miles north of Pyongyang, despite North Korean insistence that the plant is purely for energy research. On the other hand, under US pressure South Korea had pledged in 1991 never to build a reprocessor. Yet, Japan is building a huge reprocessing plant of its own and was in the meantime acquiring plutonium from the reprocessing of its uranium-waste in Europe.

Defining the US position a US Government official said that "[i]f it was any other country than Japan, we would look at this plutonium project and conclude a bomb was the real motive. But the fact is that it's O.K. for the Japanese because we trust them, and not O.K. for the North Koreans because we don't trust them." (IHT 10–11–92)

Pakistan's alleged nuclear armament

Pakistan denied an American NBC report that it had components for seven nuclear bombs. Earlier in the year the Pakistani Prime Minister acknowledged that Pakistan had the ability to make atomic bombs but said it would not do so, while the foreign minister had declared in February 1992 that Pakistan had frozen its nuclear weapons programme at the level of October 1989.(IHT 03–12–92)

Indian nuclear activities

India has a high level of nuclear autonomy because it mostly has locally designed reactors which use natural (non-enriched) uranium which is not subject to international control. However, for its plants that require enriched uranium the supply that is not connected with full-scale international monitoring has considerably decreased. There had been a policy shift by the French and the Russians, previously the most flexible suppliers, but who had decided to require full-scope safeguards for future supply agreements. The French change of policy was a result of its joining the NPT and in the Russian case the change was decreed in March 1992. Previously, France as well as the Soviet Union only required safeguards for the particular power stations which used the materials supplied. Full-scope safeguards, however, mean IAEA inspection and monitoring of all nuclear installations to see that there is no diversion towards weapons production.

One of the power plants facing problems is the *Tarapur* atomic power station which was initially supplied with enriched uranium by the US and covered by safeguards under a tripartite agreement between India, the US and the IAEA. After the US withdrew in 1974 France stepped in with a similar agreement that would expire in 1993.

Similar problems are created by India's shortage of heavy water. (FEER 29–10–92 p.20)

China's nuclear power programme

The first nuclear power plant in Guangdong province, consisting of two 900-MW units, is located at Daya Bay, 50 km from Hong Kong and was set to start up by October 1993. A second plant in Guangdong consisting of two 1,000 MW reactors is planned and a decision has to be made as to its location. The alternatives are the Daya Bay site and Yangjiang, about 200 km from Hong Kong.

Before the diplomatic row as a result of the French sale of warplanes to Taiwan (2 AsYIL 285; *see also*: Sanctions), French companies had a virtual monopoly in China's nuclear power programme. *Framatome* and *Electricité de France* built the Daya Bay plant. (FEER 18–02–93 p.56)

Radioactive waste disposal

According to Taiwanese reports Taipei and Beijing authorities were close to

agreement for the joint development in China of a modern disposal facility for low-level radioactive waste from both sides of the Taiwan Straits. The site would be large enough to accommodate all low-level waste produced by the mainland and Taiwan for the next three or four decades. The facility would be located either in northern China or on an island in the South China Sea. The first possibility would imply a modification of existing dumping facilities in Xinjiang Province, which would be relatively fast and cheap. As to the alternative option feasibility studies suggest this would involve higher development costs. (FEER 18–03–93 p. 9, 25–03–93 p.22)

OIL AND GAS

Opening of Indian oil and gas fields

In August 1992 India announced that 43 oil and gas fields would be opened for exploitation by foreign and local companies. They may either team up as majority partners with one of the two state oil explorers, the Oil and Natural Gas Commission and Oil India, or operate their own production-sharing contracts with the government.

The fields included the Mukta and Panna fields located 95 km west of Bombay and the Mid Tapti and South Tapti offshore fields near the city of Surat. (FEER 12–11–92 p.54)

Oman-Indian pipeline

The two countries signed preliminary agreements for the building of an underwater gas pipeline from Oman to India, to be completed within four years. The pipeline would, however, have to pass over the continental shelf of Iran and Pakistan. (Fin.Times 17–03-93; BLD 02–04–93)

Cut in Indonesian oil export

As a consequence of rising internal fuel demands and ageing oil fields, Indonesia started cutting back on its petroleum exports. The country's own needs already soak up nearly half of the output, and that demand is bound to increase as the economy continues to grow. Indonesia is widely expected to become a net importer of oil before the end of the decade. (IHT 27–05–93)

Malaysia-Iranian oil contracts

The national oil corporation of Malaysia, *Petronas*, signed a new contract with the National Iranian Oil Company to buy 50,000 barrels per day for two years beginning May 1993. (NST 07–04–93)

Kazakhstan
(*See also*: Foreign investment)

On 6 April 1993 Kazakhstan announced an oil agreement with *Chevron* for the exploitation of the giant Tenghiz oil field in western Kazakhstan. Tenghiz is regarded as one of the world's top ten fields with reserves likely to be as much as 35 billion barrels. The agreement set up a joint venture *Tenghizchevroil.*

British Gas and the Italian *Agip* signed a deal last year to explore and develop the huge Karachaganak oil and gas fields in the Ural Mountains, also in west Kazakhstan. *Elf Aquitaine* of France had agreed to explore a field in the centre of the country.

It was announced on 9 June 1993 that seven multinational oil companies signed a preliminary agreement for exploration and possible development of new oil fields in the Caspian Sea. The field could prove larger than the Tengiz deposit and the Korolyov field. (IHT 30–12–92, 07–04–93, 10–06–93;FEER 22–04–93 p.77)

Vietnam

The Indonesian company *Astra Petronusa* signed a production-sharing contract on 22 October 1992 to explore for oil and gas off Vietnam's southern coast, near the Dai Hung field on Vietnam's continental shelf. (FEER 05–11–92 p.65)

A Vietnamese-Russian joint venture oil exploration and production enterprise was preparing to begin searching for oil on the Spratly Islands. Meanwhile, in late May 1993 Vietnam pressed Russia for an early dissolution of *Vietsovpetro*, the existing Russian-Vietnamese joint venture for oil exploration and production. The main question still separating the two sides was how much Vietnam would pay for the dissolution. (FEER 10–06–93 p.9,17–06–93 p.9)

British Petroleum, under contract with Vietnam, made a potentially significant natural-gas discovery in waters claimed by both China and Vietnam. The block is adjacent to offshore acreage that China awarded to *Crestone* Energy Corp.in 1992. (*see* 2 AsYIL 378) (IHT 27/28–02–93)

New oil contracts in Indonesia

State oil firm *Pertamina* awarded oil exploration and production-sharing contracts to Canadian and US companies on 27 February 1993. The areas involved were the Pasemah bloc in South Sumatra, Jambi province, Irian Jaya, and North Tanjung, Central Kalimantan. (FEER 11–03–93 p.59)

Philippines

Exploration by a joint venture between *Shell Philippines Exploration* and *Occidental Petroleum* had indicated potentially large deposits of oil and gas in deep-water offshore fields west of Palawan Island. The centrepiece is Malampaya, 50 km northwest of Palawan. The two companies were expected to invest a total of $2 billion to develop

Malampaya and the adjoining Camago gas field.

Another rich field is the West Linapacan concession of the Houston-based *Alcorn*. Linapacan accounted for most of the country's 1992 domestic oil production. A third promising offshore area is the Ragay Gulf, between the Bondoc Peninsula and the Bicol provinces of southern Luzon. (FEER 27–05–93 p.59)

ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES (OPEC)

Withdrawal from membership

Ecuador announced on 18 September 1992 that it had decided to give up membership in OPEC, being the first country to leave the 13-member organization. (IHT 19/20–09–92)

Policy on output and quotas

In November 1992 the organization restored individual country quotas after a virtual free-for-all that was largely blamed for the price collapse. The November deal set a 24.58 million barrel-a-day output ceiling for members in the first quarter of 1993. That would have slashed OPEC output by about 500,000 barrels a day. (IHT 11–01–93)

On 23 January 1993 Saudi Arabia called on OPEC to reduce its overall output by 1 million barrels a day for the second quarter of 1993. This seemed to signal an end to Saudi Arabia's policy of maximizing production. On the other hand Kuwait said it could not cut output because of the losses it had incurred as a result of the Gulf War. (IHT 25–01–93)

When the group began talks in February on a reduction of production virtually everybody agreed that a reduction was inevitable but no agreement could be reached over what would constitute an equitable sharing of the burden. The talks focused on whether large producers should bear more of the burden of reduction while poorer members, particularly those that are small producers, should be exempted. Populous countries that are medium-sized producers, such as Indonesia, Algeria and Nigeria, feel that given their limited reserves of oil and their great need for revenues, they should not be asked to sacrifice their oil income. Small producers such as Qatar and Gabon, each producing under a half a million barrels a day, argue that large producers should assume most of the responsibility for adjusting production. The issue of equitability had become sensitive and its importance was highlighted in 1992 by the departure of Ecuador that felt membership was costing more than its benefits. (IHT 15–02–93) An agreement was finally reached on 16 February 1993 despite initial resistance by Kuwait and Nigeria. The initial plan was for a roughly 4 per cent pro-rata cut by all OPEC producers, with Kuwait applying the cut from the 1.5 million barrel per day national quota awarded it in November 1992, but effectively receiving a 1.6 million barrel quota through volume compensation from Saudi Arabia and the United Arab Emirates. The final agreement appeared to give Kuwait assurances that its production could go up in the summer if the market was strong enough. (IHT 16 and 17–02–93)

According to industry monitors OPEC exporters seemed to have cut crude-oil output in March 1993 by more than 1 million barrels daily to just above 24.3 million barrels.(IHT 01–04–93) The next month, however, OPEC was unable to reconcile different figures on oil output provided by member States and those from independent sources which indicated an output of 700,000 barrels above the agreed ceiling.(IHT 12–04–93) At around $19 per barrel prices were scarcely higher in real terms than they were before the 1973 Arab oil embargo. (IHT 11–01 and 25–01–93, 15–02, 16–02 and 17–02–93, 01–04, 12–04 and 13–04–93)

Response to Western carbon tax

OPEC member States and other oil-producing States, among which were Russia, Kazakhstan, China, Mexico and the Texas Railroad Commission representing the Texas oil interests and with observer status, met on 12 April 1993 to discuss how to react to the threat of new carbon taxes by the US and other Western States. The participants at the talks control 80 per cent of world oil output. The meeting shied away from confrontation and the communiqueé just said that prevailing prices were too low and a "new wave of tax increases which are discriminatory against oil will have a destabilizing effect on the oil market" (IHT 13 and 14–04–93)

PASSPORTS AND VISAS

Abolition of exit permits for nationals
(*see* 2 AsYIL 168)

The Indonesian Government decided to abolish the requirement of an exit permit for citizens who wish to travel abroad, but would continue to keep a black-list of citizens who are barred from leaving the country. (FEER 06–08–92 p. 12).

Malaysian visa requirements for South Asians

Under new visa rules aimed at preventing tourists from working in Malaysia, Malaysians must sponsor tourists from India, Sri Lanka, Pakistan and Bangladesh. (IHT 22–04–93)

PERSIAN GULF

US submarine for the enforcement of "no-fly" zone
(*See also*: Arms supplies)

On 4 November 1992 the nuclear-powered submarine "Topeka" entered the Gulf,

ahead of a submarine that Iran had purchased from Russia. However, the US Naval Forces Central Command denied any connection; it was said that the Topeka was part of a battle group that had been inside the Gulf since August for the purpose of enforcing a "no-fly" zone for Iraqi aircraft over southern Iraq. (IHT 05–11–92)

PIRACY

See also: Straits

Straits of Malacca

An International Maritime Bureau office was set up in Kuala Lumpur to coordinate information on the subject.

Most pirate attacks in the shipping channels leading in and out of Singapore were believed to originate in Indonesian territory on the nearby islands. There were more than 200 attacks on ships in 1991 and 70 in 1992 to late October, many of them in or near the Phillip Channel near Singapore. By late October 1992 the number of attacks had dropped to almost zero and meanwhile 70 Indonesians had been arrested since June.

