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ABBREVIATIONS

AALCC	-	Asian-African Legal Consultative Committee
ACHR	-	American Convention on Human Rights
AIR	-	All India Reporter
AJIL	-	American Journal of International Law
BIT	-	Bilateral Investment Treaty
BLD	-	Bulletin of Legal Developments (London)
BP	-	Bangkok Post
BYIL	-	The British Yearbook of International Law
CASE W.RES.JIL	-	Case Western Reserve Journal of International Law
CERDS	-	Charter of Economic Rights and Duties of States
CHIN.YIL	-	Chinese Yearbook of International Law
CHIN.YILA	-	Chinese Yearbook of International Law and Affairs
CHIN.LR	-	China Law Report
COL.BLR	-	Columbia Business Law Review
COLL.	-	Collection of Decisions of the European Commission of Human Rights
DEN.JILP	-	Denver Journal of International Law and Policy
D.R.	-	Decisions and Reports of the European Commission of Human Rights
ECE	-	Economic Commission for Europe
EEC	-	European Economic Community
EEZ	-	Exclusive Economic Zone
ECHR	-	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECHRYb	-	Yearbook of the European Convention for the Protection of Human Rights and Fundamental Freedoms
ECHRCColl.	-	Collection of Decisions of the European Commission of Human Rights
ECOSOC	-	Economic and Social Council (UN)
EHRR	-	European Human Rights Reports
ENV.P&L	-	Environmental Policy and Law
EUR.JIL	-	European Journal of International Law
FEER	-	Far Eastern Economic Review
GAOR	-	General Assembly Official Records
GYIL	-	German Yearbook of International Law
HASTINGS ICLR	-	Hastings International and Comparative Law Review
IACHR	-	Inter-American Commission on Human Rights
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

ICSID CONVENTION	-	The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965)
IHT	-	International Herald Tribune
IJIL	-	Indian Journal of International Law
ILC	-	International Law Commission
ILM	-	International Legal Materials
ILR	-	International Law Reports
JAIL	-	The Japanese Annual of International Law
JP	-	Jakarta Post
JUDGEMENTS AND DECISIONS	-	Publications of the European Court of Human Rights, Series A: Judgements and Decisions
JWT	-	Journal of World Trade
KGZ	-	Kokusaiho Gaiko Zassi (The Journal of International Law and Diplomacy)
MICH. JIL	-	Michigan Journal of International Law
MIT	-	Multilateral Investment Treaty
NIEO	-	New International Economic Order
NST	-	New Straits Times
NYUJILP	-	New York University Journal of International Law and Policy
ODIL	-	Ocean Development and International Law
OEA	-	Organizacīon de los Estados Americanos
OECD	-	Organization for Economic Cooperation and Development
OSOV/M	-	one-state-one vote/majority rule
PLEADINGS	-	Publications of the European Court of Human Rights, Series B: Readings, Oral Arguments and Documents
RdC	-	Recueil des Cours de l'Académie de Droit International de la Haye
SCC	-	Supreme Court Cases
UNCHR	-	United Nations Commission on Human Rights
UNCIO DOCS.	-	United Nations Conference of International Organization (San Francisco, 1945)
UNCLOS	-	United Nations Conference on the Law of the Sea
UNGA	-	United Nations General Assembly
UNEP	-	United Nations Environment Programme
UNHRC	-	United Nations Human Rights Committee
UNTS	-	United Nations Treaty Series
WTM	-	World Trade Materials
YbILC	-	Yearbook of the International Law Commission

ARTICLES

DE MAXIMIS NON CURAT PRAETOR OR JUDICIAL REVIEW: THE HAGUE COURT IN A TIME OF TRANSITION*

Fredrik Danelius**

1. INTRODUCTION

More than thirty years have passed since the death of one of the greatest international lawyers of this century, Sir HERSCH LAUTERPACHT (1897-1960). In 1933 he published what may be his finest academic achievement, *The Function of Law in the International Community*, a piece of work which still today exercises its influence upon the international legal debate. The book deals with a number of essential problems of international law — and, indeed, in many instances, law generally — concerning the role of law and courts in the international society.

LAUTERPACHT devotes two chapters to a critical examination of a view — "the doctrine *De maximis non curat praetor*" — which in his opinion has exercised an unfortunate influence upon the organization and administration of international justice.[1] According to the criticized doctrine, there is a certain kind of disputes which do not belong in courts of law, namely disputes in which the vital interests of states are at stake. This doctrine is unsound, LAUTERPACHT argued:

> ". . . in so far as the vital interests of States require protection, they are better protected by the recognition of the reign of law administered through international tribunals than by formally safeguarding, through the usual reservations, the ultimate right to have recourse to force."[2]

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* A shorter Swedish language version of this article has been published in 78 *Svensk Juristtidning* [The Swedish Law Journal] (1993) 854-862. It was awarded the Journal's annual prize in 1993 as best article of a young professional lawyer.

** Researcher in International Law, University of Lund, Sweden.

[1] H. LAUTERPACHT, *The Function of Law in the International Community* (1933) 166-201. The Latin phrase may be translated "The judge does not deal with big issues". The phrase is a travesty of the Roman law maxim *de minimis non curat praetor* (The judge does not deal with small issues).

[2] Ibid., p. 177.

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 pp. 3-13

LAUTERPACHT's view, which in 1933 may have appeared to many observers as a quite unrealistic expression of 'judicial idealism', gradually gained acceptance during the first decades of the Post-World War II-era.[3] After the adoption of the UN Charter (of which the new Statute of the Hague Court forms an integral part) in 1945 many disputes which had previously been considered exclusively political were now to be regarded (also) as legal ones and therefore as capable of being subjected to judicial settlement.

The recent practice of the Hague Court has re-opened the debate on the role of the Court in 'political' disputes. The picture which emerges from the decisions of the Court, from the pleadings of the state parties and from the academic debate in recent years is not, however, an absolutely clear one. On the one hand, a tendency towards a revival of the doctrine *de maximis* . . . may be noted. On the other hand, moves towards an enhancement of the role of the Hague Court in world politics are also part of the picture.

Here I intend to discuss the appropriateness and the possible effects of a revival of the doctrine *de maximis* . . . as a guiding maxim for the work of the Hague Court. First I intend to examine the place of this doctrine in the written rules concerning the Court's jurisdiction and the admissibility criteria applicable to cases before the Court (section 2). Thereafter I will discuss the possible impact of the doctrine on the exercise of the judicial function, first from a theoretical perspective (section 3), then from the perspective of the practice of the Court (section 4). By way of conclusion I intend to propose a particular judicial approach to the doctrine *de maximis non curat praetor* (section 5).

2. THE PLACE OF THE DOCTRINE VIS-A-VIS THE JURISDICTION OF THE HAGUE COURT AND THE ADMISSIBILITY OF THE CLAIM

The doctrine *de maximis non curat praetor* has had a particular impact on the treaties on international arbitration and adjudication which were concluded in the late 19th century and the early 20th century. Quite early in the history of modern international adjudication a distinction was made between legal and political disputes, of which only the former were considered suitable for submission to international tribunals.[4] Maintaining freedom of action in

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[3] I. BROWNLIE, 'The justiciability of disputes and issues in international relations', 42 BYIL (1967), at p. 124, has commented upon LAUTERPACHT's view on these and some closely related matters: "To some extent these propositions may now seem obvious but until LAUTERPACHT's book appeared they were probably not generally accepted."

[4] LAUTERPACHT, op. cit. n. 1 at pp. 6-9, traces the distinction to E. DE VATTEL's influential treatise *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758).

political disputes was however, according to the long-prevailing view, necessary in order not to undermine state sovereignty. As a consequence of this predominant view, a practice emerged in the late 19th century of including into arbitration treaties a clause which excluded from arbitration disputes affecting "the vital interests, the independence or the honour of the two contracting States".[5] Normally, each state party to such a treaty reserved the right for itself to determine when its vital interests or the like were at stake. By safeguarding their positions as authoritative interpreters of these treaties, states did not only protect their sovereignty. They also reduced the practical value of the numerous attempts which were made to elaborate criteria or 'tests' for distinguishing between legal and political disputes.[6]

In the words of the Statute of the Hague Court, the Court's 'compulsory' jurisdiction is still today limited to 'legal disputes', namely:

"all legal disputes concerning
a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation."[7]

Nevertheless, for two reasons it is clear that a state which has made an unconditional declaration under 'the optional clause' (thus accepting the jurisdiction of the Court in its future legal disputes) must be considered to have renounced a significant part of its freedom to interpret the scope of 'legal disputes'. Firstly, the Hague Court has been granted *compétence de la compétence*, i.e. the power to decide its own jurisdiction.[8] Secondly, the restriction of the Court's jurisdiction to 'legal disputes' has hardly the same significance today as it had at the turn of the century. Many areas which used

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[5] The example is from the Franco-British Arbitration Treaty of 14 October 1903, Art. 1, and quoted after LAUTERPACHT (op. cit. n. 1, at p. 30, n. 3). According to LAUTERPACHT the same formula appeared in 15 other arbitration treaties concluded by Great Britain in these years.

[6] On this issue, see, e.g., T. GIHL, '"The Subjective Test" as a means of distinguishing between legal and political disputes', 8 *Acta scandinavica juris gentium* (1937) 67-107.

[7] Article 36 para. 2 of the ICJ Statute. For the Court's own understanding of the phrase "legal dispute" in this Article, see *Border and Transborder Armed Actions* (Nicaragua v. Honduras), ICJ Rep. 1988, p. 91, where the Court defines a legal dispute as "a dispute capable of being settled by the application of principles and rules of international law".

[8] Article 36 para. 6 of the ICJ Statute. For the Court's own conception of its *compétence de la compétence*, see *Nottebohm* (Liechtenstein v. Guatemala), ICJ Rep. 1953, pp. 119-120, and *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), ICJ Rep. 1991, at p. 68.

to be considered exclusively political or 'matters of domestic jurisdiction' have since been subjected to international regulation and have in this way been internationally 'legalized'. Even matters relating to the threat or use of force between nations, which once were considered political to a particularly high degree, are today legal in the sense that they are subjected to the law of the United Nations Charter (and also, at least in the view of the Hague Court in the *Nicaragua* case[9], to customary international law). HERMANN MOSLER, a former judge of the Hague Court, has described the present scope of the Court's jurisdiction under the optional clause in these plain terms:

> "It is a truism to remember that any legal dispute has political implications. [. . .] There is no doubt that an unconditional declaration under the Optional Clause accepting the Court's jurisdiction includes legal disputes involving political elements of every gradation."[10]

The conclusion has to be that the confinement of the Court's compulsory jurisdiction to legal disputes is not, as international law stands today, to be understood as an expression of the doctrine *de maximis non curat praetor.*

It may also be asked whether the doctrine *de maximis* . . . could be significant as an element in a rule of litispendence between the Court and the political organs of the United Nations.[11] The Hague Court took a clear stand on this matter in the *Hostages* case.[12] Here, the Court faced the problem whether it should consider on its merits a case involving a dispute which was on the agenda of the UN Security Council. The Court clearly rejected the proposition that the fact that the Council deals or has dealt with a certain dispute prevents the Court from considering a case involving the same dispute upon its merits.[13]

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[9] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), ICJ Rep. 1986 p. 88 *et seq.*

[10] H. MOSLER, 'Political and justiciable legal disputes: revival of an old controversy?', in: B. CHENG & E.D. BROWN (eds.), *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on His Eightieth Birthday* (1988) p. 221-222.

[11] See, e.g., D. CIOBANU, 'Litispendence between the International Court of Justice and the political organs of the United Nations', in: L. GROSS (ed.), *The Future of the International Court of Justice*, Vol. 1 (1976) pp. 209-275; and T.J.H. ELSEN, *Litispendence between the International Court of Justice and the Security Council* (1986).

[12] *United States Diplomatic and Consular Staff in Teheran* (United States of America *v.* Iran), ICJ Rep. 1979, 1980 and 1981.

[13] See, in particular, ICJ Rep. 1980 pp. 21-22 and ICJ Pleadings, *United States Diplomatic and Consular Staff in Teheran*, at p. 29.

3. THE IMPACT OF THE DOCTRINE FROM A THEORETICAL PERSPECTIVE

In a contentious case a court has to satisfy itself that the dispute falls within its jurisdiction and that the claim is admissible before it proceeds to consider the case upon its merits. Jurisdiction and admissibility may in other words be described as necessary conditions for a judgment on the merits. But are they also sufficient conditions? Does the fact that a court has jurisdiction and that a claim is admissible imply a duty for the court to consider the case upon its merits? In many legal systems these questions are answered in the affirmative. Closely connected with the very ideas of the rule of law and *der Rechtsstaat* is the idea of the completeness of the law and its corollary, the prohibition of *non liquet*. A Court is not allowed to refrain from deciding a case on its merits with a reference to the lack of applicable law or to the lack of clarity of the existing law. What may appear to be a *lacuna* in the law is only a *lacuna prima facie*; the law has always an answer, and it is the professional duty of the judge to find it. The judge who pronounces a *non liquet* may even be held personally responsible for denial of justice.

Does the prohibition of non liquet also apply to the Hague Court? Or may the Court decide not to examine a contentious case on its merits even when the formal requirements for doing so are fulfilled?[14] If the latter question were to be answered in the affirmative this would break ground for a revival of the doctrine *de maximis* . . . in international adjudication, with the difference that this time the doctrine would not appear as a formal jurisdictional rule but as an element of judicial policy. Among academic writers the prohibition of *non liquet* has since some time been a matter of controversy. On the one hand,

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[14] When asked for an advisory opinion the Court has, under its Statute, no strict duty to give an opinion. Article 65 para. 1 of the Statute only says that "[t]he Court *may* give an advisory opinion on any legal question" (emphasis added) to any body which has the power to make such a request. In its practice the Court has, however, repeatedly stated that, in principle, the request for an advisory opinion should not be refused. See e.g. *Interpretation of Peace Treaties* (Advisory Opinion), ICJ Rep. 1950 pp. 71-72, or, even stronger, *Judgments of the Administrative Tribunal of the ILO* (Advisory Opinion), ICJ Rep. 1956 p. 86. In fact, the Hague Court has so far only once declined to give an opinion, namely in the case *Status of Eastern Carelia*, PCIJ, Ser. B, No. 5 (1923). It is interesting to note that one of the States whose interests were at stake in the old *Eastern Carelia* case, namely Finland (which did not challenge the propriety of the Court giving an opinion in this case; Russia did!), has recently argued that the Court should decline to give an opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request for Advisory Opinion by the WHO) and *Legality of the Threat or Use of Nuclear Weapons* (Request for Advisory Opinion by the General Assembly of the UN). For a summary of the Finnish argument in these cases, see P. KAUKORANTA, 'Finland', in: Elements of the International Legal Practice of the Nordic States in 1995, 65 *Nordic Journal of International Law* no. 2 (1996) (forthcoming).

'judicial idealists' like HERSCH LAUTERPACHT have argued that the prohibition is part of positive international law, and for good reasons.[15] On the other hand, 'judicial realists' like JULIUS STONE and, lately, HJALTE RASMUSSEN have suggested that the Hague Court has an option — perhaps even a duty — to pronounce a *non liquet* (be it explicit or 'cryptic) in cases where a judgment on the merits would be counter-productive in the efforts to obtain a just and peaceful settlement of the dispute.[16]

The idea of an option of *non liquet* has a clear link to a particular version of the distinction between justiciable and non-justiciable disputes. This distinction may be, and has indeed often been, perceived as identical with the distinction between legal and political disputes. Some observers, however, have understood the distinction in a slightly different sense. As already mentioned, the concept of legal dispute has gradually become a rather widely interpreted notion of, *inter alia*, Article 36 paragraph 2 of the Statute of the Hague Court. As distinct therefrom, a justiciable dispute could simply be understood as a dispute which is fit for judicial settlement.[17] According to what has been called 'the doctrine of justiciability' it would be good judicial policy if decisions on the merits were to be taken by the Court only in regard to such disputes as are justiciable.[18]

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[15] In the view of H. LAUTERPACHT (in: *The Development of International Law by the International Court* (1958) 165-167), Article 38 para. 3 of the Statute of the Court referring to "general principles of law as recognised by civilised States" serves as "an ultimate safeguard against the possibility of a *non liquet*" (p. 166). Recently, M. KOSKENNIEMI (in: *From Apology to Utopia* (1989) 35-40) has pointed out the parallels between LAUTERPACHT's "constructivism" and some influential streams in modern legal theory (RONALD DWORKIN and others), stressing the role of principles in ensuring the completeness and coherence of law as applied by Courts.

[16] See, in particular, the so-called Lauterpacht-Stone controversy: H. LAUTERPACHT, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law', originally published in 1958 and reprinted in: E. LAUTERPACHT (ed.), *International Law*, being the Collected Papers of Hersch Lauterpacht, Vol. 2 (1975) 213-237; and J. STONE, 'Non liquet and the function of law in the international community', 35 BYIL (1959) 124-161. For a revised and extended version of STONE's contribution, see J. STONE, *Of Law and Nations* (1974) 71-118. See, also, H. RASMUSSEN, 'Le juge international, en évitant de statuer obéit-il à un devoir judiciaire fondamental?', 29 GYIL (1986) 252-276.

[17] Cf. C. DE VISSCHER, *Theory and Reality in Public International Law* (P.E. CORBETT transl.), rev. ed. (1968) 370-376; and P. CHAPAL, *L'arbitrabilité des différends internationaux* (1967) 43-45.

[18] See P.M. NORTON, 'The Nicaragua Case: Political Questions before the International Court of Justice', 27 *Virginia Journal of International Law* (1987) 492-524.

4. THE IMPACT OF THE DOCTRINE FROM A PRACTICAL PERSPECTIVE

It has happened more than once that a defendant state before the Hague Court took the position that the dispute under consideration was non-justiciable.[19] The argument has not found favour with the Court except, perhaps, in a rather special judgment which was given in the *Northern Cameroons* case.[20] In this case Cameroon requested the Court to declare that the United Kingdom had not acted in accordance with certain duties embodied in a trusteeship agreement. Without finding it necessary to examine several British objections to the jurisdiction of the Court and the admissibility of the claim, the Court declared that the case would not be tried on its merits. In explaining this position, which in the eyes of many observers appeared quite peculiar, the Court declared, *inter alia*:

> ". . . even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore."[21]

It may seem as if the Court, in and through its judgment in the *Northern Cameroons* case, accepted the doctrine of justiciability. Considering the exceptional character of the claim (a demand for a declaratory judgment, as understood by the Court[22]) and the fact that the judgment still appears to be unique in the practice of the Court, one must be careful not to draw too far-reaching conclusions from the statement quoted above.[23]

The questions surrounding the doctrine *de maximis* . . . and the doctrine of justiciability became the focus of attention once more when, on 9 April 1984, Nicaragua filed an application to the Hague Court against the United States of America.[24] Herein, the United States was accused of violating international law by conducting and supporting military and paramilitary

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[19] In some instances (see further *infra*) this argument has been made openly before the Court. In other instances the defendant state has expressed its disapproval of the proceedings by failing to appear before the Court. For an inquiry into the links between non-appearance and (alleged) non-justiciability, see J.B. ELKIND, *Non-Appearance before the International Court of Justice: Functional and Comparative Analysis* (1984) 171-206.

[20] *Northern Cameroons* (Cameroon *v.* United Kingdom), ICJ Rep. 1963.

[21] Ibid., at p. 29.

[22] Ibid., at p. 36.

[23] For a critical assessment of the *Northern Cameroons* judgment, see, e.g., L. GROSS, 'Limitations upon the Judicial Function', 58 AJIL (1964) 415-431.

[24] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), ICJ Rep. 1984 (jurisdiction) and 1986 (merits).

activities in and against Nicaragua. The United States made several objections against the jurisdiction of the Court and the admissibility of the claim. The United States further demanded that the Court, in case it would find itself competent to entertain the case on its merits, still should refrain from doing so since the dispute was not fit for judicial settlement:

> ". . . an 'ongoing armed conflict' involving the use of armed force contrary to the Charter is one with which a court cannot deal effectively without overstepping proper judicial bonds".[25]

In both phases of the case the Court rejected this argument in rather brief words.[26]

The American argumentation in the *Nicaragua* case was clearly influenced by US constitutional theory and its particular version of the doctrine *de maximis . . .*, namely the 'political question doctrine'. The latter doctrine, which goes back to the early 19th century, implies in brief that courts shall show self-restraint in the exercise of their judicial powers in politically sensitive cases.[27] In the practice of the United States Supreme Court the doctrine has been applied, *inter alia*, when issues relating to foreign affairs have appeared on the agenda of the Court. In a recent critical examination THOMAS FRANCK has described the doctrine as a 'Faustian Pact' concluded between the courts and the political organs of the land.[28] According to FRANCK the doctrine was the price that the legendary Chief Justice JAMES MARSHALL had to pay in order to gain acceptance for his bold initiative to introduce judicial review as an American constitutional practice in the famous case *Marbury* v. *Madison* in 1803.[29]

Should the Hague Court's apparent reluctance to accept the American attempt to 'export' the political question doctrine in the *Nicaragua* case be understood as once and for all dispatching the doctrine *de maximis non curat praetor* to the history of international adjudication? Perhaps this would be a too far-reaching conclusion. In connection with a couple of recent cases in the

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[25] ICJ Rep. 1986, at p. 26. For an extended version of this argument, see P.M. NORTON, *loc. cit.* n. 18, pp. 459-526. This article is of particular interest for the understanding of the American arguments, since Norton was the deputy agent of the United States in this case.

[26] ICJ Rep. 1984, pp. 436-438 and ICJ Rep. 1986, pp. 26-28.

[27] The political question doctrine is a matter of constant controversy. See, e.g., L. HENKIN, 'Is there a "Political Question" Doctrine?', 85 *Yale Law Journal* (1976) 597-625.

[28] T.M. FRANCK, *Political Questions - Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (1992) 10-20.

[29] 5 U.S. 137 (1803).

Hague Court, which are still in their initial stages — the *Lockerbie* cases[30] and the *Bosnian* case[31] — it has once again been questioned whether 'political' disputes of this kind are really suitable for judicial settlement. Such disputes should instead, so it has been argued, be settled by diplomatic, political or even military means.

5. A JUDICIAL APPROACH TO THE DOCTRINE

For many reasons lawyers may feel inclined to favour the widest possible space for courts, both at the national and the international level. Indeed, nothing would be simpler than recommending the Hague Court — on the basis of considerations relating to the pre-eminence of the law — to continue suppressing the doctrine *de maximis* . . ., to uphold the prohibition of *non liquet* and — with the judicial strategy of Chief Justice MARSHALL in *Marbury* v. *Madison* as a model — to start exercising judicial review of the resolutions of the Security Council.[32] Good reasons for the international society to organize itself along these lines are to be found in the writings of e.g. HERSCH LAUTERPACHT and THOMAS FRANCK. For many others, however, a world order modelled in such a way may either be an idle wish or a faraway goal.

This being said, it is still necessary to consider certain historical experiences, which are here summarized in HERMANN MOSLER's words:

> "Speaking in terms of historical experience and the development of modern States in the last few centuries the importance and the effectiveness of the judiciary have always been an indicator of the degree of integration reached by a social community."[33]

The international society has hardly reached such a degree of integration that the Hague Court could reasonably function as a court for the United Nations and the community of states in a manner similar to that of the highest courts

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[30] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom and Libyan Arab Jamahiriya *v.* United States of America), ICJ Rep. 1992.

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)), ICJ Rep. 1993.

[32] THOMAS FRANCK has detected judicial moves in this direction in the Court's orders of 14 April 1992 in the *Lockerbie* cases (*supra* note 30). See T.M. FRANCK, 'The 'Powers of Appreciation': Who is the ultimate guardian of UN legality?', 86 AJIL (1992) 519-523. For the assertion that the Court "has in fact repeatedly exercised a power of judicial review, albeit deferentially, over acts by the Security Council and the General Assembly", see G.R. WATSON, 'Constitutionalism, Judicial Review and the World Court', 34 *Harvard International Law Journal* (1993) 1-45.

[33] H. MOSLER, loc. cit. *supra* n. 10 at p. 220.

in the most integrated (federal) legal systems. Those who would like to see an enhanced role of international law and the Hague Court in the international community should, therefore, not confine themselves to exercising the noble art of wishful thinking, but also ask themselves in what ways the position of the Court at present could realistically be enhanced.

It has been noted that the unprecedented length of MANFRED LACHS'S term of service as a judge (1967-1993) was in many respects a time of renewal for the Court.[34] The bloodless legalism which had left its mark on the inter-war Court and the first decades of the post-war Court was challenged by new perspectives. In addition to its function as a law-applying agency, the functions of the Court as a part of the United Nations system and as an agency for dispute-resolution were increasingly emphasized, the latter tendency being an element in what GEORGES ABI-SAAB has called "cette tendance vers l'arbitralisation de la Cour".[35] In this perspective the Court's failure even to discuss the possibilities of making a distinction between justiciable and non-justiciable disputes in the *Nicaragua* judgment is somewhat surprising. More elucidating in this respect is actually the separate opinion of MANFRED LACHS. In his opinion LACHS kept a door open for the doctrine of justiciability, even though he considered the *Nicaragua* dispute justiciable:

> "Thus it becomes clear that the dividing line between justiciable and non-justiciable disputes is one that can be drawn only with great difficulty. It is not the purely formal aspects that should in my view be decisive, but the legal framework, the efficacy of the solution that can be offered, the contribution the judgment may make to removing one more dispute from the overloaded agenda of contention the world has to deal with today."[36]

The position taken by LACHS clearly appears more flexible and realistic than the relapse into escapistic legalism which characterized this part of the Court's Judgment.

The Hague Court arrived at a crossroads when dealing with the *Lockerbie* cases and the *Bosnian* case in their initial stages. In these cases the applicants tried, *inter alia*, to induce the Court to express an opinion on the conformity with the UN Charter of certain resolutions adopted by the UN Security Council. Considering the far-reaching and inconclusively delimited powers of

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[34] L.V. PROTT, 'The Judicial Philosophy of Manfred Lachs', in: *Essays in International Law in Honour of Judge Manfred Lachs*, (J. MAKARCZYK ed., 1984) at 423-447.

[35] G. ABI-SAAB, 'De l'évolution de la Cour Internationale: Réflexions sur quelques tendances récentes', 96 *Revue Génerale de Droit International Public* (1992) 284-293.

[36] ICJ Rep. 1986 at p. 168.

the Council, it ought to be welcomed if the Court would reserve for itself such a function. At the same time it must be acknowledged that even a weak version of judicial review would seem provocative in the eyes of many states, including a majority of those occupying a permanent seat in the Security Council. If the Hague Court is to strengthen its position, this would demand a skilful manoeuvring according to a carefully prepared judicial strategy.

With the true pathos of a judicial idealist, THOMAS FRANCK has described the political question doctrine, the American version of the doctrine *de maximis non curat praetor*, as the price Chief Justice JAMES MARSHALL had to pay when he 'bought' judicial review from the devil, which in the allegory represents the holders of political power (*sic*!). If, similarly, the Hague Court by retreating from the legalism displayed in the *Nicaragua* Judgment and accepting the doctrine *de maximis non curat praetor* in a version which would be determined and controlled by the Court itself, could make way for a moderate version of judicial review, this would perhaps not be such a bad manoeuvre.[37] What may appear to be a pact with the devil to a judicial idealist in the highly integrated United States, would not necessarily appear an equally repugnant deal to the Court of the United Nations.

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[37] There are in fact, as we may learn from comparative constitutional law, several moderate versions of judicial review which have been developed in theory and/or practice on a national or regional level over the years. The following points may be considered. Firstly, of course, the very acceptance of the doctrine *de maximis*... implies a moderation of judicial power. Secondly, the Court may wish to restrict its power of review to acts which are clearly unconstitutional, thus accepting a broad margin of appreciation on the part of the political organs. Such an approach could be inspired by, *inter alia*, the reasonable doubt test of US Constitutional Theory (its originator being J.B. THAYER, 'The Origin and Scope of the American Doctrine of Constitutional Law', 7 *Harvard Law Review* (1893) at 129-156); the doctrine of margin of appreciation of the European Court of Human Rights or the criteria of obviousness ("*uppenbarhetsrekvisitet*") of Swedish constitutional law. Thirdly, the Court may take the view that, although it may and shall take a stand on all legal issues which are submitted to it, its pronouncements cannot be supreme or final in relation to any other entities than the parties to the case. This model, which can claim some support from article 59 of the Court's Statute as well as from the *travaux préparatoires* of the UN Charter, may find a theoretical basis in the doctrine of concurrent (or 'Jeffersonian') review of US constitutional theory. On 'Jeffersonian' review as a model for the Hague Court, see WATSON, *supra* n. 32 at pp. 39-43. See also, in this context, F. DANELIUS, 'The Charter as Lex Superior and the Passive Virtues', paper presented at the UN Congress of Public International Law (New York, March 13-17, 1995).

THE RIGHT TO LEGAL ASSISTANCE IN INTERNATIONAL LAW, WITH SPECIAL REFERENCE TO THE ICCPR, THE ECHR AND THE ACHR

Charika Marasinghe*

1. INTRODUCTION

The right to legal assistance is of such fundamental importance that all other rights which are relevant for the due conduct of a fair trial may be worthless if this right is not respected. Rights such as adequate time and facilities for the preparation of the defence, free assistance of an interpreter and examination of witnesses could be meaningless if the accused is not given the right to legal assistance. When confronted with the vast resources and advantages which the prosecution usually enjoys, especially in criminal cases in which the state is involved, it is only legal assistance that will help the accused to vindicate his or her case. Thus international law relating to human rights has come to accept an inalienable right to legal assistance, as a paramount consideration in the context of the concept of fair trial.

2. THE MEANING OF THE RIGHT TO 'LEGAL ASSISTANCE'

First it is necessary to examine the difference in the terminology regarding the right to legal assistance used in the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights.[1] This will facilitate a clear understanding of the case law on the interpretation of the right to legal assistance.

Article 14(3)(d) of the ICCPR reads:

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* Attorney-at-law; Senior Lecturer in Law, Faculty of Law, University of Colombo, Sri Lanka.

[1] Hereinafter referred to respectively as ICCPR, ECHR and ACHR.

Asian Yearbook of International Law, Volume 5 (Ko Swan Sik *et al.*, eds.; 90-411-0375-9
, pp. 15-44

> "In the determination of any criminal charge against him, everyone shall be entitled to [. . .] be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

Article 6(3)(c) of the ECHR which was mainly based on an earlier draft of the ICCPR, reads:

> "Everyone charged with a criminal offence has [the right] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

And finally, Article 8(2) of the ACHR refers to:

> "(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
> (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law."

All three instruments guarantee to an accused the right to defend himself in person or through legal assistance of his own choosing. The principal differences between the quoted provisions are, first, that the ICCPR goes further than the ECHR and ACHR in emphasizing the right of accused persons to be informed of their right to legal assistance if they do not already have it. Secondly, under the ICCPR, unlike the other conventions, accused persons have a right to have legal assistance assigned to them "in any case where the interests of justice so require" and without payment by him "in any such case if he does not have sufficient means to pay for it". The ECHR makes provision for free legal assistance only if "the accused has not sufficient means to pay for legal assistance" and "when the interests of justice so require". Unlike the ICCPR, it does not assure accused persons a right to have free legal assistance on every occasion where they do not have sufficient means but only "where the interests of justice so require". The ECHR is also silent about legal assistance in case the accused persons are politically or otherwise unpopular.

What happens to them in the event of their being unable to find a lawyer remains obscure in the ECHR.

The wording of the ACHR in this respect is substantially different from the ICCPR and the ECHR. According to the ACHR accused persons are entitled to be assisted by counsel provided by the state, paid or not as the domestic law provides, in two instances: if the accused does not defend himself personally or engage his own counsel within the time period established by law. It may reasonably be assumed that the phrase "does not engage his own counsel within the time period established by law" is broad enough to cover the two instances where accused persons are without means to pay for a lawyer and where the accused persons are unable to find a lawyer due to their being politically or otherwise unpopular. On the other hand, the question whether the state will pay for such assistance depends upon the domestic law of the state concerned. This qualification cannot be found in the ICCPR or ECHR.

The wording of article 14 (3)(d) of the ICCPR seems the most satisfactory of the three conventions on this point since it encompasses the widest possible range of cases and there is an implicit guarantee that no accused should remain without legal assistance for any reason. The miscarriage of justice that is inherent in any trial in which the accused is without legal assistance cannot be countenanced by any civilized society and its prevalence would exert a demoralizing impact on the subjective assessment of members of the society, whatever may be the objective outcome of the trial.

Finally, only the ICCPR and the ACHR guarantee the right of communication between the lawyer and the accused. The ECHR is silent on this point. However, the case law of the European Commission on Human Rights and the European Court of Human Rights[2] rectifies this omission.

2.1. Lawyer or legal assistance?

In order to decide whether the conventions guarantee the accused a right to be represented by a professionally qualified lawyer or merely to obtain legal assistance, it is necessary to go back to the preparatory work of the United Nations Commission on Human Rights[3] which was entrusted with the task of drafting the ICCPR.[4]

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[2] Hereinafter referred to respectively as the European Commission and the European Court.

[3] Hereinafter referred to as the UNCHR.

[4] No useful discussion pertaining to this right is found in the *travaux preparatoires* of the ECHR and the ACHR.

At an early stage in the drafting the phrase 'aid of counsel' was suggested[5] and the intention was to refer to "representation by a barrister".[6] However, at a later stage, the term 'qualified representative' was used, which was defined as covering "anyone assumed by the appellant to be qualified".[7] But as this could have meant "qualified as a lawyer", the phrase 'legal assistance' which appears in the final text was introduced because, in the words of the United Kingdom delegate Ms. BOWIE, "it did not necessarily mean a lawyer, but merely assistance in the legal conduct of a case. Under Moslem Law or in cases judged according to native law and custom the compulsory assistance of a lawyer might give rise to difficulties".[8]

From the instruments of ratification of several countries it is evident that lack of lawyers and the non-existence of a bar often prevent the implementation of the right to legal assistance to its maximum extent.[9] For example, the representative of the United Kingdom reported to the UNCHR that in St. Helena there were no lawyers in private practice. There was, however, a developed system of 'Mackenzie men' and any person charged with a criminal offence could usually obtain lay assistance in the preparation and conduct of his defence. In St. Helena the courts were used to dealing with unrepresented defendants and the court itself would assist an unrepresented defendant in ensuring that justice was done. Therefore it is appropriate to interpret 'legal assistance' in a wider sense, in order to cover situations of this nature.

One can discern a similar wide interpretation of the term legal assistance in the decisions of the European Commission. In *X* v. *FRG*[10] the applicant alleged that he was represented at his trial not by counsel appointed by the court to defend him, but by a '*Gerichtsreferendar*', who is a jurist employed by the Government. A '*Gerichtsreferendar*' is a probationer undergoing statutory training. In its decision the European Commission observed that:

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[5] E/CN.4/21.

[6] E/CN.4/AC.3/SR.5 p. 5.

[7] E/CN.4/SR.5, 6.

[8] E/CN.4/SR.107, p. 6; see also UN Seminar on the Protection of Human Rights in Criminal Law and Procedure UN Doc. ST/TAA/HR/2 at p. 16 (1958).

[9] The UK in its instrument of ratification reserved the right not to apply or not to apply in full the guarantee of free legal assistance in sub-paragraph (d) of paragraph 3 of Article 14 in so far as the shortage of legal practitioners renders the application of this guarantee impossible in the British Virgin Islands, the Cayman Islands, the Falkland Islands, the Gilbert Islands, the Pitcairn Islands Group, St. Helena and Dependencies and Tuvalu; see also Rwanda, CCPR/C/SR.782 p. 8.

[10] No. 509/59, 3 ECHRYb (1959) 174 at 180-182.

> ". . . whereas the preparatory works on Article 6(3)(c) confirm that the word 'avocat' (french text) is not to be understood in the technical sense of the term but in the sense of 'legal assistance', whereas in the case in question, although it is clear that 'Gerichtsreferendar', is not an 'avocat', he is, nevertheless, a competent 'defenseur', when instructed to provide the accused with 'legal assistance'."[11]

The use of the words "assisted by legal counsel" in the ACHR precludes any possibility of such a broader interpretation. Thus it is doubtful whether a person other than a duly qualified lawyer could defend the accused under the ACHR.

However, the most important question to be determined in this connection relates to the extent to which a broad interpretation protects the accused person's right to an effective defence. A lawyer's role in a criminal trial is vital and the advantages of representation by a trained lawyer are immense. No lay person, no matter how well informed and self possessed, has such resources of knowledge, training and skill as are especially the attributes of the legal profession. These can bring real advantages to the defence at the stage of the principal examination: the defence lawyer may object to irrelevant, inadmissible and prejudicial evidence or to leading questions or improper production of documents or other exhibits. It bears remembering what THOMAS BURGENTHAL has said in this connection:

> "Even assuming that the Commission is right in holding that Article 6(3)(c) does not require the assignment of an attorney, this does not relieve it of the duty to ascertain to what extent the individual in question did in fact provide meaningful legal assistance."[12]

Several countries[13] have reported to the United Nations Human Rights Committee[14] that representation by a lawyer is obligatory in their countries in the following instances:

(a) where the accused is a minor;

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[11] Ibid. See further ALEC SAMUELS, 'The right to a fair trial, the European Convention on Human Rights', *International Bar Journal* (1972) 39; DAVID HARRIS, 'The right to a fair trial in criminal proceedings as a human right', 16 ICLQ (1967) 352.

[12] 'Comparative study of certain due process requirements of the European Human Rights Convention', 16 *Buffalo Law Review* (1966-67) 34.

[13] Japan CCPR/C/10/Add. p. 25; Yugoslavia CCPR/C/1/Add.23 p. 19; Poland CCPR/C/4/Add.2 p. 19; Senegal CCPR/C/Add.2 p. 18; Russia CCPR/C/28/Add.3; Mongolia CCPR/C/Add.2 p. 21; Hungary CCPR/C/SR.686 p. 5.

[14] Hereinafter referred to as UNHRC.

(b) where the accused is not less than 70 years of age;
(c) where the accused is deaf or mute;
(d) where the accused is suspected to be insane or weak-minded.

2.2. When does the right to legal assistance actually arise? Preliminary investigation stage or trial stage

Neither the provisions relating to legal assistance in the ICCPR, ECHR and ACHR, nor their preparatory work indicate at what stage of the proceedings the right to legal assistance arises. The relevant provisions belong to a group of provisions which might be applicable at the trial itself as well as at a previous stage.[15] Indeed, extending the right to legal assistance to cover the preliminary investigation stage is of great importance for two main reasons. First, the preliminary investigation stage determines the framework in which the offence charged will be considered at the trial. Secondly, there is a strong possibility that evidence obtained during the preliminary investigation stage will be relied on at the trial. Also the fact that the accused person may be subjected to intense questioning by the police cannot be ignored. In particular, confessions and admissions are very often made by the accused person at this stage of the proceedings. Thus he has to be very cautious in making statements during such questioning.[16] Therefore, a lawyer's advice and assistance are essential and in the best interests of the accused at the preliminary investigation stage of the proceedings. It is essential for the defence that "the basis for its defence activity can be laid already at this stage."[17]

The UNHRC and the Inter-American Commission on Human Rights (IACHR) have not been called upon to give a ruling on whether the right to legal assistance arises at the preliminary investigation stage. The European Commission and the European Court did not answer this question specifically until 1984, when in *Can* v. *Austria*[18] the European Commission, having regard to the particular facts of the case, expressed the view that the right to legal assistance as provided in Article 6(3)(c) of the ECHR could be applicable to preliminary investigations. Although the decision was based on the specific facts before the Commission, it may reasonably be assumed that the reasoning of the European Commission laid down the foundations for a general principle

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[15] Can *v.* Austria (No. 9300/81), 96 Judgments and Decisions (1985) p. 14 para. 49.
[16] G *v.* UK No. 9370/81, 35 D.R. (1983) 75.
[17] Can *v.* Austria No. 9300/81, 96 Judgments and Decisions (1985) para. 50.
[18] Ibid.

according to which the right to legal assistance as provided by Article 6(3)(c) would also apply to the preliminary investigation stage when the circumstances so demand. Similarly in *Imbrioscia* v. *Switzerland*[19] the European Court was of the view that the manner in which Article 6(3)(c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case.

Although the UNHRC has not yet dealt with this issue in considering individual applications, it has made some comments on the subject while examining state reports submitted by various countries. Mr. LALLAH, a member of the UNHRC stressed[20] that it was particularly important to have a lawyer at the pre-trial stage of the proceedings. Mr. BOUZIRI, another member of the UNHRC, observed that in Venezuela an accused was not entitled to have a lawyer until the preliminary investigation had been concluded.[21] He went on to comment that it was not only a serious departure from the guarantees that should be afforded to the accused but was also in conflict with the Constitution of Venezuela. It is implicit in these comments that under the ICCPR the right to legal assistance was considered to cover the preliminary investigation stage. A number of states reported that in their countries the right to legal assistance is indeed available during the preliminary investigation stage.[22]

3. LIMITATIONS OF THE RIGHT TO LEGAL ASSISTANCE

3.1. The right to defend oneself in person

All three instruments give accused persons the right either to defend themselves in person or through legal assistance of their own choosing. *Prima facie* it appears that the provisions in the ICCPR, ECHR and ACHR give accused persons an option as to the way in which their defence should be assured, namely, whether to defend themselves in person or through legal assistance. In practice, however, certain limitations have been imposed on this

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[19] 32/1992/377/45, 24 Nov. 1993, 275 Judgments and Decisions; Imbrioscia *v.* Switzerland (24 Nov. 1993), Ser. A No. 275; see also the case Granger *v.* the United Kingdom (28 March 1990), Ser. A No. 174 para. 44.

[20] CCPR/C/SR.90 p. 3.

[21] CCPR/C/SR.248.

[22] Sweden, CCPR/C/1/Add.9 p. 16; Czechoslovakia, CCPR/C/1/SR.66 p. 6; Byelorussia, CCPR/C/SR.199 p. 10; Bulgaria, CCPR/C/Add.30 p. 11; Ukrain, CCPR/C/SR.160; Mongolia, CCPR/C/37/Add.2 p. 21; Rumania, CCPR/C/32/Add.10 p. 21.

right. The European Commission has repeatedly stated that all that is guaranteed by Article 6(3)(c) of the Convention is that proceedings against the accused will not take place without adequate representation for the defence, and that Article 6(3)(c) does not give accused persons the right to decide themselves in what manner their defence should be assured.[23] This approach has given rise to certain ambiguities. These can be seen in the following decisions of the European Commission. In *X* v. *Austria* the European Commission stated:

> "whereas the decisions as to which of the two alternatives mentioned in the paragraph should be chosen, namely, the applicant's right either to defend himself in person or to be assisted by a lawyer of his own choosing or in certain circumstances, one appointed by the court, rests with the respondent government."[24]

In another case between the same parties[25] the European Commission stated that the decision rests with "the competent authorities". Yet in *X* v. *Norway*[26] it said the decision depended upon "applicable legislation or rules of court". It is submitted that the reasoning on which the decisions of the European Commission were based is contrary to the basic principles of fair trial. In a criminal trial the accused may want to defend himself in person. According to the plain words of Article 6(3)(c) of the ECHR it is the right of the accused himself or herself and thus the state cannot force the person to be defended by a lawyer. In the same manner, accused persons should have the right to choose a lawyer if they so wish, subject to the power of the state to regulate the appearance of lawyers. The state may be justified under certain circumstances to impose its preference in the interest of a fair trial. If, however, the state encroaches upon the right of the accused to choose without justification, the very ideas of justice and fair trial are undermined. The state may only come into the picture for giving effect to the provisions of the conventions.

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[23] X *v.* UK (No. 7368/76, 2 May 1978, unpubl.).
[24] No. 1242/61, 24 Nov. 1962 (unpubl.).
[25] No. 2676/65, 23 ECHRC Coll. (1967) 31; X *v.* Austria No. 2645/65, 11 ECHRYb (1968) 322 at 350; X *v.* UK (No. 6683/74, 10 Dec. 1975, unpubl.).
[26] No. 5923/72, 3 D.R. (1975) 43 at 43-44.

3.2. Legal assistance of one's own choosing

Although the accused is given the right to choose his or her own lawyer in unambiguous words by all three conventions, the *travaux preparatoires* reflect a diversity of opinions. Much of the confusion results from the question whether the right to choose their own lawyer should be conferred upon the accused persons, irrespective of their ability to pay for a lawyer. The members of the UNHRC did not reach a conclusion as to the exact meaning of the words 'own choosing' in Article 14(3)(d). The case law of the UNHRC is also silent in this respect. The European Commission has adopted a restrictive interpretation in respect of the words 'own choosing'. It has held, that "the Convention guarantees the right of an accused to legal assistance of his own choosing only where he has sufficient means to pay for such assistance."[27] Again in another case[28] the European Commission declared that "Article 6(3)(c) does not guarantee the right to choose an official counsel who is appointed by the court . . . nor does it guarantee a right to be consulted with regard to the choice of an official counsel". In *Croissant* v. *Germany*[29] it was stated that the accused's right to be defended by counsel of his own choosing is necessarily subject to certain limitations in relation to free legal aid and, where it is for the courts to decide whether interests of justice require appointment, defendant's wishes must be considered. However, the courts can override those wishes when relevant and sufficient grounds exist for holding that this is necessary in the interests of justice. It is interesting to note that domestic courts have taken a similar view.[30]

The salient point which emerges from these decisions is that under the ECHR accused persons have the freedom to choose a lawyer only where they have the means to pay for a lawyer. This seems unsatisfactory, because an accused who does not have sufficient means should not be discriminated against on pecuniary grounds. Even if there might be practical difficulties in securing the lawyer the accused wants, still some degree of choice should be afforded to the accused in order to secure 'equality of arms' between the accused and the prosecution. Sir VINCENT EVANS, a member of the UNHRC, has also stated that even where the accused person received legal assistance

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[27] X *v.* FRG No. 127/55, 1 ECHRYb (1956) 230 at 231; see also X *v.* FRG No. 646/59, 3 ECHRYb (1960) 272; X *v.* Austria No. 4338/69 36 ECHRCColl. (1970) p. 79 at 82.

[28] X *v.* FRG, No. 6946/75, 6 D.R. (1976) 114 at 116-117.

[29] 62/1991/314/385, 25 Sep. 1992, 237 Judgments and Decisions.

[30] Federal Republic of Germany, Bundesverfassungsgericht (Federal Constitutional Court), 16 December 1958.

free of charge he should as far as possible choose his counsel himself.[31] In some countries[32] a list of official counsel is submitted to the accused, in order that he may choose one or more to act in his defence.

Nonetheless, where accused persons have the means to pay for a lawyer, their right to the lawyer of their own choice should be respected. Instances of violations of this right can be seen in several applications that came before the UNHRC. In all these cases[33] the free choice of defence counsel was prevented by the systematic harassment of lawyers who tried to take up the cases of political prisoners and finally the accused were forced to accept *ex officio* legal counsel. It should be noted that in all these cases the accused had the means to pay for a lawyer. Accordingly the UNHRC declared a violation of Article 14(3)(d) by the state concerned. However, the UNHRC has also stated that Article 14(3)(d) does not entitle the accused to choose counsel provided to him free of charge[34]. In another case the UNHRC said that although Article 14(3)(d) does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice.[35]

In Cases No. 8094, 9038 and 9080 the IACHR found a violation of this right by the government of Guatemala.[36] These cases concerned several persons executed by firing squads in Guatemala. They had been denied the right to be duly assisted by a defence counsel of their choice, and the IACHR held that this was contrary to the universally accepted rules of due process. The IACHR has received a number of complaints alleging acts of violence against members of the legal profession. There have been reports of the

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[31] CCPR/C/SR.425 p. 9.

[32] E.g., New Zealand, CCPR/C/10/Add.13; Mexico, CCPR/C/22/Add.1 p. 20; Austria, CCPR/C/6/Add.7.

[33] Delia Saldias de Lopoz *v.* Uruguay No. R. 12/152, UN doc. A/36/40 p. 176; Lilian Celiberti de Caseriego *v.* Uruguay No. 13/56, UN doc. A/36/40 p. 185; Alba Pietraroia *v.* Uruguay No. R. 10/44, UN doc. (A/36/40) p. 157; Teti Tsquierdo *v.* Uruguay No. R. 18/73, UN doc. A/37/40 p. 179; Vasiliskis *v.* Uruguay No. 80/1980, UN doc. A/38/40 p. 173; Viena Acosta *v.* Uruguay No. 110/1981, UN doc. A/39/40 p. 169; Marais *v.* Madagascar No. 49/1979, UN doc. A/38/40 p. 14; Conteris *v.* Uruguay No. 139/1983, UN doc. A/40/40 p. 196; Drescher Caldas *v.* Uruguay No. 43/1979, UN doc. A/38/40 p. 192.

[34] Aston Little *v.* Jamaica No. 283/1988, UN doc. A/47/40 p. 268 at 275.

[35] Irvine Reynolds *v.* Jamaica No. 229/1987, UN doc. A/46/40 p. 248.

[36] IACHR Annual Report 1984-1985, pp. 81-84 (OEA/Ser.L/V/11.66, doc.10 rev.1 (1985)). See also Sixth Report on the situation of political prisoners in Cuba (OEA/Ser.L/V/11.48, doc.7 (1979)).

disappearance, harassment and murder of lawyers in Guatemala[37], Paraguay[38] and Uruguay[39].

A further question is whether by stipulating that an accused may have legal assistance of his or her own choosing, Article 6(3)(c) secures the right to an unlimited number of defence lawyers. This question was explicitly considered by the European Commission in *Enslin, Baader and Raspe* v. *FRG.*[40] The applicants complained of the limitations placed by law on the number of defence lawyers on whose assistance they could call and the exclusion of certain of those lawyers. These restrictions allegedly violated Articles 6(3)(b) and (c). In its decision the European Commission explained its opinion in clear terms:

> "By stipulating that the accused may have legal assistance of his own choosing, Article 6(3)(c) does not secure the right to an unlimited number of defence lawyers. Even if the English version is more indefinite (to defend himself through legal assistance of his own choosing) the purpose of this provision is to secure that both sides of the case are actually heard by giving the accused, as necessary, the assistance of an independent professional. By stipulating the number of lawyers freely chosen by the accused to three, without prejudice to the ex officio addition of other defence counsel appointed by the court, an arrangement peculiar to the German procedural system, the authorities of the Federal Republic of Germany therefore did not violate the right secured by this provision."[41]

In fact, if there are cogent reasons to the effect that the complexity of the case or other reasons necessitate that the accused person be assisted by more than one lawyer, then the accused persons may so claim. But it is practically not feasible to provide as an absolute rule for the assistance of more than one lawyer particularly where the accused is provided with legal assistance under free legal aid. In *Murphy* v. *UK*[42] the applicant applied for legal aid for representation by solicitor and counsel. The European Commission came to the

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[37] Report on the Situation of Human Rights in the Republic of Guatemala (OEA/Ser.L/V/11.53 (1981) p. 66.

[38] Report on the Situation of Human Rights in Paraguay (OEA/Ser.L/V/11.43 (1978) p. 71.

[39] Report on the Situation of Human Rights in Uruguay (OEA/Ser.L/V/11.43) p. 62. For complaints of similar nature see Report on the Situation of Human Rights in Argentina (OEA/Ser.L/V/11.49, doc.19 corr.1, 1980); Second Report on the Human Rights Situation in Suriname (OAS/Ser.L/V/11.66, doc.21 rev.1 Oct.1, 1985).

[40] No. 7572/76, 7586/76 and 7587/76, 21 ECHRYb 418; 14 D.R. (1978) 64.

[41] Ibid., p. 114.

[42] No. 4681/70, 43 ECHRCColl. (1972) 1 at 13.

conclusion that, although the applicant was granted legal aid for counsel only, there was no indication whatsoever that he needed the help of two lawyers.

It is clear that the question of the number of lawyers does not arise where the accused has sufficient means to pay for legal representation. If the accused person asks for free legal representation, it is unreasonable to assume that the right to free legal assistance extends up to the point where accused persons can demand as of right any number of lawyers of their own choice. Such interpretation would create obstacles in the judicial process as well as in the implementation of the right to free legal assistance. The number of lawyers that can be assigned to an accused person must depend on the circumstances of each case.

3.3. Power of the state to regulate the appearance of defence lawyers

Since no assistance can be found in the *travaux preparatoires* of the ICCPR and ECHR or in the decisions of the UNHRC and the IACHR with regard to this controversial issue, one has to turn to the jurisprudence of the European Commission and the European Court.