Malaysian officials proposed that shipping lines should pay a levy to transit the straits, to offset costs involved in anti-piracy patrols and to combat pollution. (FEER 19–11–92 p. 46)

Malaysian-Indonesian and Singapore-Indonesian agreement

Malaysia and Indonesia announced joint measures to combat piracy in their adjoining territorial waters. A joint body was set up to coordinate maritime enforcement activities but a right of hot pursuit into each other's waters was not yet provided for. The regional centre was opened in Kuala Lumpur on 23 October 1992. Equally, military authorities from Indonesia and Singapore signed an agreement in July 1992 to work together to stamp out piracy in the Malacca Strait, including the possibility of hot pursuit in each other's territorial waters. (IHT 07–08–92,24/25–10–92; FEER 13–08–92 p. 12)

IMO Working Group on Piracy

The International Maritime Organisation's working group on piracy started its work in London in January 1993 and would focus on the Straits of Malacca. The IMO had declared the Straits of Malacca an "especially dangerous" shipping route in terms of piracy threat. It had recorded more than 200 attacks on vessels using the straits in 1991.

The working group would assess the situation and draw up proposals on combating piracy and preventing other unlawful acts at sea in the Straits of Malacca for submission to the 62nd session of the IMO's Maritime Safety Committee in May 1993. (NST 07–01–93, 27–02–93)

Attack on the MV Far Trader

The MV *Far Trader* was attacked by pirates near the Indonesian island of Natuna. The pirates used automatic weapons and stole goods worth $3.1 million. (IHT 15–12–92)

Decline of piracy in 1992

According to the International Maritime Bureau pirate attacks in South-east Asia fell sharply in 1992 due to increased surveillance. The number dropped from 107 in 1991 to 73 in 1992. (IHT 05–02–93)

RECOGNITION
See: Unrecognized entities

REFUGEES
(*see also*: Thailand-Laos, *supra* p.396)

Pakistan's policy on Afghan refugees

In a statement on 2 September 1992 the Foreign Ministry of Pakistan stated that Pakistan was not ready to take more refugees from Afghanistan. It would only allow Afghans carrying travel documents. Instead it would cooperate with the UN in setting up camps inside Afghanistan. Pakistan received more than 3 million Afghan refugees in the 14-year civil war, and more than a million have returned. (IHT 03–09–92)

Vietnamese refugees ("Boat People")

It was reported that the flow of Vietnamese refugees appeared to have ceased, with only 12 having arrived in Hong Kong in 1992 until November, and in the first eight months of the year only 18 Vietnamese had landed in Indonesia, nine in Thailand, one in Malaysia and none at all in Singapore, Macao or the Philippines. In 1991, 21,900 Vietnamese arrivals were reported by South-east Asian countries, on top of 32,100 in 1990 and 70,000 in 1989. (IHT 13–11–92)

Malaysian attitude towards Vietnamese refugees
(*see also*: Military cooperation *supra* p.422)

The Malaysian Government said it would allow skilled Vietnamese refugees to stay and work in Malaysia for up to two-years. The proposal was to allow skilled workers and professionals, such as doctors and accountants, to stay on. There were still some 14,000 Vietnamese refugees in Malaysia. (FEER 29–04–93 p.14)

Tajik refugees
(*See also*: Civil war)

Since the civil war erupted in 1992, about 60,000 Tajiks—many suspected of favouring the IRP and the Democrats—had sought refuge in northwestern Afghanistan, and thousands others were believed to have crossed the border at other parts of the country. (IHT 24/25–12–92;FEER 28–01–93 p.18)

Biharis in Bangladesh
(*see* 2 AsYIL 366)

A first badge of 324 Pakistanis out of a total of 238,000 stranded in Bangladesh left for Lahore on 11 January in a chartered aircraft. The repatriation was being financed by the Mecca-based *Rabita* agency and the Pakistan Government. (FEER 21–01–93 p.14)

Allegedy forced repatriation of Rohinyas

According to Bangladeshi officials 8,571 Rohingyas (*see* Minorities) were repatriated up to 6 January 1993, out of a total of 243,771 registered refugees. Bangladesh categorically denied accusations from UNHCR that it was coercing Rohingya refugees to return to Myanmar contrary to its pledge to adhere to the principle of voluntary repatriation. FEER 28–01–93 p. 23)

Myanmarese refugees in India
(*see*: Inter-state relations)

Indonesian Muslim refugees seeking asylum at Dutch embassy

On 10 June 1993 67 members of an Indonesian Muslim sect sought refuge for some time at the cultural centre of the Dutch embassy at Jakarta. They asked for admission to the Netherlands because they were "nowhere in Indonesia welcome". After hours of negotiations between Dutch diplomats and Indonesian military and civilian officials the group left the premises the next day. According to the embassy the group was not being persecuted but just displaced, and their problem was an internal Indonesian affair.

The sect-members had left the island of Java for west Kalimantan where they were rejected by the local population because of their divergent religious views. After having initially asked the embassy for shelter, they later requested "political asylum" which was denied. (NRC 11–06–93)

REGIONAL SECURITY
See also: Disarmament, Dispute settlement

North East Asian Security forum

In his speech to the UN General Assembly on 22 September 1992 the President of South Korea recalled his 1988 proposal for a "Consultative Conference for Peace in Northeast Asia" that included a six-party dialogue (North and South Korea, China, Japan, US and the former USSR) and expressed his hope that "an opportunity for dialogue among all interested parties will be found." (FEER 08–10–92 p.11)

The relevance of the Five Power Defence Arrangement

Under the Arrangement, formed in 1971 between Britain, Australia, New Zealand, Singapore and Malaysia the members agreed to engage in military training exercises and consult together in the event of an external attack against Singapore or Malaysia. In a recent interview the Indonesian foreign minister suggested that the pact was an anachronism since the circumstances that prompted its formation disappeared a long time ago, thereby referring to the Indonesian armed confrontation policy against Malaysia in the early sixties. While not calling for its dissolution the minister made it clear that Indonesia would prefer to see it superseded by cooperation at a bilateral or trilateral level, primarily involving Southeast Asian States. (IHT 31–10/01–11–92)

South East Asian regional security

The impetus for a security dimension in the regional cooperation came from Japan, which proposed in July 1991 that regional security could be discussed within an enhanced ASEAN Post-Ministerial Conference (PMC), the regular meeting between the six ASEAN members and Japan, the US, the EC, Australia, New Zealand and South Korea that directly follows the annual ASEAN foreign ministers' meeting. The proposal was originally rejected by some ASEAN members as they feared a definition of security in purely military terms which would imply a proposal to form a military alliance. At one end of the spectrum the Philippines and Singapore favoured a military dimension to security operation, at the other end of the spectrum Indonesia held to the view that security should be defined in broader political and economic terms. The idea was later endorsed by the 1992 ASEAN summit meeting.

During his visit to four South East Asian countries in January 1993 the Japanese Prime Minister made a speech in Bangkok on 16 January in which he called on Asian and Pacific nations to develop a long-term vision for regional security and urged the start of a dialogue among the countries of the region. The speech was aimed at bolstering proposals for some sort of collective security arrangement in Asia that would include a continued military role for the United States while shifting more of the burden onto Asian countries. (IHT 18–01–93)

Taking up the idea the International Study Centre, operating under the Thai Foreign Ministry, took the initiative for three workshops on the issue. The first workshop was set to be held in Bangkok in March 1993 and would involve under-secretary level representatives from UN headquarters, ASEAN, the Asian Development Bank and other regional officials and academics. The Centre had in mind using pro-active

"preventive diplomacy" on a multilateral basis. It intended to draw ESCAP into the programme, giving it a political dimension. It was said to aim at a regional code of conduct. Among the topics that could fall under the scope of the programme were mentioned the situation in Cambodia, the Spratly Islands, ethnic conflicts, drug suppression, the development of the Mekong River and the proposed regional growth triangles. (FEER 25–02–93 p.25)

Meanwhile ASEAN officials held talks in Japan in February 1993 and decided to call a preparatory meeting in Singapore, to develop plans for a regional security forum. This meeting was held in May 1993 and was attended by senior officials from 12 Asia-Pacific States (the six ASEAN States, Japan, South Korea, Canada, New Zealand, Australia and the US). It drew up an agenda for an ASEAN post-ministerial conference with the dialogue partners in July. An ASEAN proposal to invite Russia and China to participate informally was accepted and the US abandoned its initial opposition against a multilateral security arrangement in East Asia as it might weaken a long-established system of bilateral security treaties with America. (IHT 03–03–93, 22/23–05–93, 10–06–93; FEER 29–04–93 p.26, 03–06–93 p.18)

Council for Security Cooperation in the Asia-Pacific

Ten Asian and Pacific countries (Australia, Canada, Japan, South Korea, the US and the ASEAN countries except Brunei) agreed on 9 June 1993 to create an advisory council for security cooperation. The new body would allow military and intelligence officials to meet in a private capacity with security specialists from universities and research institutes to draw up proposals on settling disputes and building confidence. The Council would support the senior officials forum which convened is Singapore in May 1993 (*see supra*). There were plans to expand the Council to include China, Russia, Vietnam and other countries in the region. (IHT 10–06–93)

Sino-Japanese regional security talks

In response to rising tensions in the Asia-Pacific area, China and Japan agreed to bilateral talks on regional security issues. The Japanese proposal was made during a visit of the Chinese foreign minister to Japan in late May 1993. The talks might begin in July.

The Chinese foreign minister made it clear that China believed it premature to consider setting up regional structures to deal with broader security matters. Both foreign ministers agreed that the two countries should seek to avert any introduction of nuclear weapons into South and North Korea. (IHT 31–05–93; FEER 10–06–93 p.14)

RIVERS

Resumption of Mekong cooperation

Vietnam, Thailand, Cambodia and Laos on 5 February 1993 signed a joint communiqué in Hanoi outlining the broad principles for resuming cooperation in the development of the Mekong River. The four countries agreed to meet again in Thailand in April 1993 to dicuss a new framework for cooperation. (FEER 18–02–93 p.14)

SANCTIONS

See also: Embargo, Environmental pollution and protection, Space activities

US ban on supplying Indian Space Agency

(*see also*: Missile technology)

The US enforced a ban on supplying components and equipment to the Indian Space Research Organization as punishment for India's decision to buy a rocket engine from Russia. (IHT 06-08-92)

US ban on arms delivery to Pakistan

(*see* AsYIL Vol.1 pp.271,335, Vol.2 p.286 (Arms), 371 (Sanctions)

The US refused to grant a request from Pakistan for the release of 11 F-16 aircraft which were withheld under the PRESSLER amendment, banning arms sales to Pakistan since October 1990 because of its alleged nuclear programme. The aircraft were already paid for. It was later reported that the US State Department had pushed for a new interpretation of the PRESSLER restriction by which the ban on arms sales would not apply to the commercial sale of military equipment but only to concessional sales contracts between the governments.

Under the same PRESSLER amendment the US notified Pakistan that it must return eight leased US frigates of which the five-year leases had expired. (FEER 20–08–92 p. 12,29–10–92 p. 28;03–12–92 p. 6)

(NOTE: In an amendment to its 1961 Foreign Aid Act on 6 October 1992 the US Congress lumped Pakistan, China and India together on the nuclear and ballistic missile issue.)