The state's power to regulate the appearance of defence lawyers cannot be disputed in principle since one may reasonably assume that it is only for the purpose of giving effect to the blanket provisions of Article 6(3)(c) of the ECHR. It is the responsibility of the state to facilitate the effective enjoyment of the rights contained in the Convention. But a question arises when, on the pretext of regulating the effective implementation of the provisions of Article 6(3)(c), the state attempts to curtail the proper ambit of this right. This issue came up for the first time in 1962 before the European Commission in *X* v. *FRG.*[43] The applicant was charged with committing various political crimes. He chose Professor C. to represent him as his attorney and he was apparently able to pay his fee. The court however, refused to allow this lawyer to represent the applicant. In examining whether there had been a violation of Article 6(3)(c), the European Commission stated:

> ". . . that the right to defend himself through legal assistance of one's own choosing, as guaranteed by Article 6(3)(c) of the Convention, is not an absolute right, but limited by the right of the state concerned to make regulations concerning the appearance of lawyers before the courts. Whereas it follows that . . . an examination of the case . . . does not disclose any

[43] No. 722/60, 5 ECHRYb (1962) 104; see also X *v.* FRG No. 509/59, 3 ECHRYb (1959) 174.

> appearance of a violation of the rights and freedoms set forth in the Convention."[44]

Although the European Commission's short decision does not give any reason why the lawyer was excluded, THOMAS BURGENTHAL[45] hypothesizes the reason to be that the attorney in question was associated with the same political group as the accused.

The forgoing discussion has shown that the right of choice enjoyed by an accused person who has means to pay for a lawyer is subjected to further restrictions by the power of the state to exclude the appearance of certain lawyers. These decisions are open to criticism; a lawyer's involvement in a political association or a party is not a valid and justifiable ground for a state to use its power to exlude lawyers from appearing before the Court. However, there may be instances where the power of the state to regulate the appearance of lawyers is justifiable and reasonable. For example, the state may impose restrictions through educational or character standards or apprenticeship requirements for lawyers.[46] It may also impose restrictions in order to maintain the order of Court administration and to uphold professional etiquette.[47] The problem that arises in connection with the power of the state is the necessity to draw a line between acceptable regulation and unjustified interference. It is hardly possible to lay down any general rules as to how this distinction could be drawn. Since the circumstances of each case may vary, it can only be done on a case by case basis. However, when dealing with these questions, the international and regional bodies on human rights should maintain a balance between the power of the state and the rights of the accused.

4. DIFFERENT ASPECTS OF THE RIGHT TO LEGAL ASSISTANCE

4.1. The right to be present at the hearing

Bringing accused persons before the court to stand trial is a generally accepted practice in every jurisdiction. The presence of accused persons at

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[44] Ibid., at 106.

[45] 'Comparative study of certain due process requirements of the European Human Rights Convention', 16 *Buffalo Law Review* (1966-1967) 35. See further Enslin, Baader and Raspe *v.* FRG No. 7572/76, 7586/76 and 7587/76, 14 D.R. (1978) 64 at 114.

[46] C.C. MORRISON, *The Developing European Law of Human Rights* (1967).

[47] X *v.* FRG No. 5217/71 and 5367/72, 42 ECHRCColl. (1972) 139; X *v.* UK No. 6298/73, 21 May 1975 (unpublished); X *v.* UK No. 8295/78, 15 D.R. (1978) 242.

their trial is indispensable for the conduct of a fair trial. By conferring on the accused person a right to be present at the hearing, the law accepts that this is no longer a matter of discretion of the court. As the law formulated by the ICCPR now stands, the accused person is entitled to demand that he or she be brought before the court for the trial and only in exceptional situations and on very compelling grounds can the court tamper with this right.

Only the ICCPR guarantees the right of the accused to be tried in his or her presence. Neither the ECHR nor the ACHR secure to the accused a right to be present at the hearing. The European Commission has repeatedly affirmed this. Although there are no provisions regarding the right to be present at the trial in the ECHR, the European Commission has considered whether the exclusion of the accused from the hearing of a case constitutes a violation of Article 6(3)(c). In most of the cases that came up for consideration before the European Commission the right to be present at the trial was claimed not in respect of the trial in the proper sense but in respect of the appeal proceedings. But the case law of the European Commission does not make a distinction between the two situations. The objective view seems to be that the accused person's right to be present should be respected regardless of the nature of the proceedings and that the notion of fair trial involves not only the trial proper but also the appeal proceedings.

The European Commission has emphasized that the Court should take into account "the whole situation of the defence and not only the person of the accused".[48] The rationale behind Article 6(3)(c) is that a criminal trial may not take place without the defence having the opportunity to present its arguments adequately. One can argue on a plain reading of the words, that Article 6(3)(c) guarantees to an accused only a right to defend himself or herself either in person or by a representative as nothing is mentioned about a right to be present in person. It is important to note that the presence of the accused at the hearing could be beneficial to the prosecution as well as the accused. For example, the presence of the accused could enable the prosecution to confront the accused with important questions relevant to the case. The circumstances of the case may also demand that the accused person be represented by a lawyer in the best interest of the accused.[49]

Another important question that arises in this connection is whether the accused person's presence at the trial excludes his or her right to legal

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[48] X *v.* FRG No. 1169/61, 4 ECHRYb (1963) 520; X *v.* Austria No. 7138/75, 9 D.R. (1977) 50 at 53; X *v.* Belgium No. 2635/65, 15 Dec. 1967 (unpublished); M *v.* UK No. 9728/82, 36 D.R. (1983) 155; X *v.* UK No. 3852/68, 32 ECHRCColl. (1969) 38; X *v.* Denmark No. 8395/78, 12 March 1980 (unpublished).

[49] X *v.* FRG No. 5730/72, 11 Dec. 1973 (unpublished).

assistance. The mental strain and pressure is immense where an accused is charged with a grave crime and where a conviction might result in death or life imprisonment. In such a situation one cannot assume that accused persons, however well informed or familiar with all the facts necessary to prepare their defence, would be able to defend themselves without the assistance of a lawyer. Therefore the courts should not prevent accused persons being represented by a lawyer merely because they can appear in person. The European Commission also stated in *Pakelli* v. *FRG* that:

> ". . . both in the French and in the English text, the right to free legal assistance as the right to counsel in general is not excluded where the accused can appear in person. Indeed another interpretation would lead to a result not compatible with the object and purpose of Article 6(3)(c) because the choice of counsel and the right to free legal assistance would depend upon the non-appearance of the accused."[50]

Moreover, in the case of *Poitrimol* v. *France*[51] the European Court stated that a person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial.

The nature of the issues involved in a particular case is an important factor in deciding whether the accused has a right to be present at the hearing. If the issue before the court is purely a legal question, the issue could well be decided without the court having to obtain a personal impression of the accused. In such a situation representation through a lawyer would be sufficient.[52] Conversely, if the decision of the court could result in a considerable increase of the sentence, the issues are not necessarily limited to an examination of points of law. In a situation of that nature the accused's personal appearance at the hearing is required in order to secure him or her a fair hearing within the meaning of Article 6(1).[53]

The accused's right to be present at the hearing is related to the principle of 'equality of arms', i.e. the procedural equality between the accused and the prosecutor. The accused and the prosecutor have an equal right to adduce evidence and to take an active part in the proceedings in court.[54] The

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[50] No. 8398/78, 24 D.R. (1981) 112 at 119-121. The European Court concurred with this view. See 64 Judgments and Decisions (1983).

[51] 39/1992/384/462, 23 Nov. 1993, 277 Judgments and Decisions p. 14 para. 34.

[52] X *v.* Austria No. 7138/75, 9 D.R. (1977) 50 at 53.

[53] X *v.* Austria No. 8289/78, 18 D.R. (1980) 160.

[54] Pataki and Dunshirn *v.* Austria No. 596/59 and 789/60, 4 ECHRYb (1963) 718; Ofner and Hopfinger *v.* Austria, No. 524/59, 617/59, 6 ECHRYb (1962) 322; see also X *v.* Austria No. 1135/61, 6 ECHRYb (1963) 194.

European Commission reached the conclusion that if the prosecution has not played an active role at the trial, the presence of the accused is not necessarily warranted. However, the above-mentioned conclusion cannot be reconciled with the notion of fair trial. In a criminal trial, the life and liberty of persons accused may be at stake and they face a perilous situation. Therefore, they should be brought before the court or otherwise be entitled to request this. The ICCPR has gone a step further than the ECHR and it has now been established in international law that accused persons have a right to be present at a trial against them. In order to avoid the present ambiguous situation emanating from the case law of the European Commission, it is suggested that the latter should adopt the substance of Article 14(3)(c) of the ICCPR in interpreting Article 6(3)(c).

Further, it may be that the accused was not present at the trial through his or her own fault.[55] In 1994 the European Court stated in *Lala* v. *the Netherlands* that the non-appearance of the defendant, in spite of having been properly summoned, cannot, even in the absence of an excuse, justify depriving him of his right under Article 6(3) to be defended by counsel.[56]

The UNHRC has also stated that

> "the concept of a 'fair trial' within the meaning of Article 14 . . . must be interpreted as requiring the fulfilment of a number of conditions, such as equality of arms and respect for the principle of adversary proceedings. These requirements are not respected where . . . the accused is denied the opportunity personally to attend the proceedings . . .."[57]

In *Daniel Monguya Mbenge* v. *Zaire*[58] a Zairean citizen was twice sentenced to capital punishment by a Zairean tribunal. The UNHRC had to examine whether the proceedings disclosed any breach of rights under the Covenant. It stated that:

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[55] X *v.* Netherlands No. 1059/61, 5 ECHRYb (1962) 262 at 288; see also X *v.* UK No. 3075/67, 11 ECHRYB (1968) 466.

[56] 25/1993/420/499, 22 Sep. 1994, 297 Judgments and Decisions. The same view was adopted in Pelladoah *v.* the Netherlands, 27/1993/422/501, 22 Sep. 1994, 297 Judgments and Decisions.

[57] Dieter Wolf *v.* Panama No. 289/1988, UN doc. A/47/40 p. 281-282.

[58] No. 16/1977, UN doc. A/38/40 p. 134; Touron *v.* Uruguay No. R/32, UN doc. (A/36/40) p. 120; Pietraroia *v.* Uruguay No. R. 10/44, UN doc. A/36/40 p. 153; Luciano Weinberger Weisz *v.* Uruguay No. R. 7/28, UN doc. A/36/40 p. 114; Conteris *v.* Uruguay No. 139/1983, UN doc. A/40/40 p. 196; Cubas Simones *v.* Uruguay No. R. 17/70, UN doc. A/37/40; Violeta Setelich *v.* Uruguay No. R. 14/63, UN doc. A/37/40.

> "Article 14(3) and other requirements of due process enshrined in Article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances (for instance when the accused although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interests of the proper administration of justice. Nevertheless, the effective exercise of the rights under Article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him. Judgment in absentia requires that, notwithstanding the absence of the accused all due notification has been made to inform him of the date and place of his trial and to request his attendance."[59]

Trial in absentia is warranted only where the court is satisfied that the accused is wilfully absconding from the trial. Even then, as was apparent from the above decision, the judge is obliged to comply as far as possible with the rules of fair trial and to take into account the interests of the defence notwithstanding the absence of the accused. The law governing criminal procedure in many countries provides exceptions to the accused's right to be present at the trial. For example an accused can be tried in his absence where:

(a) the accused voluntarily refrains from attending the trial;[60]
(b) if the accused is a mentally disturbed person;[61]
(c) if the accused had escaped or was not available at the time of the trial;[62]
(d) if the accused is suspected of a crime which is not punishable by deprivation of liberty;[63]
(e) if the accused attempts to disrupt the hearing and fails to desist when warned by the trial judge.[64]

In many jurisdictions the presence of the defence lawyer is obligatory where the trial take place in the absence of the accused.

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[59] Ibid., p. 138.
[60] UK, CCPR/C/1/Add.17 p. 17.
[61] Norway, CCPR/C/1/Add.5 p. 5.
[62] Yugoslavia, CCPR/C/Add.23; Italy, CCPR/C/6/Add.4.
[63] Russia, CCPR/C/1/Add.22 p. 16; Poland, CCPR/C/4/Add.2 p. 19.
[64] Netherlands, CCPR/C/10/Add.3 p. 20; Austria, CCPR/C/6/Add.7 p. 17; New Zealand, CCPR/C/10/Add.6 p. 55; Gilbert Islands, CCPR/C/1/Add.37 Annex G p. 93; Gibraltar, CCPR/C/1/Add.37, Annex F p. 65.

4.2. The right of access to a lawyer

The right of access to a lawyer is not specifically guaranteed by the ICCPR, ECHR and ACHR. The various international and regional bodies on human rights have declared that the right of access to a lawyer, constituting an element of the right to a fair trial, is invariably connected to and can be considered as the very first step of the wider right of legal assistance. The right of access to a lawyer, though important throughout the entire proceedings, should particularly be observed during any period of detention of the accused, because especially in these circumstances the lawyer is a very important link with the outside world. It is through a lawyer that the accused person could complain about the conditions of detention or violation of his rights, institute proceedings before a court, apply for bail etc.

Golder v. *UK*[65] was the first case under the ECHR to recognize this right. The appellant, a prisoner, had petitioned the Home Secretary for permission to consult a solicitor with a view to bringing a civil action for libel against a prison officer. His petition was refused. Both the European Commission and the European Court held that the right of access to a court or tribunal constituted an element which is inherent in the right protected by Article 6(1) of the ECHR. Both the European Commission and European Court agreed that there were no inherent limitations to the right of a convicted prisoner to institute proceedings and for that purpose to have unrestricted access to a lawyer. This right was reiterated by the European Court in *Airey* v. *Ireland*.[66]

The UNHRC has also found violations of Article 14(3) in cases where an accused person who was detained 'incommunicado' in military establishments was barred from access to a lawyer. In the cases of *William Torrez Ramirez* v. *Uruguay*[67] and *Touron* v. *Uruguay*[68] the UNHRC held that the way the accused persons were treated during their detention virtually excluded any possibility of them having recourse to a legal counsel.

During its visits to the detention centers in a number of places in Haiti, the Special Commission of the IACHR heard prisoners' complaints about their lack of access to attorneys.[69] The IACHR has also declared a violation of the right

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[65] No. 4451/70, 1 EHRR (1975) 524.

[66] No. 6289/73 2 EHRR (1979) 305.

[67] No. R. 1/4, UN doc. A/35/40 p. 121.

[68] No. R. 7/32, UN doc. A/36/40 p. 120; see also Lafuente Penarrieta et al. *v.* Bolivia No. 176/1984, UN doc. A/43/40, p. 199.

[69] Case 1992 (Haiti), IACHR. *Ten Years of Activities,* 1971-1981, pp. 170-71; Case 6586 (Haiti), *IACHR Annual Report* 1982-1983, pp. 91-93 (OEA/Ser.L/V/11.61, Doc. 22 Rev. 1 1983); Case 3552 (Jamaica), *IACHR Annual Report* 1982-1983, pp. 99-100 (OEA/Ser.L/V/11.61, Doc. 22

to legal assistance where the accused were arrested and detained without access to or benefit of counsel.[70] The factual and legal issues involved in these cases were very similar and also straightforward. As a result the IACHR did not discuss the issues in depth and no helpful discussions are found in these decisions.

4.3. The right to adequate time and opportunity to give instructions to the lawyer

Once accused persons have access to a lawyer it necessarily follows that they should be afforded adequate time and opportunity to instruct their lawyer. The UNHRC has stated that it is imperative that accused individuals be afforded adequate time for the preparation of their defence.[71] Unless the accused is given time to instruct the lawyer, the lawyer may not be able to prepare the defence adequately.

In *Goddi* v. *Italy*[72] neither the applicant, who was in custody, nor his lawyer who had not been notified of the hearing, was present at the trial. Consequently, the court appointed a lawyer. This lawyer was not given time nor opportunity to acquaint himself with the case. The European Court declared that "the court should have adjourned or suspended its proceedings for a sufficient time to allow the new lawyer to prepare his case adequately and to consult the applicant". The failure to do so amounted to a violation of Article 6(3)(c).[73]

Murphy v. *UK*[74] presents a different picture. The Applicant complained of the fact that he did not obtain full legal aid at the quarter session. He claimed that, having obtained legal aid only on the day of appearance, he had insufficient time to explain the mitigating facts to counsel, who, therefore, was unable to offer a proper defence. However, the accused could have requested the court to adjourn the trial if he had felt that he was not given sufficient time to contact a lawyer. As he had made no such request, the European Commission held that the accused could not claim a violation of Article 6(3)(c). Thus

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rev. 1 1983); Case 9265 (Suriname), *IACHR Annual Report* 1984-1985, pp. 119-121 (OEA/Ser.L/V/11.66, doc. 10 rev. 1 1985).

[70] Report on the situation of human rights in Haiti (OEA/Ser.L/V/11.46 doc.66 rev.1 1979); Case 9850 (Argentina) *IACHR Annual Report* 1990-91 (OEA/Ser.L/V/11.79/rev.1 Doc.12 1991) p. 41.

[71] Nicole Fillastre *v.* Bolivia No. 336/1988, UN doc. A/47/40 p. 294 at 298.

[72] No. 8966/80, 76 Judgements and Decisions (1984).

[73] See also Campbell and Fell *v.* UK No. 7819/77, 7878/77, 80 Judgments and Decisions (1982).

[74] No. 4681/70, 43 ECHRCColl. (1972) 1 at 13.

if it is the accused person's own fault that prevents him from contacting his lawyer, he cannot claim a violation of this article.[75] This case too is an example of the restrictive perception of the European Commission of the rights contained in the ECHR. The proper question to which the European Commission should have addressed itself is not whether the persons accused have asked for their rights or not, but whether the benefit of the rights conferred by the ECHR on accused persons has really accrued to them. It should be emphasized that it is incumbent upon the judge to ensure that the rules regulating a fair trial are strictly adhered to. Unless the persons accused have expressly waived the rights they are entitled to ask for, the judge must act in a way which ensures that all the steps necessary for a fair trial, including adequate time and opportunity for giving instructions to the lawyer, are observed. However, if the court has granted the accused ample time he or she cannot neglect to consult a lawyer and subsequently complain of a lack of opportunity to retain a lawyer.[76]

In *Conteris* v. *Uruguay*[77] Mr. CONTERIS never saw his military-appointed counsel before the trial. It was only after the proceedings that CONTERIS had a brief meeting with him and he never heard from him again. He was sentenced to 15 years imprisonment at a trial which lasted three to four minutes. Mr. CONTERIS was unable to articulate his defence with the assistance of a lawyer who took his case seriously nor was he allowed to appear personally. In the light of these circumstances the UNHRC reached the conclusion that the state party had violated Article 14(3)(b) and (d) of the Covenant because the accused person had had no access to legal counsel for the preparation of his defence and could not defend himself in person or through legal counsel of his own choosing.

The IACHR has declared a violation of the right to a fair trial where the prisoner had the opportunity to see his lawyer for no more than 20 minutes and in the presence of the secret police.[78]

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[75] Jacob Kamma *v.* Netherlands No. 4771/71, 42 ECHRCColl. (1972) 22 at 32.

[76] X *v.* Austria No. 1135/61, ECHRYb (1963) 194.

[77] No. 139/1983, UN doc. (A/40/40) p. 196; see also Oxandabarat Scarrone *v.* Uruguay No. 103/1981, UN doc. A/39/40 p. 154; Almirati Nieto *v.* Uruguay No. 92/1981, UN doc. A/38/40 p. 201.

[78] Case 10.198 (Nicaragua), *IACHR Annual Report 1989-1990* p. 96 (OEA/Ser.L/V/11.77 rev. 1 Doc. 7).

4.4. The right to communicate with counsel and the maintenance of secrecy of such communication

The right of an accused person to communicate with counsel is specifically guaranteed in Article 14(3)(b) of the ICCPR which reads: "To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." Unlike the ICCPR and the ACHR, the ECHR does not expressly secure this right. However, the case law of the European Commission and the European Court has rectified this omission. In the absence of an express provision in the ECHR, the European Commission has considered most applications concerning a violation of this right under Article 6(3)(b). The European Court observed in *S* v. *Switzerland*[79] that an accused's right to communicate with his advocate is part of the basic requirement of a fair trial in a democratic society and follows from Article 6(3)(c) of the Convention. The Court was of the view that if a lawyer was unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness.

As mentioned earlier, the right to legal assistance extends to the whole proceeding. Being an ingredient of this right, it is obvious that the right to communicate with counsel also applies to the preliminary investigation stage.[80]

The question may be raised whether the accused has a right to communication in private. It is accepted practice in countries with a modern legal system that communication between a lawyer and a client entails confidentiality. Generally speaking, defence counsel cannot fulfil their tasks properly if they are not allowed to communicate with their clients in private, and reversely, all those rights conferred on accused persons which are essential for the conduct of a fair trial would be meaningless if accused persons could not communicate with their counsel confidentially. Though the right to communicate with their counsel in private is not expressly guaranteed by the ICCPR, the UNHRC has admitted this right in its 'General Comments' under Article 40 in the following terms:

> "Article 14(3)(b) requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgements without any

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[79] 48/1990/239/309-310, 220 Judgments and Decisions para. 48; Bonzi *v.* Switzerland No. 7854/77, 12 D.R. (1978) 185 at 190.

[80] Can *v.* Austria No. 9300/81, 96 Judgments and Decisions (1985).

> restrictions, interferences, pressures or undue interference from any quarter."[81]

Although this issue has not yet come before the UNHRC by way of individual application, the comment clearly shows that the UNHRC has accepted that the right to communicate with counsel as provided for by the ICCPR does not end there, but encompasses the right to communicate in private. The UNHRC's view, it is submitted, is the correct view, if the right to a fair trial in general and the right to legal assistance in particular are to be effective.

Can it be said that the right to communicate with counsel confidentially is without any restriction or exception? There may be instances where a restrictive interpretation is called for, due to exceptional circumstances. For example, there may be instances where very serious matters of national security, international terrorism, drug trafficking etc. are involved.[82] For example, exceptions have been introduced in Germany in conjunction with combatting terrorism. The representative of Germany explained to the UNHRC that these restrictions were introduced when it became clear in various cases that lawyers had been using their visits as defence counsel to serve as messengers between individual members of a terrorist organization, thus promoting the perpetration of further acts of violence in some cases and even smuggling weapons into the prison. Any restriction in this respect must remain an exception to the general rule, and therefore must be justified by the circumstances of the case. Several decisions of the European Commission and the European Court seem to accommodate this justification.[83]

For the sake of completeness, attention may be drawn to the decisions of the UNHRC, even though these are significantly less informative and less fully argued than the decisions of the European Commission and the European Court. In *Cubas Simones* v. *Uruguay*,[84] *Lanza* v. *Uruguay*,[85] *D. Marais* v. *Madagascar*,[86] and *Maner Lluberas* v. *Uruguay*,[87] although the accused

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[81] UN doc. A/39/40.

[82] Bonzi *v.* Switzerland No. 7854/77, 12 D.R. (1978) p. 185 at 190-191; Schertenleib *v.* Switzerland No. 8339/78, 17 D.R. (1979) p. 180; Krocher and Moller *v.* Switzerland No. 8463/78, 26 D.R. (1981) p. 24; No. 9370/81 G. v. UK, 35 D.R. (1983) p. 75; Can *v.* Austria No. 9300/81, 96 Judgments and Decisions (1985).

[83] Bonzi *v.* Switzerland No. 7854/77, 12 D.R. (1978) p. 185 at 190; Schertenleib *v.* Switzerland, No. 8339/78, 17 D.R. (1979) p. 180; Can *v.* Austria No. 9300/81, 96 Judgments and Decisions (1985).

[84] No. R. 17/70, UN doc. A/37/40 p. 174.

[85] No. R. 2/8 UN doc. A/35/40 p. 111.

[86] No. 49/1979, UN doc. A/38/40 p. 141.

[87] No. 123/1982, UN doc. (A/39/40) p. 175.

were provided with *ex officio* counsel, they were not given a single opportunity to communicate with their counsel. Therefore the UNHRC declared a violation of Article 14(3)(b) of the ICCPR. The UNHRC did not provide any detailed discussions of the right to communicate with counsel in any of these cases.

Similarly, in case 3096 (Haiti)[88] the IACHR held that there had been a violation of the right to a fair trial where the accused had not been allowed to communicate with his defence attorneys since being in jail. The IACHR has also received information that Panamanian officials often interfere with the defendant's access to his lawyer, one of the notorious cases being that of Dr. JOSE MANUEL FAUNDES, a defence attorney of Panama City. The interference with Dr. FAUNDES's access to his clients had allegedly reached the point that a sign had been posted in the prison to the effect that prisoners would not be permitted visits from Dr. FAUNDES.[89]

4.5. The right to free legal assistance where the accused does not have means to pay for a lawyer

The right of an accused person to legal assistance has little or no meaning if no proper steps are taken to provide the means which enable the effective exercise of the right conferred by Articles 14(3)(d), 6(3)(c) and 8(2)(d) and (e) of the ICCPR, ECHR and ACHR, respectively. In a global context, most accused persons involved in criminal proceedings would undoubtedly be the underprivileged. They may be impoverished or belong to the lower social strata, and the right to free legal assistance is therefore of vital significance for them.

According to the ICCPR and the ECHR, the entitlement to the right to free legal assistance depends on two conditions: the accused is without means to pay for a lawyer and the interests of justice so require. Unless persons accused can prove the fulfilment of these conditions, they are precluded from the benefit of this privilege.[90] In determining whether the accused is without

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[88] *IACHR Annual Report* 1982-1983 pp. 87-89 (OEA/Ser.L/V/11.66 doc. 10 rev. 1 1985). See also Case No. 8094, 9038 and 9080 (Guatemala), *IACHR Annual Report* 1984-1985, pp. 81-84 (OEA/Ser.L/V/11.66 doc. 10 rev. 1 1985); Case 9850 (Argentina), *IACHR Annual Report* 1990-1991, p. 41 (OEA/Ser.L./V/11.79 rev. 1 Doc. 12).

[89] Report on the situation of human rights in Panama (OEA/Ser.L/V/11.44/ doc. 38 rev. 1 (1978).

[90] X *v.* Austria No. 833/60, 3 ECHRYb (1960) p. 428 at 440; X *v.* FRG No. 604/59, 3 ECHRYb (1960) p. 236 at 242; X *v.* FRG No. 599/59, 8 ECHRCColl. (1961) p. 12; X *v.* UK No. 5477/72, 9 Feb. 1973 (unpublished); X *v.* FRG No. 2703/66, 3 April 1967 (unpublished); X *v.* UK No. 3104/67, 7 Oct. 1967 (unpublished); X *v.* UK No. 5881/72, 11 Dec. 1973 (unpublished); X *v.* FRG No. 3049/67, 15 July 1968 (unpublished).

means or not, most countries apply the 'financial means test'[91] and 'reasonableness test'[92] which take into account the net income per annum and the liquid assets of the accused person. In some countries the accused is required to submit a 'certificate of means'.[93]

The wording of the ACHR is somewhat different. According to Article 8(2) an accused person is entitled to be assisted by counsel provided by the state, paid or not as the domestic law provides, in two instances: if the accused person does not engage in defence personally nor engage his or her own counsel within the period established by law. The Inter-American Court of Human Rights has interpreted the wording of this provision in one of its advisory opinions, as follows:

> "25. (. . .) In cases where the accused neither defends himself nor engages his own counsel within the time period established by law, he has the right to be assisted by counsel provided by the state, paid or not as the domestic law provides. To that extent the Convention guarantees the right to counsel in criminal proceedings. But since it does not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his economic status if, when in need of legal counsel, the state were not to provide it to him free of charge.
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> 26. Article 8 must, then be read to require legal counsel only when that is necessary for a fair hearing.
> Any state that does not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted.
>
> 27. Even in those cases in which the accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which he is entitled under that Article."[94]

The most important question with regard to the right to free legal assistance is whether the state is under an obligation to provide a lawyer without a fee in all circumstances whenever an accused person has no means

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[91] E.g. New South Wales, Spain, Sri Lanka.

[92] South Australia, The Philippines etc.

[93] E.g. Canada (Ontario); see also Pakelli *v.* FRG, 64 Judgments and Decisions p. 21.

[94] Advisory Opinion OC-11/90 10 Aug. 1990, Exceptions to the Exhaustion of Domestic Remedies, 11 Judgments and Opinions p. 28.

to pay for a lawyer. Before examining the actual practice of states in this regard, it is important to examine the scope of the three instruments. The main limitation imposed upon the right in question in all three instruments is that the right to free legal assistance is only specifically guaranteed in respect of criminal cases.[95] This is apparent from the words "Everyone charged with a criminal offence" and "Every person accused of a criminal offence".

The right to free legal assistance includes representation in court as well as legal advice. Many countries provide legal advice to clients free of charge regardless of the offence involved.[96] The problem facing many countries in providing legal assistance in all circumstances is the lack of funds for legal aid counsel. The problematic issues involved in developing countries such as India were exemplified by the representative of India at the eleventh session of the UN Economic and Social Council:

> "The application of such a provision in India for example where a minor magistrate might deal with up to five thousand persons a year, would be ruinous to the administration and financial stability of the country."[97]

Therefore in many jurisdictions legal aid is not as fully available in respect of non-indictable offences, i.e. less serious offences, as it is in regard to indictable offences. As a result some states have made reservations to the ICCPR, to the effect that free legal aid for accused persons is limited to persons charged with capital offences.[98] In some instances accused persons are required to contribute towards the cost of legal aid counsel according to their means.[99]

On a careful scrutiny of the case law of the European Commission and the European Court several observations can be made on the scope of the right to free legal assistance. In order to provide maximum benefit to the accused person, the right to free legal assistance must be practical and effective. The case of *Artico* v. *Italy*[100] illustrates this point very well. In this case, Mr. ARTICO was assigned a lawyer under free legal aid who withdrew later due to

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[95] E/Ac.7/SR.149.

[96] E.g. New South Wales, South Australia, Austria, Canada, Indonesia etc. See further: International Bar Association, *International Directory of Legal Aid* (1985).

[97] E/AC.7/SR.149.

[98] E.g. Gambia and Australia.

[99] *United Nations Multilateral Treaties Deposited with the Secretary General* (1987) 129; Reservation deposited by Switzerland in respect of the ECHR, in: Council of Europe, *Collected Texts of the European Convention of Human Rights* (1986); see also UK, CCPR/C/1/Add. 17 p. 17; Poland, CCPR/C/S.190 p. 10; Hungary, CCPR/C/S.686.

[100] No. 6694/74, 34 Pleadings (1979). See also No. 10098/82 *v.* Germany.

other commitments. Mr. ARTICO repeatedly requested another lawyer without success. The European Commission observed that Article 6(3)(c) not only guarantees the right to an adequate defence either in person or through a lawyer, but also reinforces this by an obligation on the part of the state to provide free legal assistance. Mr. ARTICO claimed to be a victim of a breach of this obligation. The government, on the other hand, regarded the obligation as satisfied by the nomination of a lawyer for legal aid purposes. The decisions of the European Court acted as buttress of this right:

> "[. . .] the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective [. . .]. As the Commission's delegate correctly emphasized article 6(3)(c) speaks of 'assistance' and not of 'nomination'. Again mere nomination does not ensure effective assistance, since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of this situation the authorities must either replace him or cause him to fulfil his obligations. Adoption of the government's restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub paragraph (c) and structure of Article 6 taken as a whole, in many instances free legal assistance might prove to be worthless."[101]

This point was reiterated in the *Kamasinski* Case[102] where the European Court stated that the appointment of a legal aid lawyer does not necessarily ensure compliance with Article 6(3) although the state cannot be held responsible for every shortcoming of the lawyer. However, it further stated that competent national authorities are required to intervene only if failure by the legal aid lawyer to provide effective representation is manifest and sufficiently brought to their attention.

The UNHRC has also considered the qualitative aspect of an assigned counsel in *Pratt and Morgan* v. *Jamaica*[103]. The Committee expressed the view that:

> "[a]lthough persons availing themselves of legal representation provided by the State may often feel they would have been better represented by a counsel of their own choosing, this is not a matter that constitutes a violation

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[101] 37 Judgments and Decisions (1980) p. 16. See also Goddi *v.* Italy No. 8966/80, 6 EHRR (1984) 457; Biondo *v.* Italy No. 8821/79; Stock Taking on the European Convention, Supplement 1985, p. 81-82.

[102] 9/1988/153/207, 19 Dec. 1989, 168 Judgments and Decisions.

[103] UNHRC 44 (A/44/40) p. 222.

> of Article 14(3)(d) by the State Party. Nor is the Committee in a position to ascertain whether the failure of Mr. Pratt's lawyer to insist upon calling the alibi witness before the case was closed was a matter of professional judgment or of negligence."[104]

However, there might be exceptional cases where the requirements of an effective defence would require a court or tribunal to intervene and replace an assigned counsel who was clearly incapable of effectively representing a defendant.[105]

The present right is also an essential element of the principle of 'equality of arms' between the accused and the prosecution. Where the prosecution undoubtedly has ample legal assistance, the accused should not be precluded from such assistance and, for the strict maintenance of the equality of arms, should be provided with free legal assistance when necessary. However, if the 'inequality of arms' is attributable to the accused's own behaviour, then the accused cannot claim that he or she was not given adequate legal assistance.[106]

Where the case in question is not of a complicated nature and the accused can engage in personal defence, the court can refuse a request for a legal aid counsel.[107] But on the other hand, where the services of a lawyer are essential in the interest of the accused person, the court cannot refuse a request for free legal aid counsel.[108]

The question of paying the costs of the officially appointed defence counsel has resulted in serious problems. One of the questions that arises is whether the court may order the accused persons who have been granted legal aid to reimburse the costs of the proceedings after their conviction. In *X* v. *FRG*[109] the applicant complained that, having been convicted in criminal proceedings, he had been ordered to pay the costs of these proceedings and therefore was faced with the consequences of a claim which had been granted. He argued that he had a right under Article 6(3)(c) of the ECHR to free legal assistance once and for all. The wording "has not sufficient means to pay" does not, in

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[104] Ibid., para. 13.2.

[105] Pinto *v.* Trinidad and Tobago, UN doc. A/45/40 p. 69 at 73 (para. 12.5). See also Reid *v.* Jamaica, ibid., p. 85 at 91 (para. 11.4).

[106] X *v.* UK, No. 8386/78, 21 D.R. (1980) p. 126.

[107] X *v.* FRG, No. 3049/67, 15 July 1968 (unpublished); X *v.* FRG, No. 7300/75, 12 Dec. 1976 (unpublished); X *v.* Norway, No. 8202/78, 7 May 1979 (unpublished).

[108] Glase *v.* Austria No. 834/60, 4 ECHRYb (1963) p. 140.

[109] No. 9365/81, 28 D.R. (1982) p. 229; see further P *v.* Switzerland, No. 9419/81, 33 D.R. (1983) p. 153.

the European Commission's opinion, refer solely to the moment when the court decided whether or not free legal assistance should be provided. It is relevant also at the time when the question is decided whether and to what extent the defendant has to pay the costs of the proceedings. For these reasons the European Commission decided that "it is not contrary to Article 6(3)(c) that the accused has to pay the costs of his legal aid counsel after final conviction unless his means are insufficient". It is clear from the important qualification "unless his means are insufficient" in the judgment, that it was not the original intention of the European Commission to make the accused persons pay the legal costs regardless of their financial situation.

In the case of *E.B.* v. *Jamaica* (No. 303/1988) with regard to the practical operation of the system of legal aid in Jamaica, the UNHRC stressed that Article 14(3)(d) of the Covenant requires states parties to ensure proper legal assistance to persons accused of criminal offences at all stages of their trial and appeal including the Judicial Committee of the Privy Council.[110]

4.6. The right to have legal assistance assigned if the interests of justice so require

In certain instances the interests of justice necessitate the assignment of lawyers by the state. There may be instances where persons accused, owing to their involvement in a political offence, are unable to get legal assistance. The complexity of such a case may also deter lawyers from taking them up. Lawyers may also refuse to take up a case as a mark of solidarity when the victim of the crime is also a lawyer.

It was only in 1991 that the European Court considered the meaning of the words 'interests of justice'. In the case of *Quaranta* v. *Switzerland*[111] the Court was of the opinion that sub-paragraph (c) of Article 6(3) attaches two conditions to this right. The first is lack of "sufficient means to pay for legal assistance" and the second is "interests of justice". The Court further stated that, in order to determine whether the "interests of justice" required that the applicant received free legal assistance, the Court had to consider the following criteria: firstly, the seriousness of the offence and the severity of the sentence risked; secondly, the complexity of the case; and thirdly, the personal situation

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[110] No. 303/1988, UN doc. A/46/40 p. 278; see also Z.P. *v.* Canada No. 341/1988, UN doc. A/46/40 p. 297; W.W. *v.* Jamaica No. 254/1987, UN doc. A/46/40 p. 271 .

[111] 23/1990/214/270, 24 May 1991, 205 Judgments and Decisions; see also Pham Hoang *v.* France, 66/1991/318/390, 25 Sep. 1992, 243 Series A: Judgments and Decisions 22-23.

of the applicant. A decision refusing legal aid should be susceptible to review, particularly if it becomes apparent at a later stage in the proceedings that the interests of justice require the provision of legal aid. In *Granger* v. *UK*[112], legal aid was refused for an appeal which was considered to have no reasonable prospect of success. At the hearing of the appeal, it became apparent that a question of law of some difficulty in fact arose. The European Court held that it would have been in the interest of justice for legal aid to have been available from that point on, and that in the absence of any review of the original decision there had been a breach of Article 6(3)(c).[113]

The UNHRC has also interpreted the scope of the Article 14(3)(d) of the ICCPR which stipulates that everyone shall have "legal assistance assigned to him, in any case where the interests of justice so require". In *Robinson* v. *Jamaica*[114] the UNHRC examined the question whether a state party is under an obligation to make provision for effective representation by counsel in a case concerning a capital offence, should the counsel who was selected by the author for whatever reason decline to appear. The UNHRC believed that

> "it is axiomatic that legal assistance be available in capital cases. This is so even if the unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings. This requirement is not rendered unnecessary by efforts that might otherwise be made by the trial judge to assist the author in handling his defence in the absence of counsel."

In the view of the Committee, the absence of counsel constituted an unfair trial.

5. CONCLUSION

A close examination of the provisions relating to the right to legal assistance contained in the three Conventions revealed a number of similarities and disparities. Though *prima facie* this right appears to be simple and straightforward, a deeper analysis demonstrated that it involves various complex legal issues. The *travaux preparatoires* of the three Conventions, the

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[112] 28 March 1990, 174 Judgments and Decisions, p. 17.

[113] See also Maxwell *v.* the United Kingdom No. 31/1993/426/505, 28 Oct. 1994, 300 Judgments and Decisions; Boner *v.* the United Kingdom No. 30/1993/425/504, 28 Oct. 1994, 300 Judgments and Decisions.

[114] UN doc. A/44/40 p. 210.

case law of the European Commission, the European Court, the UNHRC, the IACHR and the Inter-American Court of Human Rights and the various reports submitted to the Convention institutions by states parties were of considerable assistance in resolving the ambiguities in the Conventions and in obtaining a better understanding of the right to legal assistance.

The international and regional bodies on human rights have to be very cautious in expressing opinions on issues where no guidance can be obtained from the Convention provisions and the *travaux preparatoires*. In so doing they should not give vague and imprecise interpretations as this would increase the possibilities of abuses of the right. On the other hand, if the rights of the accused cannot be safeguarded to their maximum extent by giving a literal meaning to the Convention provisions, the international and regional bodies should seek ways and means of interpreting those provisions in a broader sense in order to give the accused a fair trial.

On the whole it is fair to say that the European Commission and the European Court have achieved a considerable success by pronouncing detailed, elaborate and lengthy decisions on the right to legal assistance. The constant and regular submission of reports and evidence by the respondent States to the European Commission and the European Court have significantly contributed to this success. In contrast, the decisions of the UNHRC and the IACHR contain very little in the way of informative or detailed legal arguments or discussion. This is because the UNHRC and the IACHR often had to consider the applications *ex parte* without any cooperation from the respondent governments.

The role of the lawyer has been described by the European Commission as the "watch dog of procedural irregularity".[115] The absence of legal assistance affects the position of the defence at the trial and thus also the outcome of the proceedings. Therefore, the importance of guaranteeing this right to an accused person from the time of arrest, throughout the trial and appeal is self-evident.

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[115] Nos. 7572/76, 7586/76 and 7587/76.

RECENT DEVELOPMENTS IN EXPROPRIATION CLAUSES OF ASIAN INVESTMENT TREATIES

Paul Peters*

* Former legal adviser of companies of the Royal Dutch/Shell Group.

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, pp. 45-109

1. INTRODUCTION

For several decades I have followed developments in the international law on investment, in particular the explosive growth of bilateral investment treaties (BITs hereafter) since the 1960s. Some twenty years ago I started collecting these treaties, as other people collect postage stamps. My collection has grown to almost eight hundred items.

A comparative study of such treaty materials is interesting from several points of view. In the early days these treaties represented the views of a small number of industrialized countries - in particular Germany, Switzerland and the Netherlands - which persuaded some Asian and African developing countries to promote foreign investment by protecting it on the basis of what was then understood to be the minimum international law standard.

A comparative study of BITs shows how views have changed over time, no doubt influenced by the Third World's doctrines laid down in the 1974 Charter of Economic Rights and Duties of States (CERDS), and by the growing realization in many developing and socialist countries during the 1980s and 1990s that a liberal regime based on market principles and international dispute settlement machinery is a better way to promote investment than the rules of CERDS. This change in views and policies of so many developing countries is perhaps most convincingly exemplified by the large number of reciprocal BITs concluded among developing countries *inter se*.[1]

The worldwide network of BITs is also interesting from other points of view.[2] It allows an in-depth comparative legal study of subjects dealt with in virtually all BITs, viz. expropriation; the right to transfer capital, profits and other moneys; and dispute settlement. In this paper I shall restrict myself to

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[1] See SORNARAJAH (1994) 234 n. 27. He calls into question the reciprocity of BITs such as that between Singapore and Sri Lanka and believes that such BITs are just as much treaties between a capital exporter and a capital importer as are those between an OECD member State and a developing country. The present author does not accept SORNARAJAH's argument; a close study of BITs concluded between developing countries *inter se* shows that many of them can work both ways. It may be true that the BITs which China (PRC) has entered into with some 70 countries since 1962 first and foremost protect foreign investments in China, but they also protect a large number of small Chinese investments (e.g. restaurants) in the rest of the world. It is interesting to note that virtually all BITs are reciprocal in form and substance, even though sometimes this may be seen as a somewhat hypocritical feature. Exceptions of earlier days are the unilateral BITs between France and Haiti (1973), Indonesia (1973) and Yugoslavia (1974).

[2] See PETERS (1991) 92, where I mentioned discovery of trends in state practice and treaty-making techniques. Another aspect which will be considered below is the bargaining strength of different countries on any particular issue, e.g. on the HULL formula (see section 8.1 below). Comparison of negotiating results may also bring inconsistent behaviour to light.

one subject only, namely the way BITs deal with expropriation.[3] I shall analyze for this purpose sixty-two recent Asian[4] BITs.[5]

The choice of seventeen South, East and South-East Asian countries for this analysis may seem somewhat arbitrary. However, this is the part of the world with the highest rate of economic growth and this growth is in part due to sustained foreign investments. There is no doubt about the importance of foreign investment for economic growth in most of the countries under consideration,[6] but it is far from clear to what extent BITs have contributed to these investments.[7] Even though it is impossible to establish a correlation between volume of investments and BIT activities of the country concerned, there is a logical connection: BITs improve confidence and security of potential investors; investment plans are sometimes cancelled because of political risks which could have been reduced by a BIT.[8]

The countries whose recent BITs will be analyzed include those which in recent years have been most successful in terms of economic growth. Some of them have become known as Newly Industrialized Countries (NICs) or Asian tigers. The highest-growth countries in the world, according to 1995 expectations, were (with in brackets the expected 1995 GDP growth rate):

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[3] In PETERS (1991) 91-161 a similar analysis was made of arbitration clauses found in some 170 BITs and multilateral investment treaties (MITs).

[4] I note that KO SWAN SIK in 2 AsYIL (1992) at p. 183 has defined Asia for his purposes as excluding "states broadly west of Iran, north of Mongolia and east of Papua New Guinea and south of Indonesia". I have been even more restrictive for the purpose of this paper, by concentrating on seventeen countries in the south, east and south-east of the Asian continent: Bangladesh, China, Hong Kong, Indonesia, Japan, Korea, Laos, Malaysia, Mongolia, Nepal, Pakistan, Papua New Guinea, Philippines, Singapore, Sri Lanka, Thailand and Vietnam.

[5] The sixty-two BITs are identified in the Appendix.

[6] Japan is an obvious exception. It has experienced several decades of sustained economic growth which cannot be attributed to foreign investments. Although its growth rate has dropped recently to very modest proportions, it remains the dominant economy of the area and is now itself a major source of foreign investment, increasingly in countries of East and South-East Asia.

[7] SORNARAJAH (1994) at pp. 226, 228 and 236 recognizes that writers are divided as to the effect of BITs but emphasizes that it cannot be verified whether a country receives more investments if it concludes BITs. He points out that countries which had not entered into BITs had nevertheless been recipients of investments. DOLZER and STEVENS (1995) at p. 12 present a more positive view and conclude that the legal framework "will no doubt play a role in the decision of any would-be investor".

[8] The author knows from his own experience two cases where plans for major investments in the oil industry were cancelled on grounds of political risks which could not be insured against in the absence of the protection afforded by a BIT between the countries concerned.

China (10%), Thailand (8.9%), South Korea (8.5%), Singapore (8.5%), Malaysia (8.5%), Hong Kong (5.8%).[9]

Virtually all countries in the world want economic growth, developing countries most of all, even though we have all known since the early 1970s that the environment and logic impose limits to everlasting growth of production and consumption. The UN Framework Convention on Climate Change was adopted in 1992 and subsequently ratified by most industrialized and many developing states. Its purpose is to stabilize the concentration of carbon dioxide and other greenhouse gases in the atmosphere at a safe level so as to reduce the dangers of climate change. Unfortunately, growth means an increase of the emission of greenhouse gases and no government so far appears to be ready to sacrifice growth to climate. As and when economic growth will cease to be the overriding priority of states, the pursuit of investments will be reduced (but not necessarily that of BITs, as competition between states for scarce investments will grow). In this author's view that should happen as soon as possible, in the interest of both our common environment and of future generations. It seems fitting to add this comment in a paper devoted to BITs and investment![10]

For the reasons given above, a study based on treaty practices of Asian countries may not be so arbitrary as appears at first sight.[11]

2. PARADIGMS

The following four paradigms represent different approaches. Between them they contain most of the formulas and details which will be discussed in this paper.

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[9] OECD forecasts of growth of gross domestic product as reported in *The Economist* of 24 June 1995. Taiwan, with 6.2%, has been omitted because it has no BITs and is therefore not included in our analysis.

[10] See PETERS (1995) 366-70; see also MEADOWS et al. (1972) and (1991) and DALY (1991).

[11] There is another motivation for the author, who was born in Indonesia (when still a Dutch colony) and who has always been fascinated by cultural aspects of his country of birth.

(a) The 1967 draft Convention of the OECD[12] on the protection of foreign property, provided in Article 3:

"No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with:

(i) The measures are taken in the public interest and under due process of law;

(ii) The measures are not discriminatory; and

(iii) The measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the property affected, shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the national entitled thereto."

(b) The BIT between Australia and Papua New Guinea (1990), Article 7:

"(1) Neither Contracting Party shall take any measures of expropriation, nationalisation or any other dispossession having effect equivalent to nationalisation or expropriation against the investments of nationals or companies of the other Contracting Party, except under the following conditions:

(a) the measures are taken for a public purpose and under due process of law;

(b) the measures are non-discriminatory; and

(c) the measures are accompanied by provisions[13] for the payment of prompt, adequate and effective compensation.

(2) The compensation referred to in paragraph 1 of this Article shall be computed on the basis of the market value of the investment as a going concern immediately before the measures become public knowledge. Where that value cannot be readily ascertained, the compensation shall be determined

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[12] The draft Convention (hereafter referred to as 'the OECD Convention') was unanimously approved in 1967 by the OECD Council, Turkey abstaining, but has never been ratified. It has influenced many of the BITs which were subsequently concluded. It is also known as the Abs-Shawcross Convention after the two men who were instrumental in drawing up this instrument, the German banker ABS and the former British Labour minister Sir (later: Lord) HARTLEY SHAWCROSS.

[13] The plural form of the word 'provision' is curious. This clause closely follows the wording of the OECD Convention where 'provision' is used in the singular, which means that at the time of the expropriation provision must have been made, i.e. the necessary funds must have been earmarked for compensation (but need not yet have been paid out); it is a budgetary act. The requirement of accompanying 'provisions' can only mean that the state must lay down in writing the procedure of payment, without necessarily guaranteeing it. See section 8.5 below.

in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors.

(3) The compensation shall be paid without undue delay, shall include interest at a commercially reasonable rate from the date the measures were taken to the date of payment and shall be freely transferable between the territories of the Contracting Parties. The compensation shall be payable either in the currency in which the investment or investments were originally made or, if requested by the national or company, in a freely convertible currency."

(c) Indonesia-Korea (1991), in Article 6:

"(1) Investments of investors of either party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other party except for a public purpose related to the internal needs of the expropriating party and against full, prompt and effective compensation.[14] Such compensation, including interest from the date of expropriation,[15] shall amount to the market value of the investment expropriated prior to the moment in which the decision to expropriate is announced or made public. Compensation shall be made without undue delay, effectively realizable and freely transferable. The legality of any expropriation and its procedures, the amount and the method of payment of compensation shall be subject to review by due process of law in accordance with the existing[16] laws and regulations of the expropriating party.

(2) Where a party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its territory, and in which nationals or companies of the other party own shares, it shall insure that the provisions of paragraph (1) of this Article are applied to the extent necessary

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[14] It is interesting to compare this with the corresponding clause in the BIT between Indonesia and Norway, which simply requires 'compensation', without using the HULL formula; and which adds the condition of non-discrimination.

[15] This language is confusing. What it appears to say is that the sum of compensation proper and interest must amount to the market value; the intention is no doubt that the amount of compensation must be equal to the market value and that on top of that interest must be paid.

[16] What is the meaning of the word 'existing'? It could mean: existing at the time when the investment agreement was made or when the investment was started (or even: existing at the date when this BIT was signed). This would be a stabilizing clause, protecting the investor against changes in the law subsequently made with the purpose of diminishing his right to compensation or protection. But 'existing' can also be interpreted as existing from time to time, in which case this due-process clause affords little protection. On stabilization clauses see SORNARAJAH (1994) 328.

to guarantee compensation provided for in that paragraph to the owners of those shares."

(d) China-Pakistan (1989), Article 4:

"1. Either Contracting Party may, for the security and public interest, expropriate, nationalize or take similar measures (hereinafter referred to as 'expropriatory measures') against investment assets of investors of the other Contracting Party in its territory, but the following conditions shall be complied with:

a) under domestic legal procedure of the Contracting Party taking expropriatory measures;
b) being non-discriminatory;
c) being against compensation.

2. The compensation mentioned in Paragraph 1, (c) of this Article shall be in accordance with the laws and regulations of the Contracting Party taking expropriatory measures in convertible currencies. The compensation shall be paid without unreasonable delay.

3. If an investor considers the expropriation mentioned in Paragraph 1 of this Article incompatible with the laws of the Contracting Party taking the expropriatory measures, the competent court of the Contracting Party taking the expropriatory measures may, upon the request of the investor, review the said expropriation."

3. TERMINOLOGY

Most BITs refer to 'expropriation' and 'nationalization' and include 'creeping expropriation' one way or another. Many BITs then designate one term, usually expropriation, for further reference, to cover all the various measures that may be taken (see paradigms (c) and (d) in section 2 above). In this paper, too, unless otherwise indicated, the expression expropriation will be used to cover all forms of direct and indirect measures under discussion.[17]

It is remarkable that not a single BIT makes an attempt to define or distinguish the terms used. The question of the definition of terms such as expropriation and nationalization is a controversial matter in the literature. Usually 'expropriation' is used as the generic term covering all measures taken by a government whereby companies or individuals may, for the common good, be

[17] Another generic term often used in the literature, and sometimes in BITs, is 'taking'.

deprived of property or of certain types of rights,[18] subject to some exceptions such as taxation; while 'nationalization' is used for those cases of expropriation whereby a whole industry is brought under government control.[19]

The terms used in our sample of sixty-two BITs are: 'expropriation' (55x), 'nationalization' (53x), 'dispossession' (5x), 'deprivation of investment' (8x), 'seizure' (1x),[20] 'State intervention' (1x) and 'requisitioning' (2x). These terms are meant to cover the straightforward measures. There are several ways in which the Contracting Parties attempt to catch also cases of so-called 'creeping nationalization', i.e. all those cases which are not straightforward.[21]

Three BITs[22] include a formula of Italian origin with a wider description of governmental measures which are forbidden, viz. measures which "might[23] limit permanently or temporarily their [i.e. the investors'] rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction".[24] The saving clause at the end is obviously meant to limit the scope of the prohibition by excluding 'legitimate' measures for which no compensation should be due, such as the levying of normal taxes and court orders based on company law,[25] but throws away the baby with the bath water, for most cases of expropriation, whether or not legitimate, would also fall under this saving clause. To define in clear terms when (expropriatory) measures are legitimate and when they are not, when they should give rise to compensation, and when they should not, is obviously difficult.