Malaysia lifts sanction against South Africa

(*See also*: Diplomatic and consular relations)

Malaysia lifted its travel ban in November 1991 following South Africa's moves toward dismantling its policy of race segregation, and Malaysian Airlines would begin weekly flights to Johannesburg from 26 October 1992. (1HT 27–08–92)

Disregard of Arab boycott against Israel
(*see also*: Boycott)

Honda Motor Co. of Japan announced on 30 September 1992 that it would export cars to Israel. It would be the latest of a number of Japanese companies to disregard the Arab boycott. At least six other Japanese car producers were already selling in Israel. (IHT 01–10–92)

Freezing of US defence training aid to Indonesia
(*see also*: Military cooperation)

The US Congress passed a foreign aid bill by which it freezed US defence training aid to Indonesia in protest at the killing of separatists in East Timor in November 1991. It would reconsider lifting the freeze if the Indonesian military were to spend the funds on training its soldiers on human rights principles and providing legal redress for civilians prosecuted over the Timor incident. (FEER 22–10–92 p.14)

Chinese sanctions against France

China ordered France on 23 December 1992 to close its consulate in Guangzhou by way of retaliation for the French sale of 60 warplanes to Taiwan. (*see*: Arms supplies) In explaining the measure the Chinese deputy foreign minister said that "by insisting on the sale of the fighter aircraft to Taiwan in disregard of the strong objections of the Chinese side, the French Government has seriously infringed upon China's sovereignty and security, interfered in China's internal affairs, and obstructed and jeopardized China's efforts to achieve peaceful reunification." Comparing the French arms deal with the sale of 150 F16 warplanes by the US the Chinese Foreign Minister said that the two were different because under the three Sino-US communiqués (1972, 1978 and 1982) US weapons sales to Taiwan were "permissible" within a limited period of time. (FEER 07–01–93 p.12)

China also barred French companies from competition for contracts for the Guangzhou underground rail system and threatened to halt cooperation on a nuclear power plant. (IHT 24/25 and 29–12–92) (*see*: Nuclear capability) In early March 1993 the French telecommunications concern Alcatel-CIT said that China had apparently frozen telecommunications contracts worth some $363 million. The contracts were due to be signed at the end of 1992 but were suspended for an indefinite time. But according to the spokesman other contracts with regional Chinese authorities had not been affected. (IHT 05–03-93)

According to information from the French Trade Commission in Beijing in late December 1992 French companies were then involved in between 50 to 100 joint ventures in China with total combined investment of about $600 million. (IHT 24/25–12, 29–12 and 30–12–92, 05–03–93; FEER 07–01–93 p. 12)

Alleged violation of Iraqi oil embargo

The US protested to Iran about a large shipment of oil from Iraq in violation of international sanctions. While Iran insisted that it was respecting the trade embargo, US intelligence sources concluded that the shipment was too large to have taken place without the knowledge of the Iranian Government. (IHT 29–03–93)

SEA TRAFFIC
See also: Piracy, Straits

Collisions in the Malacca Straits

In 1992 seven major collissions between ships took place in Asia, among which four in the Straits of Malacca, a 1,000-km waterway which is used by about 2,000 vessels every month. In June the US destroyer *Ingersoll* collided with a Singapore merchant ship, causing susbstantial damage to both ships. In July two supertankers collided, fortunately not spilling any oil. On 23 August 1992 the Greek cruise ship *Royal Pacific* sank in the Malacca Strait after a collission with a fishing trawler. On 20 September 1992 the Japanese oil tanker *Nagasaki Spirit* and the Panamanian container ship *Ocean Blessing* collided and burst into flames, causing a huge oil slick entering the Malacca Strait. The collission occurred in the upper part of the Strait. [Two days before a merchant ship collided with an Indonesian boat that was drifting in the strait after developing engine trouble.] The container ship was towed to a North Sumatran port but the tanker, which was carrying 40,000 tons of oil, was still drifting in the strait with an oil slick having a radius of about 20 kilometers.

These incidents strengthened calls for a system of compulsory pilotage and the imposition of a toll on ships using the waterway. Both Malaysia and Indonesia had proposed the toll. (*see*: Piracy) The fee would provide new services such as radar surveillance for shippers using the straits. Shipowners and shippers had been against the toll, however, as it would set a precedent for other shipping lanes. Taxes and new traffic regulations would slow cargo delivery times and increase costs. For its part, Singapore as a major port and transshipment centre was reported to be wary of actions that might call into question the international status of the strait and the right of free passage. However, Malaysia and Indonesia were pressing for stricter controls. Indonesian officials had proposed the introduction of special shipping lanes or compulsory piloting for all vessels passing through the strait. The alternatives for the shallow Malacca strait are the Sunda Strait between Java and Sumatra and the Lombok and Makassar Straits which are all deep-water channels.

On 8 October 1992 the Malaysian Prime Minister announced that Malaysia would convene an international conference on the shipping lane to discuss the matter. (*see*: Straits) (IHT 24–08 and 25–08–92, 21–09, 22–09 and 25–09–92, 09–10–92; FEER 19–11–92 p.50)

Collission in the Andaman Sea

A Danish supertanker, the *Maersk Navigator*, carrying nearly 2 million barrels of oil from Oman to Japan, collided with another tanker, the *Sanko Honour*, in the Andaman Sea, near the western entrance of the Malacca Strait, about 60 nautical miles off the coast of Sumatra, on 21 January 1993. It caught fire, was abandoned, drifted and started spilling oil. Salvage experts later succeeded in stopping the drifting, and fears for an environmental disaster receded as the light crude oil pouring from a ruptured tank was easily dispersed. The oil formed a slick about three kilometers long and 200 meters wide. Later India called for international assistance to fight the large oil slick that threatened marine life in the Bay of Bengal.

Proving ultimate liability and getting financial compensation for damages might be difficult. Although the *Maersk Navigator* is owned by A.P. Moller of Denmark, it was reported that a Japanese oil company, Idemitsu Kosan Co. had chartered the tanker and leased space to General Sekiyu Co., an affiliate of Exxon Corp. (IHT 22 and 23/24–01–93, 01–02–93)

SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION (SAARC)

India's attitude toward a regional development fund

It was reported that India had dropped its long-standing opposition to a regional development fund being set up under the SAARC, insisting that aid should be disbursed on a bilateral basis. The change of attitude stemmed from pressure by Japan which intended to make a substantial initial contribution. (FEER 10–09–92 p.9)

South Asian Preferential Trade Arrangement
(*see*: Selected Documents)

The member States of SAARC concluded the trade arrangement during the seventh SAARC summit meeting at Dhaka on 11 March 1993. The arrangements do not stipulate preconditions for reciprocity or uniformity. This was to reduce misgivings that India, the largest and relatively most industrialized country in SAARC, would benefit disproportionately from the reduction of trade barriers. (IHT 12–04–93; FEER 22–04–93 p.17)

SPACE ACTIVITIES

Satellite launching by China: the Optus B2

China Great Wall Industry Corp. had launched an Australian-owned and US-built telecommunications satellite, the Optus B2, on 21 December 1992 but the satellite

disappeared and no signals were received from it although the owners expected to begin receiving signals about 14 hours later. The Chinese company considered the launch to be completed faultlessly without problems. The rocket had transmitted correct signals to the launch site for the full 11 minutes needed to reach the proper orbit and to separate from the satellite.

In June 1990 the first Western communications satellite, AsiaSat 1, was launched successfully from China, but in March 1992 a launch of an Australian satellite, Optus B1, failed. The launch was later completed in August 1992. Another foreign, Swedish, satellite for scientific experiments, was successfully launched in 1992 before the Optus B2 in December. There are three other confirmed contracts for launches of US-built satellites in 1994, among which one with the Intelsat organization.

The US and France have used export-controls against China to prevent it from undercutting launch-prices. The charge for launching the two Optus satellites was $35 million each, or about half the market rate before China entered the market. (IHT 23 and 24/25–12–92; FEER 07–01–93 p.11)

Satellite activities by Asian countries

It was reported that the (Taiwanese) China Development Corp. and the (mainland) Great Wall Industrial Corp. were planning to set up a Hong Kong partnership to design and build a regional telecommunications satellite. Meanwhile the Chinese Ministry of Post and Telecommunications had set up a separate Hong Kong company, Asia Pacific Telecommunications Satellite Co., in 1992 to launch and use satellites purchased from the US. Then there is Asia Satellite Telecommunications Co., a consortium of British, Chinese and Hong Kong interests, which already has AsiaSat-1 in operation and which has plans for a second satellite.

Except for the Philippines and Taiwan, most countries in the region already have launched or soon will send up their own satellites, including Japan, Indonesia, South Korea, Thailand and Malaysia. Singapore also has a regional satellite project. (FEER 25–03–93 p.70)

SPECIFIC TERRITORIES WITHIN A STATE: KASHMIR

See also: Borders

Indo-Pakistan talks on Kashmir

India and Pakistan had their first talks on their dispute over Kashmir in 20 years on 17 August 1992. The discussion represented a shift by Pakistan, which previously wanted the dispute resolved by the UN, whereas India had long favoured a bilateral approach.

Pakistan restated its position that ownership of the northern territory should be decided by a pebliscite, according to a 1947 UN resolution. (IHT 18–08–92)

Pakistani efforts to prevent cross-border demonstrations

In late October 1992 Pakistan took various measures, such as erecting barbed wire barricades on roads to the border with India to block a proposed march across the cease-fire line. The Prime Minister assured that "no one will be allowed to cross the border." The leader of the Jammu and Kashmir Liberation League initially said that his party rejected government appeals to call off the march. A day later, however, the march was actually called off after Pakistani forces shot into the crowds of protesters. (IHT 24/25 and 26–10–92)

In early April 1993 Pakistani forces again halted Kashmiri marchers who tried to storm the state's border with India. (IHT 06–04–93)

SPECIFIC TERRITORIES WITHIN A STATE: EAST TIMOR

Appeal for clemency

The Australian foreign minister called on Indonesia on 24 May 1993 to reduce the life sentence imposed recently on a Timorese rebel leader, and to consider giving East Timor more autonomy. (IHT 25–05–93)

STRAITS

See also: Piracy, Sea traffic

Accident prevention in the Malacca Straits

Against the background of ship accidents and collisions in the Malacca Straits the Malaysian foreign minister raised the issue at the UN General Assembly in September 1992 and spoke of an "urgent need to take a fresh look at existing international regulations applicable to the Straits and find a mechanism to share the responsibility of ensuring safety of navigation."

In connection with the accident involving the *Maersk Navigator* in January 1993 (*see*: Sea traffic) Malaysia, Indonesia and Singapore would form a working group of technical experts to look into the management of traffic in the Straits. The working group would, among other things, look into suggestions that the existing traffic scheme, that covered only a small part of the straits, be extended to cover the entire length of the straits. The group would draw up recommendations to be submitted to an international conference at ministerial level later in the year.

Accidents in the Straits in 1992 were likely to strengthen plans by the Malaysian and Indonesian Governments to introduce tolls on international shipping using the waterway to finance improved safety measures. Indonesian officials had also proposed the introduction of shipping lanes or compulsory piloting for all vessels passing through the strait. The latest system of traffic rules worked out specifically for the Straits of Malacca and Singapore dates from 1977. The recent accidents had all occurred in the

northern and wider stretch of water between the west coast of Malaysia and the coast of Sumatra, where there was no lane system in operation yet.

Shipowners have been reluctant to comply with suggestions to take a longer route from the Gulf to Japan by using the deeper Sunda Strait or the Lombok or Makassar Straits, as this would add to shipping costs. (IHT 22–01–93; NST 27–02–93; STAR 27–02–93; FEER 08–10–92 p.12)

TELECOMMUNICATIONS

Submarine cables

Australian & Overseas Telecommunication Corp. agreed in principle on 9 January 1993 to build a submarine optical-fibre cable system linking Vietnam to Thailand and Hong Kong. The network would provide Vietnam with its first optical-fibre links abroad. (FEER 21–01–93 p.59)

Regional telecommunications officials, meeting in Seoul on 19 March 1993, approved the start of a $100 million submarine optical-fibre cable project that will link South Korea, Japan and Russia with other regional networks. (FEER 01–04–93 p. 83)

TERRITORIAL CLAIMS

See also: Borders, Dispute settlement

Russian-Japanese dispute on the "Northern Territories"

(*See also*: Inter-state relations: *supra* p. 397)

The Russian Deputy Prime Minister in August 1992 made the suggestion that the US should be included in the negotiations on the disputed islands, and expressed his opinion that the matter was a [multilateral] issue. This would be a major change of policy for the Russians who had, like the Soviet Union, insisted in the past that the dispute was a bilateral matter.

Meanwhile the Russian President suggested in an interview on 16 August 1992 that the Russian troops withdrawal from the Kuril Islands may be completed a year later than the deadline previously given. The new deadline would be mid-1995. It was later said that although the President wanted to achieve progress on the issue during his planned visit to Japan in September, the very difficult situation in Russia warranted no optimism and on 2 September 1992 the President said that politically it was not a suitable time to hand over the disputed islands to Japan.

In the light of reports that local Russian authorities had been giving approval to companies to develop the islands, the Japanese Foreign Ministry told the Russian ambassador that such moves would "harm efforts to strengthen Japanese-Russian relations." Several weeks later it was reported that a Hong Kong company, Carlson and Kaplan (Hong Kong) Ltd, had bowed to Japanese pressure and disavowed a contract to

build a tourist resort on the island of Shikotan. The company, owned by a Taiwanese, informed the Japanese consulate general at Hong Kong that it was cancelling a lease to build a hotel and golf course on Shikotan. However, on 2 December 1992 the Russian President proposed in a decree that was subject to parliamentary approval that foreigners be allowed to lease land in the Kuril islands. The decree also proposed to make the islands a special economic zone with tax-free exports and imports.(IHT 05–08, 18–08 and 25–08–92, 03–09–92, 19/20–09–92, 24/25–10–92, 03–12–92;FEER 05–11–92 p.12)

Paracel (Vietn: Hoang Sa; Chin: Xisha) and Spratly (Vietn: Truong Sa; Chin: Nansha) Islands

Recent Chinese action in respect of the islands began with an air and naval operation against, and the ousting of, the then South Vietnamese garrison at the Paracel islands on 19 January 1974. Subsequently, in March 1988, in the guise of setting up sea-level weather research stations the Chinese took control of six islands in the Spratly group, thereby sinking 3 Vietnamese transport ships, killing 72 seamen and taking 9 prisoners. The 1992 Chinese Law on the Territorial Sea determined the archipelagos as Chinese territory. (*see* 2 AsYIL 165) In June 1992 Chinese troops were landed on a reef which was claimed by Vietnam and set up a "sovereignty post" and it was reported in June 1993 that China had protested against visits to the disputed islands by the Vietnamese Deputy Premier and a delegation from the Vietnamese National Assembly.

In May 1992 the signing of a contract by China with the (US) Crestone Energy Corporation on the exploration of oil in an off-shore bloc contiguous to a Vietnamese oil field (*see* 2 AsYIL 378) led to protests from Vietnam that the concession was on the Vietnamese part of the continental shelf, followed by the signing on 9 June 1992 of a contract between Vietnam and a Norwegian seismic survey company to conduct deep-water hydrocarbon surveys in the vicinity of the Crestone concession.

The Philippines officially annexed the *Kalayaan* group of eight islands (part of the Spratly archipelago) in 1978. The existing text of the US-Philippine Mutual Defence Treaty of 1951 does not explicitly prescribe US assistance in case of the Philippine position being threatened. (*see supra*: Military cooperation)

Since mid-1990 Chinese statements spoke of shelving the sovereignty issue and of jointly developing the resources of the area instead. During a visit to Malaysia the Chinese defence minister said on 25 May 1993 that China would not use military force to secure its claim to the Spratly Islands.

A workshop on managing conflicts in the South China Sea was held on 29 June-3 July 1992 at Yogyakarta, Indonesia. (*see*: Dispute settlement) Subsequently, the Association of South East Asian Nations in July 1992 adopted a Declaration emphasizing the necessity of resolving the sovereignty and jurisdictional issues pertaining to the South China Sea by peaceful means. (*see infra*, Selected documents) (IHT 26–05–93; FEER 13–08–92 p.14, 20–08–92 p.6, 26–11–92 p.20, 10–06–93 p.9)

Gulf of Tonkin

In a note from the Vietnamese to the Chinese Foreign Ministry, Vietnam complained about oil drilling and seismic surveys carried out by Chinese ships "in a sea area under Vietnam's sovereignty". The note reminded that "as long ago as 18 January 1974, the Chinese side sent a note to the Vietnamese side proposing that, pending a demarcation of territorial seas between the two countries, the two sides temporarily suspend exploration activities" in the area concerned. It also reminded that the two sides had agreed "to open negotiations soon on problems relating to the border on land, in the Tonkin Gulf and in the Eastern Sea" (*see*: Borders) and consequently asked China "to stop implementing the set plan and refrain from similar activities in the future". According to Vietnam the Chinese oil drilling rig was positioned some 130 kilometers off the Vietnam coast, or nearly 93 kilometers west, i.e. on the Vietnamese side, of a north-south boundary line in the Gulf of Tonkin agreed in 1887 by China and France. On the other hand, the Chinese foreign ministry responded that the Chinese oil drilling ships in question were working on the Chinese side of the central line, an area which is under China's jurisdiction. In the early 1970s China had proposed talks to discuss redrawing the boundary line. According to Vietnamese foreign ministry sources the two sides failed to reach an agreement whereupon China proposed that both countries refrain from searching for oil in a large rectangular area on the Vietnamese side of the 1887 line until the parties would resolve their differences. According to Vietnamese sources drilling started early September 1992 in an area some 143 kilometers off Hainan Island.

On 12 May 1993 Vietnam again publicised an incident of a Chinese seismic survey ship intruding into waters beyond the Vietnamese southern continental shelf from 5–10 May. According to the report the survey ship interfered with oil exploration vessels working for British Petroleum and the Indian Oil and Natural Gas Commission under contract with Vietnam's Oil & Gas Corp. (UNdoc. A/47/430; IHT 5/6–09–92; FEER 17–09–92 p. 14, 24–09–92 p. 22, 27–05–93 p.14)

Persian (Arab) Gulf Islands
(*see* 2 AsYIL 379)

Iran is reported to have denounced a statement by eight Arab Gulf Cooperation Council foreign ministers that criticized Iran's alleged attempts to annex three disputed islands, Abu Musa, Greater Tunb and Lesser Tunb. The islands have been ruled jointly for two decades by Iran and Sharjah, one of the seven sheikhdoms that constitute the United Arab Emirates (UAE). A 1971 agreement allowed an Iranian garrison to be stationed on Abu Musa. In April 1992 Iran, citing security reasons, expelled certain citizens of the Emirates and only allowed expatriates with Iranian permits to remain. (IHT 14–09–92) On 12 November 1992 Iran permitted 12 teachers to return to the island of Abu Musa, and also permitted an Indian doctor to reopen a clinic on the Island.

During a second round of talks between the parties on 28 September 1992 the Emirate delegation presented a memorandum in which it demanded that Iran withdraw from the three islands. An Iranian source said that a withdrawal was out of the question. (IHT 29–09–92) According to Iran the islands had historically belonged to it.

In late December the Iranian President invited the UAE to talks in Tehran to settle the dispute. (IHT 13–11 and 26/27–12–92)

Philippine claim on Sabah

The Philippine foreign minister assured Malaysia that his government would work toward a resolution by aiming at an agreement between the Philippine executive and legislature to abolish a law which defined the baseline of the Philippines by including Sabah. The country's territorial boundaries do not include Sabah, but a 1968 law included a categorical provision that stipulates that this is "without prejudice" to the Philippine claim.

Direct interest in the claim is confined to Muslim groups in the south, including descendants of the Sultan of Sulu.

A breakthrough in the issue came when the Philippine president and the Malaysian Prime Minister reached a new understanding when they met in Brunei for the Sultan's Silver Jubilee in October 1992. It was agreed to set up a joint commission to act as a framework for expanded regional ties and to settle outstanding problems. Among the Commission's tasks will be to explore the possibility of a "growth triangle" including Mindanao, Sulawesi and Sabah.

Extension offices of the respective Philippine and Malaysian embassies would be established in Sabah and Mindanao. Asked whether this meant that the Philippines was recognizing Sabah as part of Malaysia a Philippine Foreign Ministry official said the term "extension office" was used deliberately to "avoid legal and diplomatic complications that establishing a consulate would entail." (FEER 24–09–92 p.24,11–02–93 p.13)

Sipadan and Ligitan Islands
(*see* 1 AsYIL 348)

In February 1993 the Malaysia-Indonesia joint commission decided that the question of the overlapping claim be further discussed by the commission's joint working group. The latter would be convened after Malaysia had fully studied Indonesia's written reply to the memorandum submitted by Malaysia to Indonesia in July 1992. No time limit was set for a full consideration by Malaysia of the Indonesian reply so as to remove any pressure against an amicable solution. (NST 09 and 10–02–93; STAR 09–02–93)

TERRORISM
see: (Non-) Interference in internal affairs

UNITED NATIONS

South Korean participation in peace-keeping

South Korea decided on 15 April 1993 to send an army engineering unit to help UN peace-keeping operations in Somalia. (IHT 16–04–93)

Restructuring of the UN Security Council

Malaysia's views on the issue were conveyed by the Malaysian foreign minister to the President of the UN General Assembly on 19 April 1993.

Malaysia would like the Council to be restructured and expanded to provide a more representative membership. Malaysia would also like the power of veto to be abolished. (NST 20–04–93)

Jurisdiction over peace-keeping forces

An unarmed Japanese policeman was killed when a UN convoy was ambushed in Cambodia on 4 May 1993. It was reported that the Japanese Government responded by ordering all 750 Japanese police officers serving in Cambodia to retreat to the capital, Phnom Penh and that the UN protested the order as it undermined the chain of command in the peace-keeping force. Japan denied these allegations, but Japan did plead with the UN authorities to keep the Japanese members of the UN force out of danger. (IHT 06, 10 and 11–05–93)

Cessation of UN Population Fund in China

According to reports the Fund was considering to cease its activities in China. It had been—wrongly—associated with forced sterilization measures taken by China to control its population growth. It was expected that if China was threatened with a withdrawal of the Fund the government would almost certainly announce on its own that the UN support was no longer necessary.

It was reported that the US Government had decided to resume aid to the UNPF after a seven-year suspension on the condition that the US contribution would not benefit China. This new policy would reverse a 1985 provision in the US law prohibiting US funding of any organization that "supports or participates in the management of a programme of coerced abortion or involuntary sterilization". (IHT 17–05–93; FEER 27–05–93 p. 22)

Permanent UN Security Council seats for Japan and Germany

The chief US delegate to the United Nations declared that the US supported the bid by Japan and Germany for a permanent seat on the Security Council. (IHT 10–06–93)

VIETNAM WAR

The US MIA issue

Officials of the US Defense Intelligence Agency believed most of the live sightings were of Russians or other Europeans or Cubans working on projects in Indochina.

The Vietnamese chief delegate to the UN asserted that the US was making excessive demands in the search for servicemen still unaccounted for from the Vietnam War, and said that Vietnam had begun to fear that American inspections of prisons and archives were cloaks for espionage. Of particular concern to Vietnamese officials were repeated requests for "short notice" searches of prisons and sites to follow up reports that Caucasians believed to be Americans had been spotted alive. Vietnam denied that it ever offered open access to prisons in the search for Americans. Vietnam had demanded full files from the US on the reports of people who had said they had seen live Americans, while the US side was not prepared to jeopardize its sources by complying with the request. The Vietnamese representative to the UN recalled that under new agreements concluded in 1992 Vietnam had joined in 35 live-sighting searches and that all those investigations had proved the information on live sightings to be incorrect. He complained that US-Vietnamese relations were in fact taken hostage by strong MIA lobbies. (IHT 8/9 and 10–08–92)

WORLD WAR II

Financial assistance for so-called "comfort women"

It was reported that Japan was considering establishing a foundation in Korea to provide financial assistance to Korean women recruited to work as prostitutes for the Japanese army during World War II. The creation of such a foundation in Korea, to be financed by Japan but administered by the Korean Government would avoid setting a precedent for obligatory compensation. Japan maintains that compensation was officially dealt with by the 1965 Normalization Treaty between the two countries. Under this treaty South Korea waived any claims to war reparations. (FEER 13–08–92 p.12) In late March 1993 the South Korean foreign ministry said that South Korea itself would pay financial support to the women. (IHT 31–03–93; FEER 13–08–92 p.12)

Japanese apologies for recruitment of "comfort women" in the Philippines

The Japanese Prime Minister apologized to the Philippines on 11 March 1993 for the wartime recruitment of Filipino women as prostitutes for the military, adding that "[w]e are also considering some means of showing our regret." (IHT 12–03–93)

Japanese apologies

The Japanese Government, mindful of Japan's highly vociferous ultranationalist fringe, ruled out any clear-cut apology for Japan's war-time behaviour during the visit of the Emperor to China on 23–28 October 1992. The Chinese Government had not sought an apology. (IHT 15–10–92)

On the eve of the visit the Japanese chief cabinet secretary said: "The purpose of the Emperor's visit to China is not to issue a new apology" but added that the Emperor

would "make remarks about history and Chinese-Japanese relations that invoke previous statements." (IHT 23–10–92)

In his banquet toast to the Chinese President the Emperor said; "In the long history of relations between our two countries, there was an unfortunate period in which my country inflicted great sufferings on the people of China. I feel deep sorrow over this." (IHT 24/25–10–92)

Chinese war claim

A grassroots movement representing 300,000 Chinese announced plans on 15 September 1992 to form a nation-wide organization to press Japan for $180 billion in World War II reparations. The non-governmental group is named the Chinese Popular Committee for Japanese Reparations. (IHT 16–09–92)

Remainders of Japanese war material in China

On the occasion of its signing the Convention on the banning of chemical weapons China asked Japan to take responsibility for removing over 200 shells and 1,000 tonnes of toxic chemicals abandoned by the Japanese army in China during World War II. (FEER 28–01–93 p.14)

BIBLIOGRAPHY

BIBLIOGRAPHY OF INTERNATIONAL LAW CONCERNING ASIAN AFFAIRS*

J.J.G. Syatauw**

EDITORIAL INTRODUCTION

This year's bibliography follows the same format as that of previous years. Information is provided here on: (1) books, articles and other materials dealing with Asian topics; (2) in exceptional cases, other publications considered of interest; (3) English language publications only.