A clause of German origin reads: "A claim to compensation shall also exist when, as a result of *State intervention* in the company in which the investment is made, its economic substance is severely impaired".[26]

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[18] The rights in question include long-term rights of a contractual nature and concessions or industrial licences granted by the government.

[19] Cf. SCHRIJVER (1995) 270.

[20] Japan-Turkey uses this term in the valuation clause, stipulating that no reduction in value may be taken into account which is "due to the prospect of the very seizure which ultimately occurs" (Art. 5.3). The English text is the only authentic text of this treaty.

[21] See the American Law Institute's 1987 *Restatement on the Foreign Relations Law of the United States (Third)*, Vol. 2 p. 200. See also n. 34 below.

[22] The Italian BITs with Vietnam, Mongolia and Bangladesh.

[23] The potential mood of the word 'might' is confusing. The French language version of this clause, used in the Vietnam-Italy BIT, refers simply to "une mesure . . . qui limite le droit de propriété . . .".

[24] BIT Mongolia-Italy, Art. 5.

[25] An example is the well-known *Fruehauf* case where the superior court in Paris removed the American managing director of the French *Fruehauf* subsidiary and replaced him by a government-appointed administrator. See 5 ILM (1966) 476.

[26] The German BITs with Mongolia and Vietnam.

The most common formulas used for creeping nationalization are: "measures with *equivalent effect*",[27] i.e. effect equivalent to that of straightforward expropriation (31x) or "with *similar effect*" (14x); "measures *tantamount* to expropriation" or "measures having effects tantamount to expropriation" (4x); "*directly or indirectly*", e.g. investments shall not be expropriated directly or indirectly (15x).

Terminology as such is not of much interest. What is important for our analysis is the definition of the terms used, so that it is clear when government measures are subject to conditions with regard to compensation (or give rise to a right to compensation)[28] and when they are not; and also what government measures are subject to the test of public purpose, non-discrimination etc. The terminology used in BITs and the failure to define terms may create problems of interpretation which in due course will no doubt be resolved by arbitration. There is a wide range of government measures which interfere with operations of investors and may have effects similar to those of expropriation, but which are non-compensable; such measures are generally considered to be legitimate government regulation of business.[29] The exercise of taxation powers is but one obvious example. Even though so far this lack of clarity in the language used in BITs has not created major problems, legal security of investors would be enhanced by greater precision.

The use of a single term, e.g. expropriation, to make it possible later to refer back to the whole range of measures covered by a variety of terms, is of course merely a drafting device which hardly deserves our attention. Except for one thing: without such a catch-all expression it is easy to create confusion or to leave gaps in the protection of investors, gaps which the parties in drawing up the BIT clearly had not intended. For instance, when the opening phrase provides that investments shall not be subjected to expropriation or to other measures with equivalent effect (unless certain conditions are fulfilled) and a later clause provides for interest to be paid over the period between expropriation and payment of compensation, the question arises whether interest is due in case of a measure which is not expropriation but which does have equivalent effects. An arbitral tribunal would be unlikely to deny payment

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[27] Emphasis added in quotations in this article does *not* appear in the original text unless otherwise indicated.

[28] The distinction between compensation as a condition precedent and compensation as a subsequent obligation is discussed in section 4 below.

[29] See SORNARAJAH (1994) 283; DOLZER and STEVENS (1995) 98 et seq.

of interest if the opening phrase had included at the end the words "(hereinafter referred to as expropriation)".[30]

Finally on this subject let us review the language used in three sources which have been important for the development of BITs: the OECD Convention,[31] the 1984 AALCC model BITs[32] and the World Bank Group's Guidelines of 1992[33] on the treatment of foreign direct investment.

Article 3 of the OECD instrument prescribes that the host country shall not take any measures depriving the investor, directly or indirectly, of his property[34] unless certain conditions are complied with.

The AALCC text provides in Article 7 of Model A[35] and in alternative 2 of Article 7 of Model B that investments shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation except . . .; and in alternative 1 of Article 7 of Model B that the host country may exercise its sovereign rights in the matter of nationalization or expropriation in respect of investments upon payment of . . ., subject to . . .[36]

The World Bank Guidelines provide in paragraph 4 that the state may not expropriate or otherwise take in whole or in part an investment, or take measures which have similar effects, except . . ..

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[30] Cf. China-Argentina which, as a result of such a drafting error, denies arbitration in case of creeping expropriation. See also section 8.6 below at n. 116.

[31] See n. 12 above.

[32] The model BITs drawn up by the Asian-African Legal Consultative Committee, see 23 ILM (1984) 237.

[33] See the 1992 Report to the Development Committee of the Board of Governors of the IMF and the World Bank, containing Guidelines on the treatment of foreign direct investment. In September 1992 the Development Committee drew the Guidelines to the attention of member countries. Hereafter referred to as World Bank Guidelines.

[34] According to the notes to Article 3 the word 'property' is used in its widest sense and includes contractual rights. These notes also contain an interesting exposition on indirect deprivation, i.e. creeping nationalization. It covers wrongful government interference with the use of property over a long period. "Under it, measures otherwise lawful are applied in such a way as to deprive ultimately the alien of the enjoyment or value of his property, without any specific act being identifiable as outright deprivation. As instances may be quoted excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition or dismissal of staff; refusal of access to raw materials or of essential export or import licences".

[35] We shall leave Model C out of account in this paper because it is identical to Model A in all relevant aspects.

[36] In its introduction the AALCC explains that Model A represents a more liberal standard, while Model B contains provisions which are somewhat more restrictive (read: more inspired by CERDS). On expropriation the restrictionists appear to have been split; only alternative 1 reflects the CERDS philosophy. See 23 ILM (1984) 237.

4. THE NEGATIVE FORMULA

In the ideological battles fought in the General Assembly of the UN between the group of developing countries, the so-called G 77, and a number of industrialized countries, around resolutions adopted in 1974 concerning a New International Economic Order (NIEO) and the Charter of Economic Rights and Duties of States (CERDS), spokesmen for G 77 insisted on the unconditional right of the State to expropriate, while the capital exporters did not want to go beyond recognition of a conditional right of expropriation. The former therefore preferred a positive clause on expropriation such as formulated in the fourth paradigm set out in section 2 under (d) above and in the text of Model B, alternative 1 of the AALCC represented at the end of section 3 above, rather than the negative formula included in the AALCC's Model A text, as well as in the OECD and World Bank provisions and the other paradigms of section 2. In our sample of sixty-two BITs there are some which follow the positive line: the host country may expropriate but the following conditions on compensation and other matters must be complied with (obligations *ex post* or 'conditions subsequent').[37] The great majority (fifty-eight BITs), however, stick to the traditional negative formula whereby expropriation is forbidden except where certain conditions precedent have been fulfilled. The distinction appears to be an exercise in doctrinal hairsplitting and of little practical interest. Nevertheless it may have consequences for the question whether or not an expropriation is lawful, a question which could have a significant effect on the amount of compensation due by the expropriating state.[38]

All BITs, without exception, attach conditions to the state's right to expropriate. It stands to reason that supporters of the positive line, emphasising the absolute nature of the state's right, will use conditions subsequent, while

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[37] China-Pakistan and China-Philippines. China-Pakistan provides that the state may expropriate investments "but the following conditions shall be complied with: ...". Another example is the Morocco-Portugal BIT of 1988 which uses a positive formula and clearly qualifies compensation as a condition subsequent, by providing that "les mesures ... d'expropriation ... qui pourraient être prises par les autorités de l'une des Parties contractantes à l'encontre des investissements appertenant à des ressortissants ou sociétés de l'autre Partie contractante devront être conformes aux prescriptions légales, et ne devront être ni discriminatoires ni motivées par des raisons autre que l'utilité publique. La Partie contractante ayant pris de telles mesures versera à l'ayant-droit, une indemnité juste et équitable" (Art. 6).

[38] See SORNARAJAH (1994) 321.

adherents of a liberal policy formulate them as conditions precedent. However, in practice most BITs contain a mixed system.[39]

5. CONDITIONS ATTACHED TO THE RIGHT TO EXPROPRIATE

Most BITs list three or four conditions, usually as conditions precedent. But some list only two,[40] whereas some others go to five or even six.[41] The following eight conditions occur in our sample, in order of frequency:

5.1. Compensation

Compensation is universally accepted in all BITs. The phraseology differs in ways indicating political, indeed ideological, sensitivities surrounding the subject, but there can be no doubt that it is the most important of all the conditions, both in the eyes of the expropriating states and home countries – for some of which it has become a matter of ideological importance – and for the investors for whom compensation in case of expropriation is an economic imperative.[42] Notwithstanding its importance, compensation usually is the last item in the list of conditions set out in the expropriation article.[43]

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[39] Alternative 1 of the AALCC's Model B text resorts to a mixture of conditions subsequent and precedent. It says: upon payment of appropriate compensation the state may expropriate, subject to the provisions of its laws (two conditions precedent: on compensation and on due process of law) and then goes on with the following condition subsequent: the host state shall abide by and honour any commitments made or assurances given both in regard to nationalization or expropriation and the principles for determination of appropriate compensation ...

Indonesia-Netherlands has 4 conditions precedent and one condition subsequent; the French treaties with Vietnam and Mongolia have 3 and 1, respectively; China-Korea, Korea-Turkey and the Thai treaties with Czechoslovakia and Peru have 2 of each; the Korean treaties with USSR and Mongolia have 1 and 3, respectively.

[40] The Korean BITs with Thailand and Indonesia; the German BITs with Vietnam and Mongolia; Indonesia-Italy; and Nepal-UK all depend on two conditions only: public purpose and compensation.

[41] Mongolia-US lists them all (six).

[42] The economic consequences of compensation also affect host and home countries of course. Poor host countries often lack the means to pay full compensation promptly. Home countries often insure 'political risks' of their investors, so that in the end it may be the home state rather than the enterprise which has to foot the bill; and even when there is no such insurance, large losses incurred by their nationals on foreign investments will reflect on home states' prosperity.

[43] In 7 BITs, however, compensation takes the second place in a list of four. In 4 BITs it takes the third place in a list of 4-6 conditions.

The 'classical' formula for the minimum standard of international law for compensation in case of expropriation is "prompt, adequate and effective compensation", the words used by the American Secretary of State CORDELL HULL in 1938 when he wrote to the Mexican ambassador after the nationalization of American oil interests in Mexico. This so-called triple formula received wide adherence from many industrialized countries during the 1940s and 50s and still today is regarded by a number of countries as the true minimum standard of international law.[44] Its significance does not lie in the words used which, without further definition, carry little meaning,[45] but rather serve as a battle cry to uphold the old values of the classical rules of international economic law such as it was developed by the major industrialized countries during the first half of this century against the nationalization policies of the USSR and Mexico. It was a major bone of contention between developed and developing countries for several decades, say between 1950 and 1980. The battle cry on the other side, the developing countries, is – or was – 'appropriate' compensation,[46] a term as meaningless as 'adequate'. It seems to this author that the controversy around the qualifiers 'adequate', 'appropriate' and some others such as 'fair' and 'reasonable' is about prestige and about the strife between North and South, between capitalism and socialism. It has little to do with the standard of compensation.

The basic point is that the obligation to pay compensation is now generally accepted.[47] Details of time, amount and numerous other particulars remain controversial and there are significant differences between BITs. We shall discuss these below.

It is interesting to observe that the 1967 OECD Convention does not contain the HULL formula, which even then was controversial, but instead requires that expropriation measures "are accompanied by provision for the payment of just compensation". The word accompanied is significant. It means that provision for payment and expropriation must be simultaneous. The word

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[44] Countries adhering to the HULL formula whenever it is possible to do so include the US, UK, Australia, Canada, Denmark, Finland and Sweden. See section 8.1 below.

[45] 'Prompt' seldom means immediately and is occasionally defined as meaning without undue delay or as within 2 months. 'Adequate' does not provide any useful guidance as to the standard of compensation (it could be interpreted as less than 'full' compensation, although that is not the intention). 'Effective' again is meaningless unless the term is defined. We shall revert to the HULL formula in section 8.1 below.

[46] Art. 2.2 of CERDS lays down that "appropriate compensation should be paid by the State adopting such measures" (i.e. nationalization, expropriation or transfer of ownership of foreign property).

[47] That was certainly not the case in 1974 when Art. 2 of CERDS was adopted in the General Assembly of the UN.

provision is also significant. It means that the expropriating state must have taken all necessary administrative measures to ensure that compensation will be paid as indicated in the treaty, including the creation of a budgetary reserve for the amount to be paid.[48]

The AALCC text, surprisingly, adopts the HULL formula in Model A, while the NIEO-oriented Model B allows expropriation only "upon payment of *appropriate* compensation" adding, however, that this is subject to the provisions of the host country laws (alternative 1)[49] or "against prompt payment of appropriate compensation" (alternative 2).

The World Bank Guidelines require "payment of appropriate compensation" as well, adding a rider that compensation will be deemed appropriate if it is "adequate, effective and prompt" and then go on to define 'adequate' in considerable detail. It is an interesting exercise in running with the HULL hare while hunting with the CERDS hounds!

The HULL formula has regained popularity during the last ten years. It appears in twenty-three out of the sixty-two BITs analyzed; a further seven clauses use wording which is almost the same as the HULL formula. On the other hand, twenty-five BITs merely require, by way of condition precedent, compensation, without any qualification. In most of these treaties, however, a further clause on valuation is given. See further section 8 below.

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[48] Some BITs (Vietnam-Germany, Vietnam-Sweden) have taken over this formula calling for "provision for payment" accompanying the measure, but in some cases (China-Greece, Papua New Guinea-Australia) the plural "provisions" is used, and that changes the meaning, probably unintentionally. Cf. n. 13 above and section 8.5 below.

[49] This text is ambiguous as it is unclear whether the reference to the host country's laws only qualifies payment of compensation, or also the right to expropriate.

5.2. Public purpose

Public purpose or equivalent (e.g. public interest, social interest, public utility) comes next in frequency. The OECD Convention requires that "the measures are taken in the public interest"; the AALCC gives a choice between "for a public purpose" and "in the national interest", except in the restrictive alternative 1 of Model B which, for reasons which are unclear, leaves out this criterion altogether. The World Bank Guidelines require that the measures are taken "in pursuance in good faith of a public purpose". Thirty-eight of the sixty-two BITs in our sample refer to a public purpose, seventeen of these to a "public purpose related to the internal needs of the expropriating country", twenty-six to public interest, three to social interests, and four to public security.

The predilection of some countries for a public purpose related to the state's internal needs is difficult to understand. It seems a tautology as it is hard to visualize a case where the public purpose for which recourse is had to expropriation would have no relationship to the internal needs of the state. The expression was first used by the UK in BITs with Singapore (1975), Egypt and Korea (both 1976), Indonesia (1977) and China (1986).[50] Most of the later BITs concluded by the UK include this curious reference to 'internal needs'. A possible explanation for the introduction of this phrase in 1975 may lie in the nationalization of the Suez Canal in 1956. The drafters of the phrase may have thought - incorrectly in my view - that the nationalization of an international waterway, while serving a public purpose, had nothing to do with the internal needs of Egypt. This phraseology was later adopted by Australia and Hong Kong in most of their BITs (but not by Canada and New Zealand), and by Denmark and Indonesia. It was resisted by a number of countries,[51] as becomes clear when BITs are compared in detail.

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[50] But not in UK-Romania (1976) and UK-Thailand (1979). Presumably Romania and Thailand objected to the expression, either because they considered it meaningless or, if not meaningless, because it would put an additional restriction on the right to expropriate.

[51] The objectors include Papua New Guinea (see its BIT with Australia of 1990); China, which has resisted the clause in all its BITs; Russia (see its BIT with Denmark of 1989); Norway (BIT with Indonesia of 1991). Clearly there are three groups of countries: those who want the clause (UK, Australia, Hong Kong, Denmark, Indonesia); those who resist it and those who are indifferent. Some of the objectors have been inconsistent: the Philippines rejected the clause in its BIT with the UK (1980), but accepted it in the BIT with Australia (1995); similarly Thailand said no to the UK in 1978 but yes to Korea in 1989; on the other hand Papua New Guinea first accepted it in 1981 from the UK but later rejected it in the BIT with Australia (1990). The motivation of the objectors is unknown, but see n. 50 for a possible reason. See also DOLZER and STEVENS (1995) 105 at n. 287, and the text below at n. 55.

Several BITs expand on the customary words 'public purpose' in more detail. For instance, Japan-Turkey specifies that the term public purpose includes the purposes of national defence. Philippines-Spain explains that the measures must have been taken "por causas de utilidad pública o de interés público, incluidas las que tengan fines asistenciales o defensivos", thereby bringing both social security and defence specifically within the orbit of 'public purposes'.

The condition that the taking must be for a public purpose (or a similar expression) is included in all sixty-two BITs, in all but seven in first place. Clearly, states attach importance to it.[52] And yet it is recognized by most writers that this condition has little practical significance, as a court or arbitral tribunal is unlikely to be able to come to the conclusion that expropriating measures lack a public purpose if the sovereign state which took those measures insists that they served a public purpose.[53]

This condition is almost always formulated as a condition precedent, and rightly so, because the public purpose logically must precede the act of expropriation which purports to be legitimized by it. This logic is less obvious in the other so-called conditions precedent. In the case of payment of compensation the formula sometimes suggests: first pay, then expropriate. But it never happens in this sequence and it would not be realistic to insist on prepayment. The best an investor may hope for is prompt payment after the act. And it is the same with other conditions which are usually formulated as conditions precedent (absence of discrimination, due process of law, no conflict with previous undertakings): these conditions logically cannot be fulfilled prior to the act of expropriation.

5.3. Non-discrimination

Non-discrimination is the third condition for a lawful expropriation and is included in most BITs. The OECD Convention requires that "the measures are not discriminatory". The AALCC Model A contains a proviso to the effect that the measures must have been taken "on a non-discriminatory basis", but the more restrictive Model B leaves out any mention of non-discrimination in both its alternative texts. The World Bank Guidelines require that the expropriation

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[52] It is therefore difficult to understand why it is omitted in the AALCC Model B clause (see above).

[53] See SORNARAJAH (1994) 316; DOLZER and STEVENS (1995) 104; and SCHRIJVER (1995) 276, 329-330. SORNARAJAH errs where he says in his n. 95 on p. 316 that the OECD (ABS-SHAWCROSS) Convention left out the public purpose requirement.

is done "without discrimination on the basis of nationality". And yet ten of the sixty-two BITs omit the non-discrimination criterion.[54] Historically this criterion has played an important role. When in 1971 Libya nationalized British Petroleum's concessions, it did so clearly for political reasons, as retaliation against the UK because it had, according to Libya, harmed Arab interests by failing to prevent the occupation by Iran of three small islands in the Persian Gulf which had been under British protection. Statements by the Libyan president and other authorities acknowledged that the nationalization was retaliatory and an expression of Arab anger. The UK government's note of protest said, *inter alia*, that "nationalisation measures which are arbitrary or discriminatory or which are motivated by considerations of a political nature unrelated to the internal well-being of the taking State are . . . illegal and invalid".[55] Similarly discriminatory expropriations of British oil interests have taken place later, for instance in Iraq[56] and Nigeria. Earlier, Netherlands interests had been nationalized in Indonesia as retaliation for the refusal of the Netherlands government to transfer sovereignty over Dutch New Guinea (Irian Jaya) to Indonesia. It is not surprising therefore that the UK and the Netherlands insist, whenever possible, on the non-discrimination requirement. France, the Scandinavian countries, US and Poland also have a clear-cut predilection for this clause. A review of French, US and Dutch BITs reveals that such a requirement is included without exception, even in BITs with countries which are normally reluctant or even unwilling to include it. Surprisingly, some of the UK BITs have omitted the non-discrimination requirement, for instance

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[54] Four of the ten Korean BITs (those with Thailand, Indonesia, Austria and Poland); another two Thai BITs (those with Czechoslovakia and Peru); another Indonesian BIT (with Italy); the German BITs with Mongolia and Vietnam; and Nepal-UK. It would appear, also taking into account other BITs of the countries concerned, that the main objectors (or abstainers) are Austria, Germany, Indonesia and Thailand. Hong Kong leaves out non-discrimination from its model BIT as published in DOLZER and STEVENS (1995) at 200, but nevertheless included it in all five BITs analyzed for this study.

[55] See R.B. VON MEHREN and P.N. KOURIDES, 'The Libyan Nationalization Cases', in 75 AJIL (1981) 486.

[56] The Iraqi case is interesting, in that concession rights of the Iraq Petroleum Co. (IPC) were partly nationalized in 1972 for a curious reason. The Royal Dutch/Shell Group owned 23.75% of IPC. As the British parent company of Royal Dutch/Shell owned 40% of the Group (the other 60% being owned by Royal Dutch Petroleum Co., a Dutch company) and the Iraqi measure was directed solely against the UK, Iraq decided to expropriate only 40% of the Group's 23.75% share in the Iraqi concession rights.

those with China and Nepal, even though most Chinese BITs[57] include it and so does Nepal-France.

The countries which do not have the requirement in most of their BITs, and which therefore could perhaps be labelled persistent objectors, include Austria, Germany, Indonesia and Thailand. In the case of the first two (industrialized) countries the omission is difficult to understand. Germany, which has more BITs to its credit than any other country,[58] supported the non-discrimination requirement in the OECD Convention of 1967. The reluctance of the two developing countries may be due to doctrines of the Group of 77 with regard to expropriation, which found expression in the UNGA resolutions adopted in 1974 on a New International Economic Order and the Charter of Economic Rights and Duties of States. NIEO and CERDS emphasized the right of states to nationalize foreign investments without restrictions imposed by international law.[59] It is consistent with this doctrine to reject conditions precedent such as the one on non-discrimination.

5.4. Due process of law

The fourth most frequent condition is best known under the name of due process of law, although various other expressions are used. Due process can mean either or both of two different things: the expropriation measures must have been taken in accordance with the law of the expropriating state, and the expropriated investor must have the right *ex post facto* to test the legality of the measure in an independent court or administrative tribunal of the host country. A number of BITs (Vietnam-Denmark and the Mongolia treaties with Germany, UK, US and Denmark) clearly combine the two meanings by giving investors the right to go to court to review the legality of the expropriation and/or the amount of compensation by due process of law.

The condition that the measure must be in accordance with the (applicable) laws (and regulations) of the host country, or a variation on that theme, is used in eleven of the sixty-two BITs. It requires compliance with all law, both substantive and procedural. A second category is the seemingly less far-reaching condition that the measure be taken under (domestic) legal pro-

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[57] China-UK dates from 1986. Of the seventeen BITs concluded by China in the years up to and including 1986 only six leave out the non-discrimination clause, namely those with the consistent objectors Austria, Germany and Thailand and those with Italy, Romania and Sweden. The omission in China-UK and China-Sweden is therefore difficult to understand.

[58] As of 27 March 1995 Germany had 93 treaties, of which 68 in force.

[59] See in particular Art. 2 of CERDS, n. 79 below.

cedures, formulated in twenty BITs. It refers to procedural law only. In most states it is nowadays probably a matter of course that the state is bound by its own substantive rules of law, as well as by its legal procedures. Finally there are twenty BITs which use the somewhat ambiguous term due process of law.

The OECD Convention contains the condition that the measures are taken under due process of law. The notes explain that the notion of due process is akin to the requirements of the rule of law or those of the '*Rechtsstaat*' and that in an international agreement international as well as national law must be taken into account. Due process implies, according to the notes, that the expropriation measures must be free from arbitrariness; constitutional safeguards and those laid down in other laws or in judicial precedent must be observed; administrative or judicial machinery must correspond to the minimum standard of international law; the legality of the measures and – wherever the constitutional rules of the state concerned permit it – the amount of compensation should be subject to judicial review. This very wide definition of due process covers both meanings indicated above.

It should be noted that, according to ABS and SHAWCROSS, the authors of the notes, legality and amount "should be subject to judicial review" irrespective of the wishes of the investor or indeed the host country itself. It may well be that they do not want to go to the national court but want to submit any questions that may arise straight to international arbitration. Indeed, there is much to be said in favour of skipping the local means of dispute settlement if in the end the judgment of an arbitral court will prevail in any case.[60]

Model A of the AALCC requires that an expropriation must be "in accordance with its [i.e. the host country's] laws". Model B alternative 1 is ambiguous. it says, in effect, that a state may expropriate upon payment of appropriate compensation, "*subject however to the provisions of its laws*", but it is unclear what is the antecedent of the words emphasized: compensation only, or also the expropriation itself.[61] The second Model B alternative is silent on due process.

The World Bank Guidelines provide that expropriation measures must be taken "in accordance with applicable legal procedures". There is no reference here to the law or legal procedures of the expropriating country. The words "applicable legal procedures" are wide enough to encompass international as well as national legal procedures.

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[60] See PETERS (1991) 134; *per contra* SORNARAJAH (1994) 271.

[61] Cf. n. 49 above.

5.5. Specific undertakings

A fifth condition precedent requires that the expropriation measures may not be contrary to a specific undertaking previously given by the state in question. It is a standard condition in French and Dutch BITs.[62] A similar clause exists in the US treaties with Mongolia and Sri Lanka.[63]

A clause which prohibits expropriation when it would be contrary to an undertaking previously given, is a so-called 'stabilization clause', a clause which purports to limit the freedom of the state concerned to take measures it deems necessary. If the state nevertheless expropriates, the expropriation is unlawful. It is a violation of the treaty and therefore a wrongful act for which the home country can claim reparation in the form of *restitutio in integrum* (unlikely to be awarded in the light of precedents)[64] or full damages including *lucrum cessans*.