Although the diversity of topics in the literature is increasing all the time, for the sake of simplicity, consistency and a clear overview, the same headings as in previous years have been maintained.

We would like to appeal to our readers to send us, where possible, information on recent international law books and articles on Asian topics published in Asia in the English language. We need only to know, the author (s) name, title of the book or article, name of publisher or periodical, year of publication and page reference. In this way we will be able to keep this section of the *Yearbook* up to date.

The headings used in this year's bibliography are:

1. General
2. States and groups of states
3. Territory and jurisdiction
4. Sea
5. Air and space

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* 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. Special mention should be made of the bibliography on *Public International Law* published by the Max Planck Institute for Comparative Public Law and International Law at Heidelberg, Germany, and of the regular lists of acquisitions of the Peace Palace Library at The Hague, The Netherlands.

** General Editor

Asian Yearbook of International Law, Volume 3 (Ko Swan Sik *et al.*, eds.; 0-7923-2708-X; © 1994 Kluwer Academic Publishers; printed in Great Britain), pp. 457–470

6. Environment
7. International conflicts and dispute
8. War and peace neutrality, armed conflict and peace-keeping
9. International criminal law
10. Peaceful settlement of international disputes
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12. Individuals and groups of persons—human rights
13. Decolonization and self-determination
14. International economic relations
15. Development
16. Information and communication
17. The united nations and other international/regional cooperation and organization

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CHARTER OF THE SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION*
Dhaka, 8 December 1985

We, the Heads of State or Government of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka;

1. *Desirous* of promoting peace, stability, amity and progress in the region through strict adherence to the principles of the United Nations Charter and Non-Alignment, particularly respect for the principles of sovereign equality, territorial integrity, national independence, non-use of force and non-interference in the internal affairs of other States and peaceful settlement of all disputes;

2. *Conscious* that in an increasingly interdependent world, the objectives of peace, freedom, social justice and economic prosperity are best achieved in the South Asian region by fostering mutual understanding, good neighbourly relations and meaningful cooperation among the Member States which are bound by ties of history and culture;

3. *Aware* of the common problems, interests and aspirations of the peoples of South Asia and the need for joint action and enhanced cooperation within their respective political and economic systems and cultural traditions;

4. *Convinced* that regional cooperation among the countries of South Asia is mutually beneficial, desirable and necessary for promoting the welfare and improving the quality of life of the peoples of the region;

5. *Convinced* further that economic, social and technical cooperation among the countries of South Asia would contribute significantly to national and collective self-reliance;

6. *Recognizing* that increased cooperation, contacts and exchanges among the countries of the region will contribute to the promotion of friendship and understanding among their peoples;

7. *Recalling* the Declaration signed by their Foreign Ministers in New Delhi on 2 August, 1983 and noting the progress achieved in regional cooperation;

8. *Reaffirming* their determination to promote such cooperation within an institutional framework:

Do hereby agree to establish an organization to be known as South Asian Association for Regional Cooperation hereinafter referred to as the *Association*, with the following objectives, principles, institutional and financial arrangements:

Article I: Objectives

1. The objectives of the *Association* shall be:
   (a) to promote the welfare of the peoples of South Asia and to improve their quality of life;
   (b) to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realise their full potentials;

* Courtesy of the SAARC Secretariat

Asian Yearbook of International Law, Volume 3 (Ko Swan Sik *et al.*, eds.; 0-7923-2708-X; © 1994 Kluwer Academic Publishers; printed in Great Britain), pp. 473–500

(c) to promote and strengthen collective self-reliance among the countries of South Asia;
(d) to contribute to mutual trust, understanding and appreciation of one another's problems;
(e) to promote active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields;
(f) to strengthen cooperation with other developing countries;
(g) to strengthen cooperation among themselves in international forums on matters of common interests; and
(h) to cooperate with international and regional organisations with similar aims and purposes.

Article II: Principles

1. Cooperation within the framework of the *Association* shall be based on respect for the principles of sovereign equality, territorial integrity, political independence, non-interference in the internal affairs of other States and mutual benefit.

2. Such cooperation shall not be a substitute for bilateral and multilateral cooperation but shall complement them.

3. Such cooperation shall not be inconsistent with bilateral and multilateral obligations.

Article III: Meetings of the heads of state or government

The Heads of State or Government shall meet once a year or more often as and when considered necessary by the Member States.

Article IV: Council of Ministers

1. A Council of Ministers consisting of the Foreign Ministers of the Member States shall be established with the following functions:
(a) formulation of the policies of the *Association*;
(b) review of the progress of cooperation under the *Association*;
(c) decision on new areas of cooperation;
(d) establishment of additional mechanism under the *Association* as deemed necessary;
(e) decision on other matters of general interest to the *Association*.

2. The Council of Ministers shall meet twice a year. Extraordinary sessions of the Council may be held by agreement among the Member States.

Article V: Standing Committee

1. The Standing Committee comprising the Foreign Secretaries shall have the following functions:

(a) overall monitoring and coordination of programmes of cooperation;
(b) approval of projects and programmes, and the modalities of their financing;
(c) determination of inter-sectoral priorities;
(d) mobilisation of regional and external resources;
(e) identification of new areas of cooperation based on appropriate studies;

2. The Standing Committee shall meet as often as deemed necessary.

3. The Standing Committee shall submit periodic reports to the Council of Ministers and make reference to it as and when necessary for decisions on policy matters.

Article VI: Technical Committees

1. Technical Committees comprising representatives of Member States shall be responsible for the implementation, coordination and monitoring of the programmes in their respective areas of cooperation.

2. They shall have the following terms of reference:
(a) determination of the potential and the scope of regional cooperation in agreed areas;
(b) formulation of programmes and preparation of projects;
(c) determination of financial implications of sectoral programmes;
(d) formulation of recommendations regarding apportionment of costs;
(e) implementation and coordination of sectoral programmes;
(f) monitoring of progress in implementation.

3. The Technical Committees shall submit periodic reports to the Standing Committee.

4. The Chairmanship of the Technical Committees shall normally rotate among Member States in alphabetical order every two years.

5. The Technical Committees may, inter-alia, use the following mechanisms and modalities, if and when considered necessary:
(a) meetings of heads of national technical agencies;
(b) meetings of experts in specific fields;
(c) contact amongst recognised centres of excellence in the region.

Article VII: Action Committees

1. The Standing Committee may set up Action Committees comprising Member States concerned with implementation of projects involving more than two but not all Member States.

Article VIII: Secretariat

There shall be a Secretariat of the Association.

Article IX: Financial Arrangements

1. The contribution of each Member State towards financing of the activities of the *Association* shall be voluntary.

2. Each Technical Committee shall make recommendations for the apportionment of costs of implementing the programmes proposed by it.

3. In case sufficient financial resources cannot be mobilised within the region for funding activities of the *Association*, external financing from appropriate sources may be mobilised with the approval of or by the Standing Committee.

Article X: General Provisions

1. Decisions at all levels shall be taken on the basis of unanimity.

2. Bilateral and contentious issues shall be excluded from the deliberations.

In faith Whereof we Have Set Our Hands And Seals Hereunto.

Done In Dhaka, Bangladesh, on this the eighth day of December of the year one thousand nine hundred eighty five.

MEMORANDUM OF UNDERSTANDING (AMONG THE GOVERNMENTS OF THE SAARC MEMBER STATES) ON THE ESTABLISHMENT OF THE SECRETARIAT

Bangalore, 17 November 1986

I Establishment of the Secretariat

In pursuance of Article VIII of the SAARC Charter the Governments of Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka have agreed on the following arrangements with regard to the establishment of the SAARC Secretariat.

II Location

The Secretariat shall be located in Kathmandu, Nepal.

III Role of the Secretariat

The role of the Secretariat shall be to coordinate and monitor the implementation of SAARC activities and to service the meetings of the Association.

IV Structure

The Secretariat shall comprise a Secretary-General, and Professional and General Services Staff, and contain an appropriate number of functional units to be called Divisions.

V Appointment of Secretary-General

1. The Secretary-General shall be appointed by the Council of Ministers upon nomination by a Member State on the basis of the principle of rotation in alphabetical order. The appointment of the Secretary-General shall be for a non-renewable tenure of two years. He shall hold the rank and status of Ambassador.

2.* In the event of the Secretary-General being unable to serve his full term, the unexpired portion of his term shall be filled in by the nominee of the Government of the country from which the Secretary-General comes upon the approval of the Council of Ministers. Until this arrangement is made the Director from the country next in alphabetical order shall be the Officer-in-Charge.

VI Appointment of Professional Staff

1. The Professional Staff of the Secretariat shall be appointed by the Secretary-General upon nomination by Member States.

2. Each Member State shall nominate one officer at the level of Director who, on appointment shall take charge of a Division/Divisions to be assigned by the Secretary General.

3. The appointment of a Director shall be for three years. In special circumstances the Secretary-General may, in consultation with the Member State concerned, extend the tenure for a period not exceeding another full term.

4. A Director shall be of the rank of Counsellor.

VII Appointment of General Services Staff

1. The Secretary-General shall employ such General Services Staff as are necessary for the normal functioning of the Secretariat.

2. The General Services Staff shall be nationals of the Member States recruited through open competition after advertisement, and shall be appointed by the Secretary-General.

3. The General Services Staff on satisfactory completion of one year's probation shall be confirmed in their appointments.

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* As amended by the Fourth Session of the Council of Ministers, para 2 now reads as follows: "Director of the highest rank will act as the officer-in-charge of the SAARC Secretariat, in the absence of the Secretary-General, by rotation in alphabetical order of the member countries".

4. The appointment of the General Services Staff shall be subject to the proviso that no objection is raised by their respective Governments.

VIII Function and Powers of the Secretary-General

The Secretary-General, as head of the SAARC Secretariat, shall:

(1) Be responsible for conducting the work of the Secretariat including coordination and monitoring of SAARC activities;

(2) Submit Staff Rules and Financial Regulations to the Standing Committee for approval of the Council of Ministers;

(3) Act as the channel of communication and linkage, when so empowered by the Standing Committee, between SAARC and other international organizations on matters of mutual interest. In doing so, the Secretary-General shall be guided by the decision of the Council of Ministers that initiatives for collaboration with external agencies should stem from SAARC itself based on its own determination of priorities and keeping in mind the relevant provisions of the SAARC Charter;

(4) Assist in organization and preparation of SAARC meetings at the levels of Standing Committee, Council of Ministers and the Summit and such other meetings as directed by the Standing Committee. The Secretary-General shall attend those meetings or nominate a member of his Professional Staff to do so;

(5) Submit the Annual Budget of the Secretariat to the Standing Committee for approval of the Council of Ministers;

(6) Act as the custodian of all SAARC documents and publications;

(7) Report periodically to the Standing Committee;

(8) Perform such other functions as the Standing Committee and Council of Ministers may assign.