SORNARAJAH deals at length with clauses of BITs designed to uphold commitments given to investors and with the merits of stabilization clauses in general.[65] He expresses considerable doubts with regard to stabilization clauses – described as clauses which seek to freeze the law of the host state,

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[62] See Vietnam-France, Vietnam-Netherlands, Mongolia-France, Indonesia-Netherlands and Laos-France. This condition was omitted in the French and Dutch BITs with China (1984 and 1985, respectively), from which it is clear that China objected to making the legality of expropriation dependent on compliance with a specific undertaking given with regard to expropriation. China, however, did accept in its BIT with the UK (1986) the standard British clause on the same subject, which forms part of an article on protection of investment, not of the expropriation article, and which reads: "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party" (this same sentence is also included in Vietnam-Netherlands). There is no significant difference between the 'undertaking' in the former clauses ("the measures are not contrary to any undertaking which the Contracting Party which takes such measures may have given"; or "à condition que ces mesures ne soient pas contraires à un engagement particulier") and the 'obligation' in the latter, apart from the fact that the scope of the former clause is restricted to expropriation and the latter is general.

It should be noted that in one respect both clauses are equally ambiguous and open to misinterpretation: it could be argued that the first clause would only apply when a specific undertaking has been given to the other Contracting Party, i.e. the home country, so that undertakings given to the investor would not trigger the clause. And similarly, in the case of the second clause, that it could only be invoked successfully if the obligation had been entered into vis-à-vis the home country (not the investor). Such an interpretation, in my view, is not in accordance with the intentions of the Contracting Parties in the more than hundred BITs in which these clauses appear, and if ever submitted to arbitration is unlikely to be upheld.

[63] See section 5.6 below.

[64] See the award by Sole Arbitrator LAGERGREN in the arbitration between BP and Libya, 53 ILR 351 et seq.

[65] SORNARAJAH (1994) 264-265 and 328-332.

with the intention of immunizing the investment contract from changes in taxation, environmental controls etc. – and concludes that it is unclear to what extent such a provision (in a BIT) will limit sovereign and regulatory powers of the host state. But he goes on to say that unilateral guarantees not to nationalize except on payment of full compensation will be protected by such a provision in a BIT. I would go further: in my view a contractual undertaking made by the host state to the investor, to the effect that the investment will not be expropriated during the first *n* years, is likely to be upheld by arbitrators, unless they find that the period *n* is unreasonably long or the investor has violated his obligations under the investment contract to such a degree that he can no longer in good faith invoke the host state's contractual undertaking (in other words, he is estopped from relying on the undertaking).

It is as unusual for an investment contract to lay down the terms on which the state may take over the enterprise as it is for marriage vows to include divorce terms. And yet, spelling out such terms in an investment contract might avoid a lot of trouble and acrimony later. An investor, knowing that the sovereign state has the right (subject to certain conditions) to expropriate his investment, may be wise to forestall unilateral action by negotiating, and including in his contract on what terms, and when, the state may take over the business (i.e. an option in favour of the state, based on liquidated damages). Such a clause also defines up till when the state may not do so. Such an arrangement, in my view, would enhance legal security and would make good business sense in long-term contracts, but only if it is recognized that expropriation may never be contrary to a specific undertaking given by the state.

The OECD Convention does not contain this condition. It does, however, have a general article on observance of undertakings or *pacta sunt servanda* (Art. 2): "Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party." The AALCC Models do not have the clause under discussion in their more liberal versions (Model A and alternative 2 of Model B), but surprisingly include a *pacta servanda* provision in the expropriation clause of alternative 1. The basic philosophy seems to be here that the state's sovereign right to expropriate cannot be curtailed by treaty or customary law, but must be exercised in accordance with its own laws and commitments:

> "A Contracting State may exercise its sovereign rights in the matter of . . . expropriation . . ., subject . . . to the provisions of its laws. The host State shall abide by and honour any commitments made or assurances given . . . in regard to expropriation and the principles for determination of appropriate compensation . . .."

The World Bank Guidelines, finally, are silent on the effect of assurances on expropriation.

5.6. Catch-all

Most of the US BITs include a sort of catch-all condition precedent which requires that the expropriation is "in accordance with the general principles of treatment provided for in Article . . .". The article referred to guarantees fair and equitable treatment, full protection and security, treatment which is not less than that required by international law, and observance of any obligation entered into with regard to investments. The article also forbids impairment of, *inter alia*, management, operation, use and enjoyment of investments by unreasonable and discriminatory measures. This leaves little room indeed for lawful expropriation.[66]

5.7. Clarity

Most Swedish BITs contain a separate requirement, in the form of a condition precedent, to the effect that the measures must be clear, distinct or explicit.[67] Unfortunately, the meaning of these words in this context is far from clear. This clause occurs in two BITs in our sample: Vietnam-Sweden and China-Greece.

The trouble with a criterion of clarity or distinctness of measures is that it becomes more difficult for arbitrators to decide whether or not a particular taking is lawful. The parties concerned – host country, investor, his insurer

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[66] See Art. III of the US treaties with Mongolia and Sri Lanka.

[67] The Swedish text of most of the Swedish BITs since 1989 contains the condition that the expropriation measure must be "otvetydiga", which literally means unambiguous or unequivocal. In the BIT with Czechoslovakia (1990) this is translated as clear (Czech: jedneznactá). The Spanish text of the BITs with Bolivia (1990) and Argentina (1991) stipulates "que las medidas sean explícitas". Peru-Sweden (1994) uses the word unequivocal. Six BITs translate otvetydiga as distinct, including the one with Vietnam. There is one other BIT - China-Greece - which has taken over this Swedish clause, translated as clear (I have not been able to check the Chinese and Greek texts). All these treaties, except those with Bolivia and Argentina, are either written in English as the only language or the English text is the one which will prevail if there is a divergence of interpretation. The words clear, distinct and explicit are certainly not synonymous in English, nor do they mean exactly the same as the word unequivocal. It is curious to see how ambiguous language is used in an attempt to forbid ambiguous expropriation measures. Some countries apparently disagreed with the clause, as evidenced by its omission from Sweden's BITs with Morocco (1990), Hong Kong (1994) and Bulgaria (1994).

and the home country - will have to cope with a reduced predictability. Although the requirement of clarity and the like is no doubt meant to protect investors against vague government measures, by making it a criterion of the legality of takings it may in the end prove to be counter-productive.

5.8. Fair and equitable treatment

Finally, two Thai treaties of our sample[68] add a condition which requires that the investor is accorded fair and equitable treatment in relation to any expropriation measure. It precedes three other conditions: those discussed under 5.1, 5.2 and 5.4 above.

6. THE TERRITORIAL SCOPE OF EXPROPRIATION

While it is generally accepted that a state has the right, subject to certain conditions, to expropriate foreign-owned assets which are physically available within its territory, the question whether a state can do so with assets situated outside its territory is controversial. A case in point was the nationalization many years ago of foreign oil companies in Zaire, when the question arose what was the legal position of some service stations in neighbouring Rwanda, which were owned and operated by one of these companies. The government of Zaire claimed that these service stations in Rwanda were included in the nationalization and therefore belonged to it, while the oil company concerned relied on the principle that legislative and administrative measures taken by a government in the exercise of its sovereign power cannot have extraterritorial effect. Similar problems often arise when a nationalized company has subsidiaries in other countries. Courts in various countries which have had to deal with such questions have reached different conclusions.[69]

It is therefore of some interest to see what the relevant treaty clauses say on this point. Some of them (fourteen BITs) contain wording to the effect that *investments or assets in the territory of the host country* will not be expropriated (unless certain conditions are met). The majority (thirty-five BITs), however, is ambiguous, in providing that assets *will not be expropriated in the*

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[68] Thailand's BITs with Czechoslovakia and Peru.

[69] In the aftermath of the French nationalizations of 1982, Swiss and Belgian courts came to different conclusions with regard to the right of the newly nationalized French parent company of the St. Gobain group to exercise control over the group's Swiss and Belgian subsidiaries.

host country's territory (again subject to conditions).[70] Thirteen BITs omit any mention of the territorial scope.

The OECD Convention, like these thirteen BITs, is silent on the territorial scope. But its note on Article 3 nevertheless elucidates the position by referring to the sovereign right of the state under international law to deprive owners of property *which is within its territory*. Model B, alternative 1 of the AALCC text refers to the state's right of expropriation in respect of *investments made in its territory*, while the other models refer to investments *which shall not be expropriated in the territory* of the host state except . . .. The World Bank Guidelines, finally, talk about a state taking a foreign private investment in its territory.

The true objective of the territorial restriction remains obscure, particularly as the clauses of which it forms part are almost always drafted in a negative form. A prohibition to expropriate assets in one's territory unless certain conditions are fulfilled cannot be interpreted as *carte blanche* to expropriate assets outside one's territory, nor as an absolute prohibition on the expropriation of assets outside one's territory. The prohibition comes from elsewhere. The clause under discussion might just as well have been omitted from all BITs.

The governing principle in my view is the rule of territorial sovereignty and the prohibition of the exercise of extraterritorial jurisdiction which follows from it. A BIT between host state A and home state B cannot infringe the sovereign rights of a third state C in whose territory lie the assets of an investor from B which A claims to have expropriated. What the BIT between A and B cannot do is to increase the expropriatory jurisdiction of host state A at the expense of C. What it can do is to reduce A's jurisdiction, e.g. by specifically laying down that assets outside A's own territory may not be claimed by A, not even if they belong to a wholly-owned subsidiary of the investor (a company established in A) which had been nationalized by A or whose assets had been expropriated by it. This would need specific language and I do not think that the fourteen BITs referred to above are sufficiently specific in this respect.[71] In any case, a restriction to assets situated within the expropriating state's own territory, if it were specific enough, might safeguard foreign assets (e.g. service stations) owned by the expropriated company itself.

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[70] This appears to mean that expropriatory measures may not be taken in the host country, rather than that assets within the host country will not be expropriated.

[71] Cf. para. 50 of the ICJ Judgment in the ELSI Case (US *v.* Italy), ICJ Rep. 1989, where the Chamber of the Court indicated that, for lack of a sufficiently high degree of specificity of treaty language, it could not accept the setting aside of an important principle of customary international law such as the local remedies rule.

But in most cases it would offer no comfort if the assets were owned by a foreign subsidiary of the expropriated company, for the shares in the subsidiary which the expropriated company owns are likely to be available in the territory of the expropriating state and therefore within its jurisdiction. This might be otherwise if the shares, in the form of bearer shares, were kept elsewhere so that the expropriating state could not reach them; or, if the assets in question were not owned by a subsidiary of the expropriated company itself, but for instance by a sister company, i.e. a subsidiary of its parent company abroad.

7. THE OBJECT OF THE EXPROPRIATION

Ever since the Napoleonic codifications during the early years of the 19th century, expropriation of property has been regulated by the law and often by the constitution of the state. This applied to many European countries and, somewhat later, to Latin America; now virtually everywhere. The object of an expropriation often was, and still is, a specific piece of real property required for a public purpose. It is only in 1917, during the Russian revolution, that large-scale expropriations of whole industries, usually referred to as nationalization or socialization, gave a new face to this old institution.

The authors of BITs have been concerned with wholesale dispossession, rather than expropriation of a single piece of land or other asset. The word whereby the object of the expropriation is indicated in the BITs is almost always 'the investment' (or investments); or occasionally 'investment assets'. The World Bank Guidelines are the only source where I have found a reference to the taking in whole *or in part* of an investment. The OECD Convention speaks of the *property* of the investor and makes clear that this property is the object of protection. The notes add that property is used here in the widest sense and includes contractual rights. It is in fact defined in considerable detail elsewhere in the Convention (just as investment is defined in detail in virtually all BITs).

There are ten BITs[72] in the sample where not only investments but also 'returns' are protected under the expropriation clause. This is curious, because returns usually means profit[73]; which may either have been repatriated (in

[72] They include the Italian BITs with Korea, Bangladesh, Vietnam and Mongolia; and China-Korea, Japan-Turkey, Korea-Spain, Malaysia-Denmark, Philippines-Spain and Vietnam-Sweden.

[73] The term returns is variously defined in the BITs and, besides profit and dividends, sometimes includes gross income, royalties, interest and other forms of cash income.

which case it is out of reach of the host country) or is waiting in a bank account for repatriation or spending or it may have been re-invested, i.e. added to the assets of the enterprise which forms the investment. Only in the last-mentioned case there could be a possibility of expropriation, i.e. taking of assets, and therefore a case for protection. A sum of money in a bank account is not, or should not, be an object of expropriation as this concept has been interpreted in most BITs as a taking in the public interest and against compensation representing the value at the time of the taking. Obviously, an investor should be protected against theft of money by the authorities of the host country, but the expropriation clause seems the wrong place to do it, and 'returns' the wrong connecting point. The fair treatment clauses of most BITs would seem to afford adequate protection against such abusive government conduct. If the object of expropriation is the local company of the investor rather than the assets of that company, any moneys held by the company in cash or in bank accounts would obviously be included in the expropriation and it would be unnecessary to mention returns as a separate object of expropriation.

Indonesia-Italy, at least, is clear on this point: it includes as an object of expropriation (and therefore of protection against expropriation): income from an investment re-invested in the same investment.

Two BITs[74] include another item under the objects of expropriation and protection against it, viz. liquidation proceeds acquired by the investor when he winds up the enterprise in question. Here again, it seems to me a *contradictio in terminis* to speak of expropriation of a sum of money.

The origin of the clause which brings returns and liquidation proceeds within the scope of the expropriation provision lies in Italy and Sweden. Since Egypt-Sweden (1978), most of the Swedish BITs have included this feature.[75] Since 1987 the same two items also appear in at least twelve Italian BITs.[76]

8. COMPENSATION

The question of compensation being the most important and most controversial issue – historically, politically and economically – with which BITs are

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[74] Bangladesh-Italy and Vietnam-Sweden.

[75] Including those with Pakistan (1981), Sri Lanka (1982), Bolivia and Czechoslovakia (1990), Latvia, Lithuania and Estonia (1992), Bulgaria and Belarus (1994). Curiously, the BIT with Belarus omits the liquidation proceeds and refers to returns only.

[76] Those with Hungary and Kuwait (1987), Korea (1989), Uruguay, Bangladesh, Bolivia, Vietnam, Venezuela and Czechoslovakia (1990), Albania (1991), Mongolia and Chile (1993).

concerned, we should now look at it in more detail. After a brief introduction about the myth and reality of the HULL formula, we shall deal with the twin 'standards' applied to compensation and valuation, respectively; the point in time relevant to valuation and its fine-tuning; time constraints; payment of interest; and effectiveness of the compensation.

8.1. The HULL formula: myth and reality

When in December 1937 Mexico nationalized its oil industry, a dispute arose with regard to compensation. In 1938 US Secretary of State CORDELL HULL, in a letter to the Mexican ambassador in Washington, set out the US understanding of the legal position in the following words: "Under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefor". The hallowed words prompt, adequate and effective have become the flagstaff of American policy regarding expropriation and have remained so till this day. They are today regarded by governments of a number of countries[77] as the true minimum standard of compensation in international law, known as the 'triple standard'.

As we indicated in section 5.1 above, a large majority of developing states have disputed this claim for an international law standard. In debates during the 1960s and 1970s[78] in the UN about the concept of permanent sovereignty, a new international economic order and the economic rights and duties of states, the Group of 77 (developing countries) emphasized the right of states to expropriate. At the hight of the debate, in the early 1970s, extremist views on compensation prevailed,[79] leaving it to the expropriating state to determine what (if any) compensation should be paid and denying that this was a matter governed by international law. Compensation which states should pay was characterized as 'appropriate compensation'.

Thus each of the two doctrines has its own hall-mark: prompt, adequate and effective, and appropriate compensation, respectively. Neither means

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[77] See n. 44 above.

[78] See SCHRIJVER (1995), Chapter 3.

[79] See Art. 2 of CERDS which reads in part: "Each State has the right: . . . to nationalize, expropriate . . . foreign property, in which case appropriate compensation should be paid by the State . . ., taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought . . .".

anything specific, these expressions have become symbols identifying the opposing forces. A number of countries have remained neutral on this battlefield and abstain in their BITs from using either expression.

It is indeed remarkable how devoid of meaning both expressions are. On the one side, 'adequate', which gives no indication at all of the amount of money that should be paid. The word suggests that something less than 'full' compensation (i.e. the full value of the assets taken) ought to be paid, but this is unlikely to have been HULL's intention. The word 'prompt', if taken literally, would be meaningful, but state practice as well as the explanatory wording in the BITs themselves make it clear that a literal interpretation is not intended (see section 8.5 below). The word 'effective' has a clear meaning in the context, but it can only be understood in the light of a historical interpretation. On the other side, 'appropriate' compensation is just as unhelpful. It gives no cue of what an arbitrator should look for, even less so than most of the other qualifications used in this context (see section 8.2 below).

We recall that the OECD Convention did not embrace the HULL formula, but requires "provision for the payment of just compensation". The AALCC Model A does call for "prompt, adequate and effective" compensation; while Model B wants "payment of appropriate compensation" in alternative 1 and "prompt payment of appropriate compensation" in alternative 2. The World Bank Guidelines, it may be recalled,[80] try to get the best of both worlds by asking for "payment of appropriate compensation", followed by a clause equating appropriate compensation with compensation which is adequate, effective and prompt.

A review of our sample of sixty-two recent Asian BITs shows that nineteen of them contain a full-fledged HULL formula. Five contain an 'improved' triple standard which is clearly inspired by HULL.[81] A further ten contain two of the three elements of HULL, usually 'adequate and effective', thus still clearly reminiscent of HULL. These make a total of thirty-four HULL-based BITs.[82]

In a sample of 282 BITs worldwide the following countries are found to be the main protagonists of the HULL formula: US, UK, Australia, Canada,

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[80] See section 5.1 above, *in fine*.

[81] Instead of prompt, adequate and effective, the qualifications full, immediate and effective have been adopted in these 5 BITs (Bangladesh-Italy; Indonesian BITs with Italy, Korea and Netherlands; Mongolia-Italy). 'Full' compensation may be felt to give better protection than 'adequate' compensation. 'Immediate' expresses even greater urgency than 'prompt'.

[82] The strong position of the HULL formula is confirmed if the same analysis is made on a larger sample of 282 BITs worldwide, entered into or brought into force since 1980. The number of BITs in this sample with a classical HULL formula is 105. In addition, there are 11 with a reinforced HULL formula (full instead of adequate compensation) and 43 with two of the three elements. This shows a total of 159 or 56% with a clearly recognizable affinity to HULL.

and three of the four Scandinavian countries (Denmark, Finland and Sweden, but not Norway). France and Switzerland consistently favour formulas with two of the three HULL elements: prompt and adequate in the case of most of the French BITs, adequate and effective in the Swiss BITs. Countries with a less pronounced predilection for HULL include Italy, Korea and Turkey. The main HULL antagonists appear to be Austria, China, Germany, the Netherlands, Norway and Spain. Indeed, until recently most of the developing countries had a natural disinclination towards HULL and what it stood for. Morocco stood firm against the US (1990) and is its only BIT partner which succeeded in getting a (small) deviation from HULL ('just' instead of 'adequate'). In 1990 Morocco stood up against the standard UK wording as well and got a clause with 'fair and equitable' compensation.[83] China has from the outset stuck out against HULL. It has never accepted it, not even from a country such as Australia, which has it in all its other BITs.[84]

On the other hand, some countries with a strong preference for HULL got it included notwithstanding the other country's obvious dislike: a case in point is Kuwait which had it included in its BIT with Germany, a country which in more than ninety BITs has consistently (apart from this one exception) used its own, quite different, formula. Similarly, Estonia and Latvia persuaded Norway, a country averse to HULL, to include the HULL formula in their BITs. Curiously, Lithuania - which in all other respects made common cause with the other Baltic republics in BIT negotiations - did not get the HULL formula in its BIT with Norway.

All the above goes to show how much importance is attached by a great many countries to the magic of the HULL formula. Politically, indeed ideologically, it is a reality which plays a role in negotiations. As to substance, it is a myth, mere eyewash. This will become clear when we look at the detailed terms of BITs with a HULL formula, as far as promptness (section 8.5 below), adequacy (section 8.2 below) and effectiveness (section 8.7 below) of compensation are concerned.

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[83] Other persistent objectors against the HULL clause include Romania which resisted, *inter alia*, the Danish HULL formula (1980); Egypt which stood up against France (1974); Bulgaria against Italy (1988); Bulgaria and Albania against Switzerland (1991/92); and Ghana against the UK (1989). In most of these cases compensation was promised without any qualifier, or with a neutral (and more meaningful) word such as 'just'.

[84] See SORNARAJAH (1994) 257 at n. 83, where he incorrectly states that China made an exception for Australia.

8.2. Standards of compensation and valuation: the qualifying adjectives

Most BITs use two adjectives in the compensation formula: one to qualify the compensation due to the expropriated investor and one to qualify the value of the investment for which compensation has to be paid. Some omit all adjectival embellishment,[85] others need more than one descriptive term on each side of the equation.

In our sample of sixty-two BITs we found – apart from the nineteen BITs with 'prompt, adequate and effective', the ten with 'adequate and effective' or 'prompt and adequate', and the one with 'appropriate' compensation,[86] – the following: three with *adequate*, one with *effective*, three with *fair*, five with *full* and five with *just* compensation. None of these epithets adds anything to the meaning of the concept 'compensation', except perhaps 'full' compensation which emphasizes that it is the intention that the investor's loss should be compensated *in toto*, and not merely in part.[87]

If the above record is compared with the world-wide sample of 282 BITs (see n. 82), a striking feature is again the large number of BITs where no epithet is used (65). This is largely due to Austrian, German and Norwegian BITs. Otherwise this analysis yields the following picture: apart from 102 complete and forty-seven partial HULL formulas, 'adequate' occurs in fourteen, 'appropriate' in one, 'effective' in two, 'fair' or 'reasonable' in six, 'full' in two and 'just' or 'equitable' in twenty-five BITs. So far about qualifiers of compensation, we now turn to qualifiers of value.

The distribution of qualifying adjectives relating to the relevant value is as follows in the two samples of sixty-two and 282 treaties of which respectively fifty-nine and 274 have a value clause:

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[85] The Chinese treaties excel in soberness. Six of them (with Mongolia, Portugal, Spain, Albania, Georgia and Estonia) merely promise compensation equal to the value of the investment. Three others (with Greece, Philippines and Uruguay) refer to fair or reasonable compensation equal to the value. Maximum soberness is also shown in Mongolia-Germany and Vietnam-Germany. It should be noted that virtually all German BITs of the last 15 years, world wide, use this sober formula, as do most Austrian and Norwegian BITs.

[86] China-Laos. Earlier also used in China-France (1984) and China-Thailand (1985), but these earlier BITs are not included in our sample.

[87] In practice partial compensation, according to the literature, is the rule rather than the exception. This is certainly true for final settlements laid down in international lump sum agreements. The outcome of settlements achieved through direct negotiation or arbitration is, however, seldom published and reliable data are usually not available. SORNARAJAH (1994) at 363 and 401 concludes that compensation is usually partial and that international law does not require full compensation in case of a major nationalization. The present writer does not share this view.

none:	14 / 87x	e.g. most German and Austrian treaties
market value:	20 / 68x	e.g. many Scandinavian and Australian BITs
fair (market) value:	10 / 29x	in particular US treaties
genuine (market) value:	1 / 18x	in particular UK and Netherlands treaties
real value:	13 / 43x	in particular French treaties
actual value:	1 / 4x	
normal value:	0 / 3x	partly attributable to Turkey
effective value:	0 / 2x	
full value:	0 / 2x	
just value:	0 / 1x	

Some of the BITs which refer to market value add a further clause with instructions how the value is to be ascertained in the absence of a market value. We shall revert to this point in section 8.4 below. In Papua New Guinea-Australia the reference is to the market value of the investment 'as a going concern'. This emphasizes, as we mentioned above, that the provisions made in BITs regarding expropriation, under whatever name, almost always disregard the possibility that a government may expropriate a single asset such as a piece of land, a building or a patent.[88]

In the circumstances surrounding most real-life expropriations a reference to market value will seldom be of use, as normal market mechanisms will usually be thoroughly disturbed. Nor will most of the other qualifying terms be of much help to arbitrators called upon to establish the value. The word 'normal' may be taken to indicate that the value to be established must be the value in normal circumstances and not that in the disturbed circumstances which resulted from (or gave rise to) the expropriation.[89] The word 'actual' is positively misleading. This word has many meanings in the English language (and is often used without any meaning at all), including "existing at the time, current".[90] The intention here is, on the contrary, to establish the value at an earlier point in time, i.e. when circumstances were still normal (see section 8.3 below).

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[88] BITs also disregard partial expropriations whereby the government of the host country seeks to acquire a percentage, for instance 51%, of the investment as a whole. In this way the government may get control but arguably need pay as compensation only 51% of the value. Expropriations of this type were started by Libya in the early 1970s. Understandably, companies thus deprived of control of their investment and forced into a joint venture, consider such measures unacceptable and unlawful.

[89] Cf. the France-Nigeria BIT which spells it out by requiring the real value in normal circumstances.

[90] According to the *Shorter Oxford English Dictionary* this is one of the main and oldest meanings.

To illustrate this review of terms, we quote below some examples, mainly from our sample of BITs. The confidence of the investor is likely to depend on the precise language used. The mandatory wording ('shall') of the first example (the OECD Convention), together with the requirement of a 'provision' (a budgetary allocation) at the time of the measure and the reassuring words 'just' and 'genuine', are likely to inspire more confidence than the loose wording of the Thailand-Czechoslovakia BIT, quoted at the end, where market value only needs to be 'taken into account', together with other, unnamed, factors:

- "The measures are accompanied by provision for the payment of *just* compensation. Such compensation shall represent the *genuine* value of the property affected . . ." (Art. 3 OECD Convention, 1967);

- ". . . against prompt payment of *appropriate* compensation. . . . 'appropriate compensation' shall mean compensation determined in accordance with *equitable principles* taking into account the capital invested, depreciation, capital already repatriated and other relevant factors" (Art. 7 AALCC Model B, alternative 2, 1984);

- ". . . against the payment of *appropriate* compensation. Compensation for a specific investment taken by the State will . . . be deemed 'appropriate' if it is *adequate*, effective and prompt. Compensation will be deemed 'adequate' if it is based on the *fair market value* of the taken asset . . ." (paragraph 4 World Bank Guidelines, 1992);

- ". . . against *adequate* and *effective* compensation. Such compensation shall amount to the *market value* of the investment . . . expropriated on the day the measure was taken . . ." (Art. 5 Korea-Thailand, 1989);

- ". . . against compensation. The compensation . . . shall be in accordance with the laws and regulations of the Contracting Party taking expropriatory measures . . ." (Art. 4 China-Pakistan, 1989);

- ". . . against compensation. The compensation . . . shall be such as to place the investors *in the same financial position* as that in which they would have been if the measures . . . had not been taken" (Art. 4 China-Argentina, 1992);

- "the measures are accompanied by provisions for the payment . . . of *fair* compensation. Such compensation shall amount to the *value* of the investments affected . . .. The compensation shall be calculated in such a way as to place the investor *in the same financial position* in which he would have been, had the measures . . . not been taken" (Art. 4 China-Greece, 1992);

- "against payment of compensation. Such compensation shall be *adequate*, taking into account, *inter alia*, the *market value*" (Art. 6 Thailand-Czechoslovakia, 1991).

Some further examples are given below from recent non-Asian BITs:

- Article 4 Norway-Romania (1991) requires, by way of condition precedent, that "A proper procedure is established to determine the amount and method of payment of compensation". This is followed by: "The compensation shall correspond to *the value* of the investment . . . and shall be *prompt, adequate and effective*. The amount of compensation shall be determined in accordance with recognized principles of valuation, such as the *market value* of the investment. . . . In case the market value cannot be ascertained, the compensation shall be determined on the basis of equitable principles taking into account, inter alia, the capital invested, its appreciation or depreciation, current returns, replacement value and other relevant factors . . .". These clauses can be identified as of Romanian origin, as almost the same wording is used in Article 4 Italy-Romania (1990), except that 'market value' is replaced there by 'effective and fair market value' and in the HULL clause the weaker word 'should' is substituted for 'shall'.

- "The measures are taken against *just* compensation. Such compensation shall represent the *genuine* value of the investments affected" (Art. 6 Estonia-Netherlands, 1992); Article 6 Latvia-Netherlands (1994) has the same text except that *fair market value* replaces 'genuine'.

- "vorausgesetzt, dass eine wertentsprechende . . . Entschädigung vorgesehen ist" (Art. 7 Albania-Switzerland, 1992).

- ". . . mediante indemnização. A indemnização deverá corresponder ao valor que o investimento expropriado tinha à data da expropriação" (Art. 10 Cape Verde-Portugal, 1990).

- ". . . contro immediato, pieno, ed effettivo risarcimento . . . Il giusto risarcimento sarà equivalente all'effettivo valore di mercato dell'investimento . . ." (Art. 5 Bolivia-Italy, 1990).

8.3. The relevant point of time for valuation

Compensation requires valuation of the assets expropriated. In the previous section we reviewed the general terms whereby the compensation and valuation are often qualified. We concluded that most of the terms used throw little if

any light on the valuation process required. In this section we will consider the time element and see how various BITs have sought to define or clarify it. In the next, finally, we will analyze other detailed arrangements introduced into BITs by way of fine-tuning the process.

Most of the sixty-two BITs in our sample contain a clause indicating what is the point in time for which the value of the investment has to be assessed, seven are silent on this question. The others use expressions such as:

(a) on the day when the measure was taken (1x);
(b) at the time of (or just before) the expropriation (2x);
(c) at the time when the expropriation is proclaimed (12x);
(d) before the expropriation became known (13x);[91]
(e) before the expropriation or impending expropriation became public knowledge (27x).

Only the last two formulas recognize that the value is likely to be affected by the very expropriation for which compensation is to be made, and of course by any rumours or expectations about it. None of them are of much use in case of a 'creeping nationalization' consisting of government measures spread over a long period, e.g. delaying import authorizations or any other procedures on which the business of the investor depends, perhaps with the intent that the investor give up his business, so that expropriation is no longer necessary, or perhaps precisely in order to reduce the amount of compensation the government would have to pay. Such malpractices are not unknown in the business world when mergers or take-overs are planned and there is no reason to think that they could not exist when state-owned companies and governments are involved.

The conclusion must be that the clauses under discussion, if taken literally, are likely to be ineffective in many cases of expropriation, particularly when there is no 'proclamation'. The formula we quoted as the penultimate example at the end of section 8.2 above ("to place the investor in the same financial position in which he would have been, had the measures . . . not been taken") would be a better way of helping arbitrators to achieve the intended result. Even so, this formula disregards the possibility that, long before the expropriation in question, the investment climate may have been thoroughly disturbed by other expropriations or threats thereof.[92] A clear-cut formula is contained in the French BITs with Vietnam and Mongolia: ". . . par rapport à une situation économique normale et antérieure à toute menace de dépossession".

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[91] In Sri Lanka-US this is further elaborated in a protocol by clarifying that the expression "became known" is intended to refer to any knowledge resulting in the diminution of the fair market value.

[92] See the discussion immediately below on the OECD Convention.

The time problem first cropped up during the early 1970s[93] and about half of the one hundred-odd BITs concluded up to 1982 tried to find a remedy on the lines indicated under sections 8.1 to 8.5 above. It is indeed surprising that most BITs concluded during the first half of the 1990s have still not found an effective solution!

The OECD draft Convention did not deal with this problem in its Article 3 on taking of property, but did refer to the question in the notes and comments on this article. On the genuine value of the property affected it is said that "the value must remain unaffected by artificial factors such as deterioration due to the prospect of the very seizure which ultimately occurs, similar seizures by the Party concerned or the general conduct of that Party towards property of aliens which makes such seizures likely". It is remarkable that, apart from the French BITs with Vietnam and Mongolia quoted above, none of the BITs analyzed covers the two last-mentioned causes of deterioration: preceding expropriations of others' investments by the same country, and its general conduct.

AALCC Model B did not deal with the problem at all, but Model A prescribed that compensation "shall be computed on the basis of the investment immediately prior to the point of time when the proposal for expropriation had become public knowledge".

The World Bank Guidelines go into greater detail on the question of compensation than any BIT has done so far. They first provide that compensation will be deemed adequate:

> "if it is based on the fair market value . . . as such value is *determined*[94] immediately before the time at which the taking occurred or the decision to take the asset became publicly known."

It is further provided that the host country, if called upon to determine the compensation, may reasonably do so in the case of assets which are neither a profitable going concern, nor an economically unviable enterprise, on the basis of replacement value or, in case the book value has been recently assessed or has been determined as of the date of the taking, on the basis thereof.

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[93] See France-Zaire (1972).

[94] This should no doubt be interpreted as meaning that, whenever the determination is made, it must relate to the value at the time indicated. The words used, if taken literally, would mean that the determination (assessment) itself must have been made at the time indicated. It should be observed that the formula quoted is not a *conditio sine qua non* but is flexible. If the condition is fulfilled, the compensation will in any case be deemed adequate. If it is not fulfilled, there is nothing to prevent arbitrators from still finding compensation adequate.

8.4. Fine-tuning of valuation procedures

Even though the BITs of our sample do not display the wide range of possibilities for valuation which one can find in the World Bank Guidelines, nevertheless – or, perhaps, precisely for that reason – it is worthwhile to look in some detail at their rules on valuation. The Guidelines, of course, were drafted later than most of the BITs under review and may be regarded as an attempt to formulate the greatest common denominator of all the different procedures one can find in treaty practice. Before going into the nitty-gritty of rules on valuation, we want to give some thought to the principles at stake and the practical problems faced by those involved: (a) the government of the expropriating country, which normally is the host country;[95] (b) the investor who has suffered expropriation; (c) the investor's home country which may be entitled to give diplomatic protection to the investor and whose own national interests may be at stake; (d) courts and arbitral tribunals called upon to deal with disputes about compensation; (e) legal advisers of the parties.

The literature on expropriation and compensation is abundant,[96] but most of it has been written by academics from an academic or political rather than from a practical point of view and few of these authors have been personally involved. There are, however, also some valuable contributions by practising lawyers who have been so involved, in particular during the past 15 years, in arbitrations before the Iran-US Claims Tribunal in The Hague. In many cases where disputes were resolved through direct negotiation or by arbitration the full terms of the settlement or award have not been divulged, let alone the arguments and methods by which the final results had been achieved. Lawyers engaged in such negotiations and arbitrations are not prone to publish their experience.

The present author had some experience with expropriations in the oil industry during the thirty years he worked for one of the major oil companies, but this paper is not the place to expand on that experience, nor is he inclined to make public confidential materials which, even after many years, may cause embarrassment to the companies or governments concerned. Inevitably, however, the views here expressed on principles and problems involved will be coloured by this background and experience.

Many expropriations of recent decades have been conducted in reasonable cooperation between the governments and companies concerned. Compensation

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[95] Not always, see sec. 6 above at n. 69.

[96] See SORNARAJAH (1994), Ch. 9 and the literature referred to there. See, in particular, LILLICH (1972) and SCHACHTER (1984).

then is a matter of negotiation and although the parties will no doubt calculate different values on a range of possible bases, the final settlement is bound to take account of other considerations as well: the economy of the country (how much can it afford to pay, and how soon?); the legal position (if it is an illegal expropriation the company may seek a higher amount than in the case of a lawful expropriation); recent precedents (the outcome of comparable expropriations in other countries); remedies available if the negotiation fails (international arbitration); future relationship which either or both parties may aspire to (the expropriated company may continue to run the business as a contractor of the state).

There have also been many cases, of course, where relations between the parties were decidedly hostile and which led to highly controversial arbitrations. These bitter disputes inevitably dominate the collective memory and writings about expropriations of the second half of this century. Even in these cases the parties sometimes came together, once tempers had cooled off, and worked out a settlement, usually a package deal including payments in cash and/or in kind, loans, future contracts and other elements, and arbitration proceedings were discontinued. In such cases it is impossible to show in retrospect that the compensation was based on 'market value', 'book value' (whether or not written down, adjusted for inflation or otherwise), or on any other bases and procedures prescribed in BITs, Guidelines or textbooks.

Notwithstanding these reservations, it remains of interest to study the detailed rules and procedures on compensation and valuation set out in BITs and in the World Bank Guidelines, as these are likely to influence negotiations between the parties and deliberations of arbitrators.

As we have seen, most BITs which qualify the value to be established refer to the market value. This is not a recent trend of the post-cold-war period, but had already started in the early 1970s.[97] As said above, market value of companies which have been expropriated is seldom relevant, for the simple fact that in most cases there is no market where companies are traded. Even in countries where corporate take-over practices have developed it is rarely possible to identify competition and information on financial conditions and offers without which it is difficult to speak of a market. Market value would be more relevant when the objects of the expropriation consisted of marketable items such as a parcel of land or a building but, as we have seen, it is clear from the wording of most BITs that the expropriation provisions apply to the investment as a whole and not to individual items.

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[97] In a sample of 38 BITs of the period 1973-82, ten refer to market value.

The drafters of the BITs, in using the term market value, may have had a much wider concept in mind, namely the fair value of the investment (company or whatever else might be the object of an expropriation) in the context of a market economy. In other words, at a time when *grosso modo* the world consisted of two types of countries - the prosperous ones of the 'West', predominantly relying on a market economy, and those of the 'South' and the 'East' with a centrally organized command economy - the words 'market value' were a signpost pointing to the system of market economies. In drafting these provisions little thought seems to have been given to the relevance of market value as such to the problem of determining compensation due by an expropriating state. The OECD Convention avoided this term where it required in Article 3 payment of compensation representing "the genuine value of the property affected". Although, in the notes and comments on this article, it was pointed out that "the genuine value of the property affected" will, as a rule, correspond to the fair market value of the property, the words 'as a rule' indicate that this is not necessarily so. How the genuine value should be established if it does not correspond to fair market value, is left open.

AALCC Model A does take into account the possibility that a market value cannot be *readily* ascertained and prescribes that in that case the compensation "shall be established on equitable principles taking into account *inter alia* the capital invested, depreciation, capital already repatriated and other relevant factors". The word 'readily' confuses the issue and had better be deleted.[98] From the words '*inter alia*' and 'other relevant factors' it is clear that the enumeration of factors is open-ended, but the three listed must in any case be taken into account. As we shall see below, several BITs have somewhat extended this list.

As we mentioned in section 5.5 above, alternative 1 of the Model B text leaves it to the parties in each case to agree upon the principles for determination of appropriate compensation, including the mode and manner of payment. Barring stipulations to the contrary, compensation must be calculated on the basis of recognized principles of valuation. The basic duty of the host state is to pay 'appropriate' compensation but this duty is subject to the provisions of its own laws. The host state also must abide by and honour any commitment it has made in regard to the above-mentioned principles, but it remains unclear

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[98] Cf. the unconscionable extent to which attempts to establish market value may be pursued under the World Bank Guidelines by the simple expedient of extending the definition of market value to include virtually any other type of value or system of valuation (see sec. 8.3 above *in fine*). The Guidelines, in para. IV. 4, provide that "determination of the 'fair market value' will be acceptable if conducted according to a method agreed by the State and the foreign investor ... or by a tribunal or another body designated by the parties".

whether the commitment to abide takes precedence over the host country laws, and, whether the party with which the host country must agree the principles and vis-à-vis which it is committed is the home country or, more sensibly, the investor. In summary: rules about valuation are not included in the Model text but are left to be made later, presumably when the investment contract is entered into; the host state appears to be bound thereby, but this is not quite clear.

The corresponding alternative 2 starts out on the basis of the HULL formula, then prescribes that – barring stipulations to the contrary – compensation must be calculated in accordance with equitable principles, taking into account the capital invested, depreciation, capital already repatriated and other relevant factors, i.e. virtually the same as in Model A.

Two thirds of the sixty-two BITs of our sample[99] do not contain procedural rules such as those set out in the instruments discussed above. Ten follow the pattern of AALCC Model A, with minor variations. The starting point is market value, but when this cannot be 'readily ascertained' the instruction is to establish the compensation on the basis of 'generally recognized principles of valuation' and equitable principles, taking a number of specific factors into account plus any other factors which may be relevant. The 'generally recognized principles of valuation' have been added to the AALCC formula, presumably to avoid disputes about the equitable nature of valuation practices. AALCC's three specific factors (capital invested, depreciation and capital repatriated) are included in nine out of the ten BITs. The exception is the Indonesia-Italy BIT, which – for reasons unknown – leaves out the factor 'capital repatriated' and is exceptional in other respects as well. The Indonesian clause in question is as follows:

> ". . . compensation shall amount to the real market value . . . Such amount shall be calculated according to the method *agreed upon by both parties* in conformity with international [sic!] acknowledged evaluation standards. In case that the real market value cannot be *easily* ascertained, the compensation shall be determined on equitable *objective* principles, taking into account, inter alia, the capital invested, its *appreciation or depreciation*, current returns, replacement value and any other relevant factor *mutually agreed upon*"[100] (this English text is the prevailing text of the treaty).

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[99] Viz. 13 out of 17 Chinese treaties, 4 of 5 Hong Kong, 3 of 4 Indonesian, 10 of 11 Korean, 6 of 8 Vietnamese treaties and 7 out of the 12 other treaties.

[100] The Indonesian treaties show a preference for things to be left open for agreement between the parties when the time comes, rather than spelling them out in the treaty. See also n. 115 below on the *musyawarah* practice and philosophy.

The confusion that may be caused by the word 'easily' has been commented upon above. The phrase "agreed upon by both parties" may also cause confusion. In the context 'parties', even though not written with a capital P, is likely to be understood as the Contracting Parties. As a practical matter there is no need for explicit agreement, and certainly not agreement of the two countries, as this would hamper arbitrators[101] who may be called upon to resolve a dispute which could arise on this point between the parties most concerned, namely the host state and investor. The same problem exists with regard to the words 'mutually agreed upon' at the end of the quote. The insertion of 'objective' needs no comment. The addition of 'appreciation' is odd as it would seem to change the sense of the term 'depreciation' retained from the AALCC formula. The AALCC used 'depreciation' in the normal accounting sense, i.e. the amount amortized or written down on the capital invested. The corresponding accounting concept in an upward direction, by a revaluation or upgrading of the value of certain assets whose market value has increased, might be called appreciation but is so exceptional that a reference to appreciation or depreciation of capital is more likely to be understood as changes upward or downward in the value of capital held in currency, as a result of deflation/inflation or of revaluation/devaluation of currencies in the monetary sense. Such ambiguity is regrettable.

Nine of the ten BITs have added 'replacement value'[102] as a factor, five have added 'currency exchange rate movements'[103] and one has added 'goodwill'.[104]

Finally, what do the World Bank Guidelines have to say about this? The criteria listed there for determining the fair market value are: the amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case. In the case of a going concern with a proven record of profitability, the fair

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[101] If the dispute hinges on a particular accounting standard which arbitrators and the investor consider relevant, the arbitrators may be precluded from applying it if the host country objects. If the standard is favoured by the host country but opposed by the investor, arbitrators would have to decide whether agreement is required from the investor or from the home country (which may hold different views and may have different interests).

[102] China-Slovenia; the Australian BITs with Vietnam, Hong Kong, Indonesia, Papua New Guinea, Laos and Philippines; and the Italian BITs with Vietnam and Indonesia.

[103] The Australian BITs with Vietnam, Hong Kong, Indonesia, Laos and Philippines.

[104] Vietnam-Italy.

market value could be the present value of the discounted cash flow,[105] using a discount rate reflecting the time value of money (i.e. a reasonable long term interest rate) as well as inflation and risks. The system described in the Guidelines would seem to be more realistic than that set out in most BITs.

8.5. The time constraint

Under the HULL formula compensation should not only be adequate and effective but also prompt. Virtually all clauses on compensation provide for timely payment. But what is timely? 'Prompt', usually translated into French or Spanish as 'immédiatement' or 'de inmediato', is used in many BITs, as we have seen, as part of a HULL formula (in whole or in part), but is often gainsaid in the next sentence by using a more indulgent expression, such as 'without undue delay' or 'as soon as possible'. Altogether in eleven BITs the promptness of a HULL formula has been toned down in this way. A remarkable example is Korea-USSR where prompt compensation was translated into payment within two months after expropriation and it was further provided that interest would accrue if after the two-months period payment had not yet been made.

Apart from the HULL formula, where 'prompt' is part of a ritual expression and must not be taken literally, the three degrees of urgency encountered in our BITs are: immediate or prompt (2x), without delay (21x) and without undue delay[106] (35x). Although 'without delay' has a degree of sternness about it which is lacking in 'without undue delay', at a closer look the difference may be deceptive. For instance Nepal-UK prescribes 'without delay' but adds 'in any event not later than six months after the date of expropriation', while Hong Kong-Denmark requires payment "without undue delay which, in any event, shall not extend [*sic*!] a period of three months".

Another formula which is sometimes used to indicate business on a cash-down basis requires that the expropriation measure is 'accompanied by pay-

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[105] According to the Guidelines the cash flow should be estimated on a forward basis, presumably (but this is not defined) from the day when the expropriation becomes effective (the day of taking) to the end of its economic life. An alternative would be a present value based on the cash flow over the whole period from commencement of the investment up to the end of its economic life, with past (actual) cash flow figures being adjusted upward by the same discount rate as future estimated figures are discounted downward. In either case the present value calculated is the value at the day of taking.

[106] Or: without unreasonable delay.

ment' of compensation (as further defined).[107] The more usual formula which requires that the expropriation measure should be accompanied by 'provision(s) for compensation'[108] does not contain a commitment to pay by a given date or within a given period, it merely means that at the date of the expropriation the expropriating state must have the money available or at least have fixed the whole procedure.[109]

Perhaps the most realistic means of protecting the investor against delay in compensation is an obligation for the state to pay interest. This will be discussed in the next section.

8.6. Payment of interest

If payment of compensation is required promptly or without delay it may seem inconsistent explicitly to require payment of interest in case of delay, i.e. when the state is in default. A court or arbitral tribunal may be expected to award damages to the investor in case of default and these should normally be equal to interest at a normal commercial rate. If compensation must be paid without undue delay, a specific clause on interest to be paid during the period between expropriation and payment of compensation would be logical. In practice compensation is hardly ever paid promptly or without substantial delay, sometimes ten years or more, and payment of interest at a rate which reflects inflation and the time value of money thus becomes an important element of compensation.

The OECD Convention did not have an interest clause. Neither did more than 80% of BITs concluded before 1982. The initiative for including an

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[107] Australian BITs with Indonesia, Laos, Philippines and Vietnam. The tautology in a requirement for expropriation to be "*accompanied* by *prompt*, adequate and effective compensation" illustrates the merely symbolic function of the HULL formula.

[108] As pointed out above (see n. 13), the word 'provision' in this formula is sometimes used in the plural (provisions), thereby acquiring another meaning. The original intent in the OECD Convention appears to have been that a government, before taking an expropriationary measure, should make budgetary provision (i.e. reserve the money) to ensure that just compensation could be paid.

[109] This formula is used in China-Greece, Vietnam-Sweden and Papua New Guinea-Australia. A similar provision can be found in Vietnam-Germany and Korea-Austria: "Provisions for the determination and payment of such compensation shall be made in an appropriate manner not later than at the moment of the expropriation". Cf. Korea-Romania where the establishment of a proper procedure to determine the amount and method of payment of compensation is a condition precedent.

interest clause seems to have lain in most cases with the developing countries, in particular Asian countries such as Korea, Singapore and Sri Lanka.[110]

The AALCC Model A included a clause that "compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment". The World Bank Guidelines require in normal circumstances payment of compensation without delay, but in certain defined exceptional circumstances allow payment in instalments "provided that reasonable, market-related interest applies to the deferred payments in the same currency", i.e. the currency brought in by the investor or a freely transferable currency.

Compared with the 20% of pre-1982 BITs which provided for interest, there has been a sharp increase in our sample of sixty-two post-1990 Asian BITs, of which forty (i.e. 63%) carry an interest clause.[111] Most of these follow the wording of the AALCC clause (interest at a normal commercial rate from the date of expropriation until the date of payment), but in one BIT (Korea-USSR) interest does not become due until two months after expropriation.

Various formulas have been used to specify the rate of interest to be paid. In four BITs the rate is related to LIBOR.[112] Laos-France specifies the official Special Drawing Rights interest rate fixed by the IMF. Sometimes it is specified that the rate to be used is the current rate applicable to the currency brought in for the investment,[113] while in other cases the rate applicable to the host country currency is to be used.[114] Vietnam-France prescribes a rate to be agreed between the Contracting Parties, i.e. Vietnam and France. Such a procedure is detrimental to the investor and likely to cause delay as the debtor state has no interest in coming to a quick agreement unless the rate is favourable to it.[115]

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[110] While more than 90% of German and Swiss BITs did not include an interest clause in those early years, the German treaties with Mali (1977), Oman (1979) and Papua New Guinea (1980) and the Swiss treaties with Korea (1971) and Sri Lanka (1981) did. So did the BIT between Korea and Sri Lanka (1980) and Japan-Egypt (1977).

[111] The abstainers include all but three of the 17 Chinese BITs and four out of eleven Korean BITs.

[112] The London Inter-Bank Offered Rate (published daily for 1 to 12 months periods) is indicated in three of the five Italian BITs (with Bangladesh, Mongolia and Vietnam) and Vietnam-Denmark.

[113] China-Slovenia and World Bank Guidelines.

[114] Hong Kong-Sweden indicates the rate applicable under the law of the host country.

[115] A similar clause is to be found in Indonesia-Italy: the rate has to be *agreed* – it is unclear whether it is the investor or its home country which should reach agreement with the host country – "according to the prevailing rates". Indonesia-Australia prescribes an *agreed* "commercially reasonable rate". This must have been inspired by the concept of *musyawarah*, one of the pillars of the Pancasila philosophy underlying the Indonesian Constitution of 1945, which requires consensus or exhaustive negotiation. Malaysia-Denmark, too, wants "an appropriate rate as

In two Korean BITs the interest clause appears to be ineffective as a result of peculiar drafting.[116] For religious reasons a number of Islamic countries have traditionally been averse from interest clauses. Thus Bangladesh, Egypt, Morocco, Oman, Pakistan and Tunisia have concluded BITs without a normal type of interest clause, although all of them except Morocco and Tunisia have on occasion deviated from this policy.[117] Other Islamic countries, on the other hand, have shown a predilection for BITs with an interest clause.[118]

There are three Multilateral Investment Treaties (MITs) with exclusively Islamic membership: the 1980 Arab League Treaty of Amman for the Investment in Arab States (21 member states); the 1981 Treaty of Baghdad of the Organization of the Islamic Conference (46 member states) for the promotion, protection and guarantee of investments among member states, signed by at least 18 of the 46 states[119] and in force since 1988; and the 1990 Treaty of the Arab Maghreb Union (5 member states) on promotion and protection of investments. In addition there is a fourth investment MIT concluded in 1987 in Manila among the six ASEAN member states, three of which may be regarded as Islamic states (Indonesia, Malaysia and Brunei). The 1980 Amman

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agreed". See also n. 100.

[116] The clause in Korea-Indonesia says in effect: compensation including interest shall amount to the market value, while the intention is no doubt that compensation shall amount to the market value and interest shall be payable in addition. The language used in Korea-Spain leaves it to the debtor-state to determine what (if any) interest it will pay, by saying: compensation shall include payment of interest in accordance with the laws and regulations of the expropriating state. See also n. 30 above.

[117] E.g., Bangladesh-US (1986) and Bangladesh-Italy (1990) have an interest clause. So has Egypt-Italy (1989), while Egypt-US (1982) contains what might be described as a crypto-interest clause: ". . . compensation shall include payment for delay as may be considered appropriate under international law". Morocco-US (1985) makes no mention of interest in the expropriation article of the treaty, but adds in a protocol a crypto-clause to the effect that "compensation shall include as appropriate an amount to compensate for any delay in payment that may occur". The same crypto-clause (except for the words "as appropriate" has been added in a protocol attached to Tunisia-US (1990).

[118] Algeria, Bahrain, Indonesia, Kuwait, Malaysia, United Arab Emirates and Yemen. Some of these have occasionally concluded BITs without an interest clause, but only with countries which normally omit these clauses. See for instance Kuwait-Pakistan (1983), Malaysia-Norway (1984), Yemen-Sweden (1983). The clause in Germany-Kuwait (1994) is interesting in that it seeks to explain and justify payment of interest at considerable length: "In the event that the payment of compensation is delayed, such compensation shall be paid in an amount which would put the investor in a position not less favourable than the position in which he would have been had the compensation been paid immediately on the date of expropriation. To achieve this goal the compensation shall include interest at the prevailing commercial rate, however in no event less than the current LIBOR rate . . .".

[119] The 18 signatories include three of the Asian states on which our sample of 62 BITs is based, viz. Indonesia, Malaysia and Pakistan.

treaty contains an interest clause,[120] but the Baghdad and Manila treaties do not.