IX Functions of the Directors

The Directors shall perform such functions as may be assigned to them by the Secretary-General.

X Language

English shall be the working language of the Secretariat.

XI Funding and budget

1. Nepal as the Host Country shall provide the following facilities for the Secretariat:
   (i) Accommodation with initial decoration and furnishing and provision of basic utilities and services including power, water, gas, air-conditioning, telephone, telex and major maintenance of the same; and
   (ii) Machines, equipment and vehicles for the initial stage.

2. The Annual Budget of the Secretarial shall contain two main components:
   (i) Capital expenditure, including all capital costs on such items as procurement of machines, equipment and vehicles; and
   (ii) Recurrent expenditure, including all expenses associated with the running of the Secretariat during the Budget Year including payment of salaries, allowances and perquisites of all Secretariat personnel, utility charges, office requisites and stationary, minor maintenance and any other regular expenses.

3. The Annual Budget of the Secretariat shall be shared by member States on the basis of a formula agreed upon by the Council of Ministers.

XII Salaries and allowances

The salaries and allowances of the Secretary-General and Professional and General Services Staff of the Secretariat shall be determined by the Council of Ministers.

XIII Privileges and immunities

1. The Secretariat, the Secretary-General and members of the Professional Staff of the Secretariat shall enjoy such privileges and immunities as are admissible to diplomatic missions/envoys and as detailed in the Headquarters Agreement to be reached between the Secretariat and the Host Country.

2. Other SAARC States will take steps to accord immunities and privileges to the Secretary-General and other members of the Professional Staff when visiting their territories on official duties, consistent with local laws and practices.

XIV Audit and Accounts

The accounts of the Secretariat shall be audited annually by a Panel of Auditors comprising three qualified members nominated by three Member States by rotation and appointed every year for a contract period of three weeks by the Standing Committee. The Report of the Panel of Auditors along with the annual accounts shall be submitted to the Standing Committee for approval of the Council of Ministers.

XV Amendment

An amendment to this Memorandum will require approval of the Council of Ministers.

XVI General

1. The Secretariat shall commence functioning from a date to be determined by the Council of Ministers.

2. Signed this Seventeenth Day of November of the year One Thousand Nine Hundred and Eighty-Six at Bangalore, India.

ASEAN DECLARATION ON THE SOUTH CHINA SEA*

Manila, 22 July 1992

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. *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 combatting 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.

Signed in Manila, Philippines, this 22nd day of July, nineteen hundred and ninety-two.

* Courtesy of Dr. KRIANGSAK KITTICHAISAREE, Bangkok

AGREEMENT ON SAARC PREFERENTIAL TRADING ARRANGEMENT (SAPTA)*

Dhaka, 1 April 1993

Preamble ...

Article 1: Definitions

For the purpose of this Agreement:

(1) "Least Developed Country" means a country designated as such by the United Nations.

(2) "Contracting State" means any Member State of the South Asian Association for Regional Cooperation (SAARC) which has entered into this Agreement.

(3) "Serious injury" means significant damage to domestic producers, of like or similar products resulting from a substantial increase of preferential imports in situations which cause substantial losses in terms of earnings, production or employment unsustainable in the short term. The examination of the impact on the domestic industry concerned shall also include an evaluation of other relevant economic factors and indices having a bearing on the state of the domestic industry of that product.

(4) "Threat of serious injury" means a situation in which a substantial increase of preferential imports is of a nature to cause "serious injury" to domestic producers, and that such injury, although not yet existing, is clearly imminent. A determination of threat of serious injury shall be based on facts and not on mere allegation, conjecture, or remote or hypothetical possibility.

(5) "Critical circumstances" means the emergence of an exceptional situation where massive preferential imports are causing or threatening to cause "serious injury" difficult to repair and which calls for immediate action.

(6) "Sectoral basis" means agreements amongst Contracting States regarding the removal or reduction of tariff, non-tariff and para-tariff barriers as well as other trade promotion or cooperative measures for specified products or groups of products closely related in end-use or in production.

(7) "Direct trade measures" means measures conducive to promoting mutual trade of Contracting States such as long- and medium-term contracts containing import and supply commitments in respect of specific products, buy-back arrangements, State trading operations, and government and public procurement.

(8) "Tariffs" means customs duties included in the national tariff schedules of the Contracting States.

(9) "Para-tariffs" means border charges and fees, other than "tariffs", on foreign trade transactions of a tariff-like effect which are levied solely on imports, but not those

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* Courtesy of the SAARC Secretariat

indirect taxes and charges, which are levied in the same manner on like domestic products. Import charges corresponding to specific services rendered are not considered as para-tariff measures.

(10) **"Non-tariffs"** means any measure, regulation, or practice, other than "tariffs" and "para-tariffs", the effect of which is to restrict imports, or to significantly distort trade.

(11) **"Products"** means all products including manufactures and commodities in their raw, semi-processed and processed forms.

Article 2: Establishment and Aims

1. By the present Agreement, the Contracting States establish the SAARC Preferential Trading Arrangement (SAPTA) to promote and sustain mutual trade and the economic cooperation among the Contracting States, through exchanging consessions in accordance with this Agreement.

2. SAPTA will be governed by the provisions of this Agreement and also by the rules, regulations, decisions, understandings and protocols to be agreed upon within its framework by the Contracting States.

Article 3: Principles

SAPTA shall be governed in accordance with the following principles:

(a) SAPTA shall be based and applied on the principles of overall reciprocity and mutuality of advantages in such a way as to benefit equitably all Contracting States, taking into account their respective levels of economic and industrial development, the pattern of their external trade, trade and tariff policies and systems;

(b) SAPTA shall be negotiated step by step, improved and extended in successive stages with periodic reviews;

(c) The special needs of the Least Developed Contracting States shall be clearly recognized and concrete preferential measures in their favour should be agreed upon;

(d) SAPTA shall include all products, manufactures and commodities in their raw, semi-processed and processed forms.

Article 4: Components

SAPTA may, *inter alia*, consist of arrangements relating to

(a) tariffs;

(b) para-tariffs;

(c) non-tariff measures;

(d) direct trade measures.

Article 5: Negotiations

1. The Contracting States may conduct their negotiations for trade liberalisation in accordance with any or a combination of the following approaches and procedures:
(a) Product-by-product basis;
(b) Across-the-board tariff reductions;
(c) Sectoral basis;
(d) Direct trade measures.

2. Contracting States agree to negotiate tariff preferences initially on a product-by-product basis.

3. The Contracting States shall enter into negotiations from time to time with a view to further expanding SAPTA and the fuller attainment of its aims.

Article 6: Additional Measures

1. Contracting States agree to consider, in addition to the measures set out in Article 4, the adoption of trade facilitation and other measures to support and complement SAPTA to mutual benefit.

2. Special consideration shall be given by Contracting States to requests from Least Developed Contracting States for technical assistance and cooperation arrangements designed to assist them in expanding their trade with other Contracting States and in taking advantage of the potential benefits of SAPTA. The possible areas for such technical assistance and cooperation are listed in Annex I.

Article 7: Schedules of Concessions

The tariff, para-tariff and non-tariff concessions negotiated and exchanged amongst Contracting States shall be incorporated in the National Schedules of Concessions. The initial concessions agreed to by the Contracting States are attached as Annex II.

Article 8: Extension of Negotiated Concessions

The concessions agreed to under SAPTA, except those made exclusively to the Least Developed Contracting States in pursuance of Article 10 of this Agreement, shall be extended unconditionally to all Contracting States.

Article 9: Committee of Participants

A Committee of Participants, hereinafter referred to as the Committee, consisting of representatives of Contracting States, is hereby established. The Committee shall meet at least once a year to review the progress made in the implementation of this Agreement and to ensure benefits of trade expansion emanating from this Agreement accrue to all Contracting States equitably. The Committee shall also accord adequate

opportunities for consultation on representations made by any Contracting State with respect to any matter affecting the implementation of the Agreement. The Committee shall adopt appropriate measures for settling such representations. The Committee shall determine its own rules of procedure.

Article 10: Special Treatment for the Least Developed Contracting States

1. In addition to other provisions of this Agreement, all Contracting States shall provide, wherever possible, special and more favourable treatment exclusively to the Least Developed Contracting States as set out in the following sub-paragraphs:
(a) Duty-free access, exclusive tariff preferences or deeper tariff preferences for the export products,
(b) The removal of non-tariff barriers,
(c) The removal, where appropriate, of para-tariff barriers,
(d) The negotiations of long-term contracts with a view to assisting Least Developed Contracting States to achieve reasonable levels of sustainable exports of their products,
(e) Special consideration of exports from Least Developed Contracting States in the application of safeguard measures,
(f) Greater flexibility in the introduction and continuance of quantitative or other restrictions provisionally and without discrimination in critical circumstances by the Least Developed Contracting States on imports from other Contracting States.

Article 11: Non-application

Notwithstanding the measures as set out in Articles 4 and 6, the provisions of this Agreement shall not apply in relation to preferences already granted or to be granted by any Contracting State to other Contracting States outside the framework of this Agreement, and to third countries through bilateral, plurilateral and multilateral trade agreements, and similar arrangements. The Contracting States shall also not be obliged to grant preferences in SAPTA which impair the concession extended under those agreements.

Article 12: Communication, Transport and Transit

Contracting States agree to undertake appropriate steps and measures for developing and improving communication system, transport infrastructure and transit facilities for accelerating the growth of trade within the region.

Article 13: Balance-of-Payments Measures

1. Notwithstanding the provisions of this Agreement, any Contracting State facing serious economic problems including balance of payments difficulties may suspend provisionally the concessions as to the quantity and value of merchandise permitted to

be imported under the Agreement. When such action has taken place, the Contracting State which initiates such action, shall simultaneously notify the other Contracting States and the Committee.

2. Any Contracting State which takes action according to paragraph 1 of this Article shall afford, upon request from any other Contracting State, adequate opportunities for consultations with a view to preserving the stability of the concessions negotiated under the SAPTA. If no satisfactory adjustment is effected between the Contracting States concerned within 90 days of such notification, the matter may be referred to the Committee for review.

Article 14: Safeguard Measures

If any product, which is a subject of a concession with respect to a preference under this Agreement, is imported into the territory of a Contracting State in such a manner or in such quantities as to cause or threaten to cause, serious injury in the importing Contracting State, the importing Contracting State concerned may, with prior consultations, except in critical circumstances, suspend provisionally without discrimination, the concession accorded under the Agreement. When such action has taken place the Contracting State which initiates such action shall simultaneously notify the other Contracting State(s) concerned and the Committee shall enter into consultations with the concerned Contracting State and endeavour to reach mutually acceptable agreement to remedy the situation. In the event of the failure of the Contracting States to resolve the issue within 90 days of the receipt of original notification, the Committee of Participants shall meet within 30 days to review the situation and try to settle the issue amicably. Should the consultations in the Committee of Participants fail to resolve the issue within 60 days, the parties affected by such action shall have the right to withdraw equivalent concession(s) or other obligation(s) which the Committee does not disapprove of.

Article 15: Maintenance of the Value of Concessions

Any of the concessions agreed upon under this Agreement shall not be diminished or nullified, by the application of any measures restricting trade by the Contracting States except under the provisions as spelt out in other Articles of this Agreement.

Article 16: Rules of Origin

Products contained in the National Schedules of Concessions annexed to this Agreement shall be eligible for preferential treatment if they satisfy the rules of origin, including special rules of origin, in respect of the Least Developed Contracting States, which are set out in Annex III.

Article 17: Modification and Withdrawal of Concessions

1. Any Contracting State may, after a period of three years from the day the concession was extended, notify the Committee of its intention to modify or withdraw any concession included in its appropriate schedule.

2. The Contracting State intending to withdraw or modify a concession shall enter into consultation and/or negotiations, with a view to reaching agreement on any necessary and appropriate compensation, with Contracting States with which such concession was initially negotiated and with any other Contracting States that have a principal or substantial supplying interest as may be determined by the Committee.

3. Should no agreement be reached between the Contracting States concerned within six months of the receipt of notification and should the notifying Contracting State proceed with its modification or withdrawal of such concessions, the affected Contracting States as determined by the Committee may withdraw or modify equivalent concessions in their appropriate schedules. Any such modification or withdrawal shall be notified to the Committee.

Article 18: Withholding or Withdrawal of Concessions

A Contracting State shall at any time be free to withhold or to withdraw in whole or in part any item in its schedule of concessions in respect of which it determines that it was initially negotiated with a State which has ceased to be a Contracting State in this Agreement. A Contracting State taking such action shall notify the Committee, and upon request, consult with Contracting States that have a substantial interest in the product concerned.

Article 19: Consultations

1. Each Contracting State shall accord sympathetic consideration to and shall afford adequate opportunity for consultations regarding such representations as may be made by another Contracting State with respect to any matter affecting the operation of this Agreement.

2. The Committee may, at the request of a Contracting State, consult with any Contracting State in respect of any matter for which it has not been possible to find a satisfactory solution through such consultation under paragraph 1 above.

Article 20: Settlement of Disputes

Any dispute that may arise among the Contracting States regarding the interpretation and application of the provisions of this Agreement or any instrument adopted within its framework shall be amicably settled by agreement between the parties concerned. In the event of failure to settle a dispute, it may be referred to the Committee by a party to the dispute. The Committee shall review the matter and make a recommendation thereon within 120 days from the date on which the dispute was submitted to it. The Committee shall adopt appropriate rules for this purpose.

Article 21: Withdrawal from SAPTA

1. Any Contracting State may withdraw from this Agreement at any time after its entry into force. Such withdrawal shall be effective six months from the day on which written notice thereof is received by the SAARC Secretariat, the depositary of this Agreement. That Contracting State shall simultaneously inform the Committee of the action it has taken.

2. The rights and obligations of a Contracting State which has withdrawn from this Agreement shall cease to apply as of that effective date.

3. Following the withdrawal by any Contracting State, the Committee shall meet within 30 days to consider action subsequent to withdrawal.

Article 22: Entry into Force

This Agreement shall enter into force on the thirtieth day after the notification issued by the SAARC Secretariat regarding completion of the formalities by all Contracting States.

Article 23: Reservations

This Agreement may not be signed with reservations nor shall reservations be admitted at the time of notification to the SAARC Secretariat of the completion of formalities.

Article 24: Amendments

This Agreement may be modified through amendments to this Agreement. All amendments shall become effective upon acceptance by all Contracting States.

Article 25: Depositary

This Agreement shall be deposited with the Secretary-General of SAARC who shall promptly furnish a certified copy thereof to each Contracting State.

The Agreement is provided with three Annexes:

Annex I: Additional measures in favour of least developed contracting states

Annex II: National schedules of concessions

Annex III: Rules of origin

FINAL DECLARATION OF THE REGIONAL MEETING FOR ASIA OF THE WORLD CONFERENCE ON HUMAN RIGHTS*

Bangkok, 2 April 1993

The Ministers and representatives of Asian States, meeting at Bangkok from 29 March to 2 April 1993, pursuant to General Assembly Resolution 46/116 of 17 December 1991 in the context of preparations for the World Conference on Human rights,

ADOPT this Declaration, to be known as "The Bangkok Declaration", which contains the aspirations and commitments of the Asian region:

Bangkok Declaration

Emphasizing the significance of the World Conference on Human Rights, which provides an invaluable opportunity to review all aspects of human rights and ensure a just and balanced approach thereto,

Recognizing the contribution that can be made to the World Conference by Asian countries with their diverse and rich cultures and traditions,

Welcoming the increased attention being paid to human rights in the international community,

Reaffirming their commitment to principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights,

Recalling that in the Charter of the United Nations the question of universal observance and promotion of human rights and fundamental freedoms has been rightly placed within the context of international cooperation,

Noting the progress made in the codification of human rights instruments, and in the establishment of international human rights mechanisms, while EXPRESSING CONCERN that these mechanisms relate mainly to one category of rights,

Emphasizing that ratification of international human rights instruments, particularly the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, by all States should be further encouraged,

Reaffirming the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of States,

Stressing the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization,

Recognizing that the promotion of human rights should be encouraged by cooperation and consensus, and not through confrontation and the imposition of incompatible values,

Reiterating the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the inherent interrelationship between development,

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* A/CONF.157/ASRM/8–A/CONF.157/PC/59 (7 Apr. 1993)

democracy, universal enjoyment of all human rights, and social justice, which must be addressed in an integrated and balanced manner,

Recalling that the Declaration on the Right to Development has recognized the right to development as a universal and inalienable right and an intergral part of fundamental human rights,

Emphasizing that endeavours to move towards the creation of uniform international human rights norms must go hand in hand with endeavours to work towards a just and fair world economic order,

Convinced that economic and social progress facilitates the growing trend towards democracy and the promotion and protection of human rights,

Stressing the importance of education and training in human rights at the national, regional and international levels and the need for international cooperation aimed at overcoming the lack of public awareness of human rights,

1. *Reaffirm* their commitment to the principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights as well as the full realization of all human rights throughout the world;

2. *Underline* the essential need to create favourable conditions for effective enjoyment of human rights at both the national and international levels;

3. *Stress* the urgent need to democratize the United Nations system, eliminate selectivity and improve procedures and mechanisms in order to strengthen international cooperation, based on principles of equality and mutual respect, and ensure a positive, balanced and non-confrontational approach in addressing and realizing all aspects of human rights;

4. *Discourage* any attempt to use human rights as a conditionality for extending development assistance;

5. *Emphasize* the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure;

6. *Reiterate* that all countries, large and small, have the right to determine their political systems, control and freely utilize their resources, and freely pursue their economic, social and cultural development;

7. *Stress* the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization, and that no violation of human rights can be justified;

8. *Recognize* that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds;

9. *Recognize further* that States have the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms, and also recognize that remedies must be sought and provided primarily through such mechanisms and procedures;

10. *Reaffirm* the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the need to give equal emphasis to all categories of human rights;

11. *Emphasize* the importance of guaranteeing the human rights and fundamental

freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees and displaced persons;

12. *Reiterate* that self-determination is a principle of international law and a universal right recognized by the United Nations for peoples under alien or colonial domination and foreign occupation, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development, and that its denial constitutes a grave violation of human rights;

13. *Stress* that the right to self-determination is applicable to peoples under alien or colonial domination and foreign occupation, and should not be used to undermine the territorial integrity, national sovereignty and political independence of States;

14. *Express concern* over all forms of violation of human rights, including manifestations of racial discrimination, racism, apartheid, colonialism, foreign aggression and occupation, and the establishment of illegal settlements in occupied territories, as well as the recent resurgence of neo-nazism, xenophobia and ethnic cleansing;

15. *Underline* the need for taking effective international measures in order to guarantee and monitor the implementation of human rights standards and effective and legal protection of people under foreign occupation;

16. *Strongly affirm* their support for the legitimate struggle of the Palestinian people to restore their national and inalienable rights to self-determination and independence, and demand an immediate end to the grave violations of human rights in the Palestinian, Syrian Golan and other occupied Arab territories including Jerusalem;

17. *Reaffirm* the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights, which must be realized through international cooperation, respect for fundamental human rights, the establishment of a monitoring mechanism and the creation of essential international conditions for the realization of such right;

18. *Recognize* that the main obstacles to the realization of the right to development lie at the international macroeconomic level, as reflected in the widening gap between the North and the South, the rich and the poor;

19. *Affirm* that poverty is one of the major obstacles hindering the full enjoyment of human rights;

20. *Affirm also* the need to develop the right of humankind regarding a clean, safe and healthy environment;

21. *Note* that terrorism, in all its forms and manifestations, as distinguished from the legitimate struggle of peoples under colonial or alien domination and foreign occupation, has emerged as one of the most dangerous threats to the enjoyment of human rights and democracy, threatening the territorial integrity and security of States and destabilizing legitimately constituted governments, and that it must be unequivocally condemned by the international community;

22. *Reaffirm* their strong commitment to the promotion and protection of the rights of women through the guarantee of equal participation in the political, social, economic and cultural concerns of society, and the eradication of all forms of discrimination and of gender-based violence against women;

23. *Recognize* the rights of the child to enjoy special protection and to be afforded the opportunities and facilities to develop physically, mentally, morally, spiritually and

socially in a healthy and normal manner and in conditions of freedom and dignity;

24. *Welcome* the important role played by national institutions in the genuine and constructive promotion of human rights, and believe that the conceptualization and eventual establishment of such institutions are best left for the States to decide;

25. *Acknowledge* the importance of cooperation and dialogue between governments and non-governmental organizations on the basis of shared values as well as mutual respect and understanding in the promotion of human rights, and encourage the non-governmental organizations in consultative status with the Economic and Social Council to contribute positively to this process in accordance with Council Resolution 1296 (XLIV);

26. *Reiterate* the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia;

27. *Reiterate further* the need to explore ways to generate international cooperation and financial support for education and training in the field of human rights at the national level and for the establishment of national infrastructures to promote and protect human rights if requested by States;

28. *Emphasize* the necessity to rationalize the United Nations human rights mechanism in order to enhance its effectiveness and efficiency and the need to ensure avoidance of the duplication of work that exists between the treaty bodies, the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Commission on Human Rights, as well as the need to avoid the multiplicity of parallel mechanisms;

29. *Stress* the importance of strengthening the United Nations Centre for Human Rights with the necessary resources to enable it to provide a wide range of advisory services and technical assistance programmes in the promotion of human rights to requesting States in a timely and effective manner, as well as to enable it to finance adequetely other activities in the field of human rights authorized by competent bodies;

30. *Call for* increased representation of the developing countries in the Centre for Human Rights.

INTRA-CHINESE AGREEMENTS*

Singapore, 29 April 1993

INTRODUCTORY NOTE

In 1991 unofficial bodies have been established by the governments on the Chinese mainland as well as on the Island of Taiwan to serve as instruments for mutual contact. The mainland organization is the Association for Relations Across the Taiwan Straits (ARATS) and the one at Taiwan is the Straits Exchange Foundation (SEF).

In 1992 the two chairmen agreed to hold a meeting to discuss matters of mutual concern to both organizations. A first preparatory meeting by representatives was held on 11 April

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* Courtesy of Mr. YANG SHENG-TSUNG, Taipei

1993, followed by a second one on 25–26 April 1993. The formal talks between the chairmen took place from 27 to 29 April 1993.

The four agreements concluded between ARATS and SEF were: (1) a Joint Agreement; (2) an Agreement on Use and Verification of Certificates of Authentication Across the Taiwan Straits; (3) an Agreement on Matters Concerning Inquiry and Compensation for Registered Mail Across the Taiwan Straits; (4) an Agreement on the System for Contacts and Meetings between SEF and ARATS. The first and fourth Agreements are reproduced below in part.

Because of the existing differences in style between the parties and because of the existing political sensitivities, the agreements have been written in two versions with, inter alia, *different precedence in referring to each party and different dating systems. The English translation below has been received from the Taiwanese side. The Editors have neglected the exact differences in form between the two versions.*

JOINT AGREEMENT

... The two parties reached the following agreements:

1. Agenda of Discussions for This Year

The two parties will definitely hold, by the end of this year, administrative [non-political and functional] discussions on the following topics: repatriation of people who enter the area of the other side in violation of relevant regulations [illegal migrants] and related questions; questions concerning joint efforts to suppress the criminal activities of marine smuggling and robbery; handling of marine fishing disputes between the two sides; protection of intellectual property of the two sides; and mutual assistance between the judicial organs of the two sides (contact and assistance between relevant courts of the two sides).

2. Economic Exchanges

Both parties concur in the necessity of strengthening economic exchanges between the two sides for their mutual benefit. Both parties agree to select times and places to continue discussions on the issue of protecting Taiwan business investment in the mainland and related questions, as well as mutual visits of people from industrial and commercial circles.

3. Exploitation and Exchange [Cooperation] in Energy and Resources

Both parties agree to hold discussions on strengthening cooperation in the exploitation of energy and resources.

4. Culture, Education, Science, and Technology Exchanges

Both parties agree to actively promote mutual visits and exchanges of young people, the press and science and technology exchanges between the two sides. The two parties will, by the end of this year, sponsor a young people's talent and art competition and exchange and help realize an exchange between young people and mutual visits of news media executives and senior reporters. Both parties shall promote mutual visits of science and technology personnel, exchange science [and] technology publications, study the unification of terminology in science and the standardization of product specifications, and jointly promote the exchange of technology in computers and other industries. Related matters will be discussed further.

5. Signing and Entry Into Force

This joint agreement enters into force thirty days from the date of signing by both parties.

AGREEMENT ON THE SYSTEM FOR CONTACTS AND MEETINGS BETWEEN SEF AND ARATS

The Straits Exchange Foundation (hereinafter referred to as SEF) and the Association for Relations Across the Taiwan Straits (hereinafter referred to as ARATS), for the purpose of establishing a system for contacts and meetings and having held discussions thereon, reached the following agreements:

1. Meetings

Where there is practical need and with the consent of both parties, the SEF and ARATS chairmen will hold meetings concerning the business of the two organizations. The venues and related questions will be settled through further negotiation.

The SEF deputy chairman and ARATS deputy chairman or secretaries general of the two organizations will, in principle, hold a meeting once every six months concerning the business of the two organizations. The meetings will be held in Taiwan and the mainland alternately, or in a third place settled on through discussions.

Deputy secretaries general, department chiefs, and personnel of the rank of director of the two organizations will hold meetings quarterly in selected places in Taiwan or the mainland.

2. Administrative [non-political and functional] Discussions

Both parties agree to hold, as soon as possible, exclusive discussions on matters which arise in the course of exchanges between the two sides which need to be discussed, and sign agreements.

3. Task Forces

Both parties agree that they will each set up an economic team and a comprehensive team as business requires.

4. Emergency Contacts

Both parties agree that they will each designate their deputy secretaries general as liaison persons for emergencies. They shall contact each other and take appropriate measures in such cases.

5. Facilitating Entry and Exit

Both parties agree that, on the grounds established by this agreement, they will mutually facilitate personnel, designated by the two organizations through discussions, in their entry into and exit from the areas of the two sides. This shall include assistance in customs processing and other matters relating to travel. Concrete measures will be settled through discussions.

6. Execution, Amendment, and Termination of Agreements

Both parties shall comply with agreements reached. Execution, amendment, or termination of an agreement shall be made with the consent of both parties through negotiation.

7. Unsettled Matters

If this agreement leaves any matters unsettled, the two parties may negotiate a settlement through appropriate channels.

8. Signing and Entry Into Force

This agreement enters into force 30 days from the date of signing by both parties.

DECLARATION ON THE INVIOLABILITY OF FRONTIER

Adopted at a meeting of the heads of state of the Republics of Kazahkstan, Kyrgyzstan, Tajikstan, Uzbekistan and of the Russian Federation, held in Moscow on 7 August 1993*

The signatories to this Declaration,

Reaffirming their commitment to the Charter of the United Nations, the principles of the Conference on Security and Cooperation in Europe and the founding instruments of the Commonwealth of Independent States,

Emphasizing that the inviolability of frontiers and the territorial integrity of States are basic principles in international relations and their observance is an essential condition for maintaining international peace, security and stability,

Recalling that, under the Charter of the United Nations, the territory of States is inviolable and may not be the object of the use of force,

Concerned at the serious violations of their frontiers committed by countries which are not part of the Commonwealth of Independent States,

On the basis of the inherent right of individual or collective self-defence under Article 51 of the United Nations Charter,

Declare the following:

1. The signatories to this Declaration consider that ensuring the inviolability of their frontiers is of vital mutual interest and is a common duty to be carried out on a multilateral or bilateral basis.

2. The signatories to this Declaration will continue to view any and all encroachments upon their frontiers as illegal acts which are grounds for adopting reciprocal and commensurate measures under international law, including the use of armed force, as a form of individual or collective self-defence. They shall work together to prevent and put an end to any outside attempt to encroach upon the territory of any of the States which are signatories to this Declaration.

3. The signatories to this Declaration will continue to put an end to any action carried out on their territory by individuals, groups or organizations which is aimed at breaching the inviolability of the frontiers of these States.

4. The signatories to this Declaration shall be collectively responsible for the inviolability of their frontiers with third-party States. At the same time, none of the signatories to this Declaration has the obligation to unilaterally ensure the security of the frontiers of another State.

5. The signatories to this Declaration reaffirm their willingness, by means of negotiations involving all the parties concerned, to find a way to terminate and prevent armed conflicts along frontiers.

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*UN Doc. A/48/304–S/26290

6. The internal stability of the States which are signatories to this Declaration is a prerequisite condition of the security of their frontiers. To this end, each State shall take appropriate steps to strengthen its democratic institutions and achieve national harmony on the basis of respect for human rights and fundamental freedoms.

7. The signatories to this Declaration are counting on neighbouring States and the international community in general for their support and understanding of the situation.

KUALA LUMPUR DECLARATION ON HUMAN RIGHTS*

Preamble

Whereas, the peoples of ASEAN recognize that all human beings are created by the Almighty, and possess fundamental rights which are universal, indivisible and inalienable;

Whereas, the peoples of ASEAN are born free and equal with full dignity and rights and are endowed with reasoning and conscience enabling them to act responsibly and humanely towards one another in a spirit of brotherhood;

Whereas, the peoples of ASEAN realize that human beings cannot live alone but in harmony with one another with nature and their environment to achieve complete fulfilment of their aspirations in a just society based on harmonious and balanced economic, social, political and cultural developments;

Whereas, the peoples of ASEAN recognize that human rights have two mutually balancing aspects; those with respect to rights and freedom of the individual, and those which stipulate obligations of the individuals to society and State;

Whereas, the peoples of ASEAN accept that human rights exist in a dynamic and evolving context and that each country has inherent historical experiences, and changing economic, social, political and cultural realities and value system[s] which should be taken into account.

Whereas, the peoples of ASEAN are convinced that human beings [have] a right to development and freedom from poverty, hunger, illiteracy, ignorance, injustice, diseases and other human miseries;

Whereas, the peoples of ASEAN reaffirm the observance of the United Nations Universal Declaration of Human Rights Charter, and the Vienna Declaration and Program of Action of 25 June 1993;

Whereas, the continuing progress of ASEAN in freeing its people from fear and want has enabled them to live in dignity;

Whereas, ASEAN seeks to further enhance its role in promoting a world order based on freedom, peace and social justice through international, regional and bilateral cooperation.

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* Approved by the Second Plenary Session of the 14th General Assembly of the ASEAN Inter-Parliamentary Organization, October 1993.

Part I HUMAN RIGHTS DECLARATION: Principles

Article 1

All human beings, individually and collectively, have a responsibility to participate in their total development, taking in account the need for full respect of their human rights as well as their duties to the community. Freedom, progress and national stability are promoted by balance between the rights of the individual and those of the community.

Article 2

All human beings, without distinction as to race, colour, sex, language, religion, nationality, ethnic origin, family or social status, or personal convictions have the right to live in dignity and to enjoy the fruits of development and should, on their part, contribute to and participate in it.

Article 3

All human beings have the right to self-determination. By virtue of this right, they freely determine their political status and may pursue their economic, social, political and cultural development.

Article 4

Each Member State has the right to development based on its own objectives, to set its own priorities, and to decide the ways and means of realizing its development without external interference.

Article 5

Universal promotion and protection of human rights should take place in the context of international cooperation based on respect for national sovereignty, territorial integrity and non-interference in the internal affairs of States, and human rights should not be used as a conditionality for economic cooperation and development assistance.

Article 6

National development shall be founded on the basis of respect for the dignity and value of human beings, which required the elimination of all forms of inequality, exploitation, colonialism, racism, and the implementation of civil, political, economic, social and cultural rights without discrimination.

Part II: FUNDAMENTAL HUMAN RIGHTS

Article 7

Everyone has the right to life. No one shall be deprived of such right except in accordance with the law.

Article 8

Everyone has the right to freedom of thought, opinion, conscience and religion, these rights include freedom of teaching, practice, worship and observance, both in private and public, individually or in community with others.

Article 9

Everyone has the right to property, liberty and security of person. No one shall be deprived of these rights except in accordance with law.

Article 10

Any violation of these fundamental human rights should be redressed in accordance with law.

Part III: BASIC RIGHTS AND DUTIES OF CITIZENS AND STATES

Article 11

Everyone is equal before the law and is entitled to protection of the law without any discrimination.

Article 12

Everyone has the right to freedom of expression which carries inherent duties and responsibilities.

Article 13

Everyone has the right to freedom of association. No restrictions may be imposed on the exercise of this right other than those prescribed by law.

Article 14

Everyone charged with a criminal offence has the right to be presumed innocent until proven otherwise according to law.

Article 15

Every citizen has the right and should have the opportunity, without unreasonable restrictions, to participate in the conduct of public affairs directly or indirectly through freely chosen representatives, to vote and to be elected to public office.

Article 16

It is the right and duty of each Member State to formulate appropriate and sustainable national development policies that aim at the constant improvement of the well-being for all its citizens on the basis of active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 17

Each Member State should undertake all neccessary measures for the realization of the right to development and shall ensure equality of opportunity for all its citizens in their access to basic resources, education, health services, food, housing, employment, public services and the fair distribution of income.

Article 18

Each Member State should undertake appropriate economic, social, political, technical and cultural measures in order to promote social justice.

Article 19

Each Member State has the duty to encourage and facilitate the participation of all citizens in all spheres of development to ensure full realization of human rights.

Article 20

It is the task and responsibility of each Member State and every citizen to ensure the promotion, implementation and protection of human rights.

Article 21

It is likewise the task and responsibility of Member States to establish an appropriate regional mechanism on human rights.

Article 22

Each Member State and its citizens shall endeavour to exercise the aforementioned rights and duties subject only to such limitations as are determined by law in respect of these rights and duties to meet the just requirement of morality, public order and the general well-being of society.

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PAUL GUGGENHEIM FOUNDATION

INSTITUT UNIVERSITAIRE DE HAUTES ETUDES INTERNATIONALES
THE GRADUATE INSTITUTE OF INTERNATIONAL STUDIES

132, rue de Lausanne—1211 Genève 21

PAUL GUGGENHEIM PRIZE 1995

The Board of the Paul Guggenheim Foundation has decided to award the eighth Paul Guggenheim Prize of Swiss francs 12,000 in 1995.

The Paul Guggenheim Prize is periodically awarded to a monograph of major importance in the field of public international law. The monograph must be of the highest quality and be the work of a person at the beginning of his/her career. Works submitted may be in the form of published books or of manuscripts intended for publication: they may be written in English, French, German, Italian or Spanish. Works which have already received a prize of a similar nature will not be considered.

Applications accompanied by a *curriculum vitae*, a list of publications and five copies of the work submitted *must be received, no later than 31 January 1995*, by: The Paul Guggenheim Foundation, The Graduate Institute of International Studies, 132, rue de Lausanne, 1211 Genève 21 (Switzerland). Applicants are required to specify whether the work has already been awarded a prize.

The Rules pertaining to the Prize may be obtained at the same address.

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GENERAL INFORMATION

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Contributions to the Yearbook

The *Yearbook* invites contributions in the form of:
- articles (5000 words or more) on topics of international law, either with special reference to Asia or of general relevance;
- (shorter) notes and comments;
- translated versions of articles originally written in a language other than English;
- materials in the field of municipal or international state practice of Asian states and organizations, with relevance to international law;
- data on events and incidents relating to Asia and Asian countries and with relevance to international law and relations;
- information on literature and documents (in any language) either concerning international law in Asia or concerning international law in general and published or issued in Asia.

Contributors of articles and notes will receive 25 offprints free of charge. Contributors of other materials will receive 10 offprints of the *Yearbook*-section in which their materials are included.

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