The three BITs of our sample which may have been affected by Islamic policies on interest are: Bangladesh-Italy, Malaysia-Denmark and China-Pakistan. The first two have an interest clause, the last one has not, all as one would expect in the light of the treaty practice of the countries concerned as illustrated above.

8.7. Effectiveness

Compensation must be effective, says the HULL formula. But what does this mean? It covers two things: convertibility and transferability.[121] There is hardly a compensation clause which does not deal with it, one way or another, but it is pretty clear that the authors of these various clauses attach different meanings to the terms they use.

The OECD Convention requires compensation to be "transferable to the extent necessary to make it effective for the national entitled thereto". According to the accompanying notes and comments effective means that compensation must be paid "in a form that is of real practical use to the person entitled thereto, having regard to his particular situation". So if the investor is a resident of the expropriating country it may be that non-transferable compensation is effective for him. But usually it will have to be transferable. "A transfer through the market . . . would represent a proper discharge of the obligations . . . provided it did not entail an undue reduction in the genuine value".

AALCC Model A has the HULL formula which calls for effective compensation and furthermore asks that compensation be allowed to be repatriated. Convertibility is presumably deemed to be included in effectiveness. Model B alternative 1 merely says that the state will honour commitments made in

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[120] Art. 11.2 reads: "Compensation must be paid within one year from the date of accord on the amount of compensation or the date . . .. Otherwise the investor shall be entitled to *deferment interests* on the unpaid amount from the day following expiry of the said period, on the basis of the prevailing bank interest rate in the State where investment was made."

[121] Convertibility gives the right to convert the currency in which compensation is paid (usually the local currency) to a suitable foreign currency (usually the investor's home country's currency or an internationally freely convertible currency such as US dollars). Transferability gives the right to repatriate (i.e. transfer to the home country) the amount in foreign currency representing the compensation.

regard to (*inter alia*) "the mode and manner of payment" of compensation. Alternative 2 is silent on the issue.

The most up to date and businesslike instruction is, one would expect, to be found in the World Bank Guidelines: compensation must be effective and this is the case if it is paid:

(a) "in the currency *brought in by the investor where it remains convertible*",
(b) "in another currency designated as freely usable by the IMF", or
(c) "in any other currency accepted by the investor".

However, the words which have been emphasized are unclear and the right of the investor to transfer the money abroad (the right to repatriate) after having converted it is not clearly expressed.[122]

Our sample of sixty-two BITs uses, apart from the HULL formula, a miscellany of expressions, including: payment in convertible currency (20x); compensation shall be convertible (or freely convertible) (14x); in freely usable currency (2x);[123] (freely) transferable (49x); allowed to be repatriated (4x); in the currency of the country of origin (1x). Thus thirty-six BITs specifically deal with convertibility and 54 with transferability. In addition, the expressions 'effectively (or fully) realizable' (31x) and 'effective' (5x) are used without a clear meaning, presumably as a kind of catch-all phrase. The expression 'effectively realizable' was used in a number of early US Friendship, Commerce and Navigation treaties, probably to cover both convertibility and transferability.[124]

Most of the treaties which are silent on convertibility while dealing specifically with transferability contain one of the two last-mentioned clauses and it is a fair assumption that the states involved considered convertibility to be covered by 'realizable' or 'effective'. And reversely, BITs with a convert-

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[122] By way of example, a US investor in Japan who originally had brought in dollars and who now gets compensation in yen, is entitled to convert the yen into dollars. But will he be allowed under these Guidelines to transfer the dollars to the US? And, if originally he had brought in the money in yen (bought in New York or, perhaps, already in his possession from other transactions), will he then not be entitled to repatriate them? What is the meaning of the words "where it remains convertible"? Does it mean that the dollars, as long as they remain in the investor's hands, may be converted back to yen? Or does it mean that an investor from a country with a currency designated by the IMF as not freely usable, having brought in this currency for an investment in Japan and after expropriation having been compensated in the same non-convertible currency, may now convert it into a freely convertible currency?

[123] Korea-Zaire and Mongolia-US. The latter has added: as defined in Article 30 of the Articles of Agreement of the IMF.

[124] E.g. Art 6.4 of the US-Netherlands Treaty on Friendship, Commerce and Navigation of 1956: ". . . compensation shall be in an effectively realizable form".

ibility clause but without one on transferability seem to have used 'realizable' or 'effective' to cover transferability.

In a world with fast-changing exchange rates an investor who is guaranteed convertibility has an interest in a realistic definition of the rate of exchange that will be applied. However, only nine BITs of our sample make an attempt to provide a definition. Sri Lanka-US prescribes the prevailing market rate on the date of expropriation,[125] thus protecting US investors against a subsequent fall of Sri Lankan currency versus the dollar (but a change of the exchange rate might go the other way!). Mongolia-US, on the other hand, refers to the prevailing rate on the date of transfer[126] with respect to spot transactions. Mongolia-Denmark adds, interestingly, that in the absence of a market rate the most recent exchange rate applied to inward investments will be used. Japan-Turkey uses a formula we have encountered earlier:[127] compensation must be paid in a manner which would place the claimant in a position no less favourable than the position in which he would have been if the compensation had been paid immediately on the date of the expropriation.

Some BITs[128] and also the World Bank Guidelines leave a significant hiatus in the guarantee of convertibility and transferability by allowing, in the words of the Guidelines, exceptions in cases where the state faces exceptional circumstances, as reflected in an arrangement for the use of the resources of the IMF or under similar objective circumstances of established foreign exchange stringencies. Compensation in foreign currency may then be paid in instalments over a period which must be as short as possible and which may not exceed five years.

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[125] China-Greece prescribes the rate of exchange applicable on the date used for the determination of value, which normally will be the date of expropriation. China's BITs with Korea and Argentina use almost the same language.

[126] Same in the Vietnam BITs with Italy and Denmark.

[127] See n. 118 above. A similar formula is used in China-Greece for the calculation of the amount of compensation, see the 7th example given at the end of sec. 8.2 above.

[128] E.g. Japan-Turkey: the host country may, in exceptional financial or economic circumstances, impose exchange restrictions in conformity with the IMF Articles of Agreement as long as it is a party to those Articles of Agreement. This wording is ambiguous. It probably should be interpreted as meaning that exchange restrictions may only be imposed by a country which is party to the IMF Articles, but it could also mean that such restrictions may always be imposed but must conform to the Articles while the country is a party to them.

9. PROTECTION OF SHAREHOLDERS

Sixteen in our sixty-two BITs sample contain a separate clause of British origin designed to indemnify the investor's shareholders in the home country when the investment is expropriated in the host country. An interesting question is whether such a clause serves a useful purpose and, if so, why the other forty-seven BITs forego the clause. The answer depends in part on the definitions of an investor and an investment. Let us take, by way of example, the relevant clause in the Hong Kong-Australia BIT:

> "Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its area, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee compensation referred to in paragraph (1) in respect of their investment to such investors of the other Contracting Party who are owners of those shares"

or, paraphrased (as applied to an investment in Australia):

> "Where Australia expropriates *the assets*[129] of an Australian company in which Hong Kong investors own shares, Australia must ensure that those shareholders are compensated *to the extent necessary* in accordance with the compensation rules above."

There are various possibilities. If the investment is made by an Australian subsidiary of a Hong Kong company, the clause would seem to be unnecessary, even confusing, because that company, which is the shareholder, is already entitled to compensation under the preceding clause which guarantees compensation to Hong Kong investors who are deprived of their investments[130] in Australia.

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[129] The definite article is significant: this clause applies only when 'the assets', i.e. all assets are expropriated, not in case of a partial expropriation.

[130] An investment is defined in the BIT as every kind of asset owned *or controlled* by the foreign (here: Hong Kong) company. The term 'control' is defined in such a way that a company which has a substantial interest in the investment is regarded as the controlling company. Under the main expropriation clause the Hong Kong parent company is therefore protected (against expropriation) as the investor, not as the shareholder. This is so both in the case that the Australian company itself, i.e. the shares therein (which constitute an asset of the parent company), is expropriated and in the case that the assets of the Australian company are expropriated. If there are non-controlling shareholders in Hong Kong, they could base a cause of action against Australia on the separate clause for the protection of shareholders.

If the investment is made by an Australian company which is jointly controlled by foreign companies in Hong Kong and other countries, each for a minority percentage, the Hong Kong company may not be regarded as having a substantial interest and on that ground being in control of the assets expropriated in Australia. The clause for protecting it as a shareholder then is its only safeguard.

The same is true for Hong Kong individuals who own a portfolio investment in the expropriated Australian company and who, thanks to the shareholder protection clause, can claim compensation "to the extent necessary", which may mean to the extent that they have not received their proportional part of the compensation paid to the expropriated company.[131] Most BITs are concerned with direct investments only and do not protect the interests of foreign portfolio investors.

If the Australian company is a subsidiary of a Hong Kong company which itself is wholly owned by (for instance) a UK company, the provisions of the shareholder protection clause apply. But if a Hong Kong company wholly owned by Hong Kong shareholders makes the investment in Australia via a subsidiary in a third country (which has not a similar BIT with Australia), the shareholders protection clause does not apply. No doubt one can think of other cases where the clause would apply or would not apply and where in the light of the purpose of the BIT, namely to encourage direct investments in Australia, it should or should not apply. In the light of this analysis the standard clause appears to overshoot its mark. It could have been drafted narrower, so as to apply only where additional protection is purposeful and functional and where competing claims are avoided. Everything said in the preceding paragraphs is, of course, equally relevant to Australian investments in Hong Kong and the position of Australian parent companies and shareholders.

The shareholder protection clauses in most of the sixteen BITs under review are substantially equal to the above paradigm. In two treaties[132] the restriction "to the extent necessary" has been deleted. One of the BITs[133] has omitted, perhaps by inadvertence, the requirement to pay compensation *to* the shareholders, merely requiring that the provisions of the preceding paragraph are applied to the extent necessary *in respect of* the shareholders. But do the shareholders themselves have a cause of action? The clause is clearly

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[131] If the level of compensation paid by Australia to its domestic company is less than the standard of compensation set out in the main expropriation clause of the BIT, the Hong Kong shareholders may be entitled to the difference.

[132] China-Korea and Korea-Mongolia. None of the other Chinese BITs contains a similar formula, while four Korean BITs (out of eleven) have it.

[133] Malaysia-Denmark.

controversial and, apart from British BITs which as a rule include it,[134] it is unclear why some countries accept it in some BITs and not in others.[135]

10. DISPUTE SETTLEMENT AND DUE PROCESS OF LAW

As we saw above, the expropriation clause of many BITs contains a provision requiring due process of law, sometimes as a condition precedent for lawful expropriation and sometimes as a right of the expropriated investor. According to the comment on Article 3 of the OECD Convention, due process covers two things: the measures must be lawful, in accordance with domestic legal procedures; and it must be possible to test them in court.[136] Twenty BITs in our sample refer to due process of law in general, a further eight use other terms for testing the legality of the expropriation and the amount of compensation in court, such as the right of the investor to prompt review, by a judicial or other independent authority of the expropriating state, of the investor's case and of the valuation of the investment.[137]

Apart from such clauses, which are part of the expropriation article, virtually all BITs[138] have a separate arbitration article providing for com-

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[134] There are some variations; the clause in Turkey-UK (1991) is interesting, as it eliminates some of the doubts caused by the standard formula. It provides that each country must ensure that in case of expropriation of investments of a company incorporated or constituted under its law and in which an investor of the other owns shares, its law provides either (i) for that company to be compensated in accordance with the provisions of the preceding paragraph; or (ii) for the investor of the other country to be compensated directly in accordance with those provisions; in no event shall this paragraph be construed so as to require a country's law to provide for both (i) and (ii).

[135] All five Hong Kong BITs include the clause, as well as four Korean, three Mongolian, two Thai, two Indonesian and one each of China, Vietnam, Malaysia and Nepal.

[136] According to the OECD comment the term implies that, whenever a state seizes property, the measures taken must be free from arbitrariness; safeguards existing in law and precedent must be fully observed; administrative or judicial machinery used or available must correspond at least to the minimum standard required by international law. Thus the term contains both substantive and procedural elements. Still following the OECD Convention, one safeguard deserves special mention: the legality of the measures taken by the expropriating state and - wherever the constitutional rules of the state concerned permit it - the amount of compensation should be subject to judicial review.

[137] Hong Kong-Netherlands.

[138] There is one exception in our sample, Korea-Zaire, which provides for arbitration of disputes between the two states but not those between the investor and the host state. See for other exceptions PETERS (1991) 119-120.

pulsory[139] international arbitration of disputes between the investor and the host country. Admittedly, most of the Chinese BITs (and some others) confine the scope of compulsory arbitration to a narrow range of disputes, but these always include disputes on the amount of compensation, sometimes other aspects of expropriation as well.[140]

Thus two strains of thought - on due process and dispute settlement - come together here. Both are given for the protection of the investor, but it is doubtful whether due process, in the sense of the right to prompt judicial review in the host country of the legality of the expropriation and the amount of compensation, adds anything to the investor's security. On the contrary, it suggests the need to exhaust local remedies before a dispute may be submitted for final settlement to the arbitral tribunal.[141] On the merits and demerits of the local remedies rule in international law when there is a right to arbitration there is much to say.[142] The present author holds the view that, whenever there is a right to arbitration, it is in the best interest of both parties to set aside the local remedies rule. Most BITs reduce the period available for negotiation or judicial review to a few months, after which period the parties are entitled to go to international arbitration (there can be no question then of exhausting local remedies). In some BITs the local remedies rule is explicitly set aside, in our sample only in Korea-Austria.

The right of the investor to submit disputes with the host country to arbitration is an essential part of the protection[143] for which BITs were made. It is disconcerting, therefore, to find that in some BITs this right is rather shaky. In Japan-Turkey the right of the investor to go to arbitration is jeopardized in two ways: it exists only as long as both Contracting Parties are

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[139] Compulsory in the sense that either party to the dispute (or, in some BITs, only the investor) is entitled to submit a dispute to arbitration and once set in motion the procedure is compulsory for both parties.

[140] See PETERS (1991) 129.

[141] This suggestion is reinforced by the wording in some BITs which, by using a 'shall'-clause, make it appear that the judicial review is a mandatory procedure, instead of being an option open to the investor.

[142] See PETERS (1991) 133-135 and SCHRIJVER (1995) 347-350.

[143] If the host country unilaterally changes the agreed terms of the investment, e.g. by changing laws or regulations, the local courts are likely to apply the new municipal law rather than rules or principles of international law. This applies to many countries, including the US. Cf. *Restatement of the Law, Third, The Foreign Relations Law of the United States* §115: "An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede . . . is clear . . .". See also PETERS (1992) 231. An international arbitral tribunal is unlikely to find that municipal law takes precedence over international law.

parties to the 1965 ICSID Convention,[144] and the host country can make the right inoperative simply by renouncing the ICSID Convention.[145] In the second place the right to arbitration of a dispute ends once the investor has resorted to administrative or judicial settlement of that dispute in the host country. If the host country insists on local remedies the way to arbitration therefore remains closed. A similar problem exists in Korea-Turkey. The investor has a right to arbitration only if he has submitted the dispute to the national courts of the host country and there has not been rendered a final award within one year after the dispute had arisen. In practice it would seem most unlikely that a final award in highest instance can be given within that period, but if it is and turns out to be a travesty of justice, it is highly unsatisfactory that the way to arbitration remains blocked.[146] According to Korea-Romania, a dispute, if not settled within 6 months, "shall by agreement of parties to the dispute . . ." be submitted to ICSID. This can hardly be considered a firm right to arbitration. One last example of a deficient arbitration clause is China-Argentina where, as a result of a drafting error in the definitions, the right to arbitration turns out to apply only in case of straightforward expropriations, but not in case of a creeping nationalization.[147]

A review of the three examples with which we have compared the BITs all along, yields no surprises. The OECD Convention merely requires that the measures are taken "under due process of law". It does not provide for

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[144] The Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, 1965.

[145] The Thai BITs with Korea, Czechoslovakia and Peru also require both Contracting Parties to be party to ICSID in order that the investor's right to arbitration can be implemented. There is a simple expedient used in many other BITs (e.g. most recent British BITs) to avoid this, namely by giving the investor (or the parties to the dispute) a choice between several forms of arbitration, including a non-administered system such as UNCITRAL arbitration, so that the right to arbitration will not be dependent on the host country.

[146] The same problem is posed by China-Pakistan.

[147] Art. 4 uses the following words: "any measure of nationalization or expropriation (hereafter referred to as 'expropriation') or any other measure having similar effect . . ."; and for all such measures compensation is due. Art. 8 provides for international arbitration for disputes arising about investments in China in the case of a dispute "involving the amount of compensation for expropriation". Clearly, this arbitration is not applicable for measures "having similar effect", so-called creeping nationalization. As the English text prevails over the Chinese and Spanish texts, this error – assuming this result was not intended – could have unpleasant consequences for the investor.

arbitration between the host country and the investor.[148] The expropriation article of AALCC Model A provides that "the determination of the compensation, in the absence of agreement . . ., shall be referred to an independent judicial or administrative tribunal or authority . . . or to arbitration . . .". Model B, Article 9, gives the investor right of access to courts and tribunals of the host country for review of expropriation measures. It requires local remedies to be exhausted prior to any other proceedings. The World Bank Guidelines require that expropriation measures are "in accordance with applicable legal procedures" and goes on to state that disputes, failing settlement through negotiation, "will *normally* be settled . . . through national courts or through other agreed mechanisms including . . . binding independent arbitration". Binding independent arbitration is not, therefore, according to the Guidelines, a *conditio sine qua non*. The absence of a firm right to arbitration is a regrettable hiatus in the protective armour provided by the Guidelines. Perhaps it was inevitable for the World Bank Group to be restrained by the terms of its own ICSID: the preamble of the ICSID Convention declares that member states are never, without their consent, bound to submit a dispute to arbitration (except only that, according to Article 25 of the Convention, a party having given its consent may not withdraw it unilaterally).

11. CONCLUDING REMARKS

At the end of this detailed review, having considered all the main elements of the expropriation clauses we found in the sixty-two treaties of our sample, several conclusions can be drawn.

The essential rule on expropriation in virtually all BITs is the same:

(i) the host state is entitled under certain circumstances to expropriate foreign investments;
(ii) it must pay compensation;
(iii) if there is a dispute about compensation, it can be submitted to independent arbitration.

The small print on matters such as conditionality, detailed methods of valuation, and convertibility and transferability of funds shows significant differences, and provisions in some BITs are unsatisfactory, but these are not

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[148] Many of the early BITs, in particular the German, Swiss and Chinese ones, made no provision for direct arbitration between investors and host country. In case of a dispute that could not be resolved by negotiations between the parties to the dispute, the investor had to rely on his home country to concern itself with his interests and seek a solution, if necessary, through intergovernmental arbitration. Cf. PETERS (1991) 119.

the most essential elements on which security of investment depends. The most essential element is a clause which safeguards the integrity of contracts made between the investor and the government of the host country, i.e. a *pacta sunt servanda* clause which purports to elevate an undertaking made by the host country vis-à-vis the investor to the level of international law, by converting it into an undertaking vis-à-vis the home country. Such a clause ensures that an investor can himself make the necessary arrangements with the host country on valuation, convertibility, transferability and anything else he deems important, and that he can be confident that such arrangements will stick, that they cannot be abrogated unilaterally by the host country on the strength of its sovereign powers.

We briefly touched on this subject in section 5.5 above, in the context of a clause requiring compliance with specific undertakings given by the host country. In view of the importance of the concept, both as a cornerstone of investment protection and as a newly emerging and still controversial principle of international law, some further clarification may be useful here.

The controversial aspect is, of course, the implication that companies should be treated as subjects of international law. The concept of a functional international legal personality for non-state entities (other than intergovernmental organizations, whose international legal personality is not in doubt), however limited it may be, still is difficult to accept for many states. Nevertheless, it has been accepted so far in at least two contexts: ICSID and UNCLOS. The ICSID Convention of 1965, now signed by more than 130 countries, was created especially for the purpose of allowing disputes between a state and a foreign investor to be settled by international arbitration. It made room for the investor in the house of international law, but only if the state in question wanted it. Clearly, this formula has been successful, as evidenced by the large number of states which participate in ICSID. Admittance to international law through ICSID is restricted to foreign investors or, in other words, to Transnational Corporations (TNCs) in UN parlance, or Multinational Enterprises (MNEs), according to OECD terminology.[149]

In Article 153(2)(b) of the 1982 UN Convention on the Law of the Sea, room was made for "juridical persons which possess the nationality of States

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[149] In practice a foreign investor is, almost by definition, a TNC or MNC or, more precisely, a company belonging to an international group of companies known as a TNC or MNC. Not all TNCs (MNEs), however, are necessarily foreign investors. Some may restrict their foreign activities to trade or other things, such as banking, and abstain from investing. The terms TNC and MNE are misleading, they suggest for a group of companies a single legal personality which does not exist. A TNC is *not* a corporation, but a group of corporations. An MNC need not be *multi*national but may be restricted to establishments in two or three countries.

Parties or are effectively controlled by them or their nationals, when sponsored by such States". Such juridical persons (companies) can enter into contracts with the International Seabed Authority for conducting deep seabed mining operations and under such contracts they will have rights and obligations governed by the Convention. Thus they will be subjects of international law. Disputes arising in this context may be submitted to the dispute settlement machinery specified in Articles 187 and 188 of the Convention, with one interesting exception which reveals the misgivings which existed when these provisions were negotiated: according to Article 190(2) a respondent state cannot be forced to appear in an action brought by a company. It may ask the sponsoring state to appear in lieu of the company, or it may arrange to be represented itself by a company of its own nationality. The message is clear: it is unseemly for a sovereign state and a mere company to appear in court as equals.

However, the procedures developed in order to 'elevate' an undertaking made by the host country vis-a-vis the investor to the level of international law, by 'converting' it into an undertaking vis-à-vis the home country, do not violate this taboo. Let us be precise. There is a contract between State A (the host state) and the investing company C (or its parent company). The 'undertakings' (i.e. obligations) assumed by A under that contract are subject to the law of the contract, which may be the law of State A, or it may be A's law together with the rules of international law, or it may have been defined in some other way; but it is unlikely to be international law as such. There is also a treaty (BIT) between A and C's home State B, according to which A must carry out the undertakings (i.e. obligations) which it has assumed vis-a-vis C. What does this mean? It does not constitute a *novatio* in the sense of Roman civil law. The *novatio* is a legal institution, in Roman law and in many legal systems derived from Roman law, whereby one obligation is substituted by another: in our case, if A's obligation to C were substituted by another obligation by A to B, with the concomitant extinction of A's obligation to C, it would have been a *novatio*. But this is not what has happened. The effect of the BIT clause is that a new obligation is created, an obligation by A to B, which does not extinguish the obligation by A to C. The A-to-B obligation is subject to international law. The A-to-C obligation is, in all likelihood, subject to another law, the law of the contract between A and C. Moreover, C cannot force B to enforce the A-to-B obligation. This is entirely at the discretion of B (there is a parallel here with B's right to give diplomatic protection to C against A; this, too, is a matter for B's discretion and is not a right which C

can invoke against B).[150] B can hold A to its obligation under the BIT, even if C does not want it. It is clear that B's claim against A is not the same as C's claim against A, even if the substantive content of A's obligation is the same in both cases.

One striking difference between the two legal claims is the applicable law. It is true that different applicable laws may be indicated in a contract or in a treaty to deal with different aspects of parties' relations or with different legal questions (so-called dépeçage, as recognized in the 1980 EC Convention of Rome on contractual obligations, which allows the parties to select the law applicable to the whole or a part only of the contract). However, we are here faced with two separate obligations (A-to-B and A-to-C) and the concept of dépeçage strictly does not apply. Neither is there merit in the argument that the dépeçage doctrine should be applied by analogy in this case, where there are two separate obligations with the same content. For in practice dépeçage often causes more problems than it solves, and it is therefore little used.[151]

Investors generally do not want to be dependent on their home government for the implementation of their legal rights against the host country. Home governments are often reluctant to take up the cudgels for their TNCs in foreign investment disputes. *Pacta sunt servanda* clauses in BITs which the home government may – or may not – invoke, will not solve all problems and will not satisfy or reassure all investors. Nevertheless, coupled with international arbitration,[152] they give a powerful boost to investors' confidence in the stability of investment terms and thus to the promotion of investment. Hence their importance.

Coming back now to the variations and discrepancies we noted in BIT texts, there are at least two good reasons why it would be desirable to eliminate all these small, relatively unimportant differences of detail between

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[150] Cf. the legal position between A, B and C when A seeks to enforce a CALVO clause against C. B is entitled under international law to extend its diplomatic protection to C against A and may require A to desist from its claim against C. But B is not obliged to do so. Under international law C is not entitled to diplomatic protection from B, even though (hypothetically) it may be so entitled under B's own law (however, few if any states give a right to diplomatic protection to their citizens). B may take action against A if it considers it to be in its own national interest, even if C does not want it. It is clear that B has a right of its own and does not merely represent C in the defence of C's legal rights. See SHEA (1955) and SCHRIJVER (1995) 166.

[151] See PETERS (1992) at 236 n. 9, and POLAK (1994) 25.

[152] A national court of the host country may find that the government's undertaking given to the investor was *ultra vires* or has been overridden by subsequent legislation. It is unlikely then to find in favour of the investor on the ground that he is entitled to direct application of the BIT clause. An international arbitral tribunal, on the other hand, is more likely to give priority to international law (including provisions of the BIT) over rules of municipal law which frustrate the object and purpose of the treaty.

one BIT and another. There is the purely practical question of treaty-making convenience: if roughly 150 states want to regulate mutual investment matters bilaterally, it takes about 11,000 treaties to achieve total coverage. About 1,300 treaty links already exist by virtue of some 900 BITs and 5 MITs so far concluded, or will exist once they have all entered into force, leaving 9,800 new bilateral treaties to be concluded. The man-power and time required for such a job and its cost make bilateral coverage unattractive. It could be done more efficiently by means of one global Multilateral Investment Treaty, or by a small number of regional ones such as the ASEAN MIT of 1987.

As perceived by capital exporting countries, the principal objection to the global approach has long been the danger of compromise solutions, thereby sacrificing important matters of principle. It seems to me, however, that the process of cross-fertilization between BITs in the last ten years and the dwindling of the more extreme NIEO and CERDS-based doctrines have by now reduced this danger so far that the advantages of a global solution now far exceed the disadvantages. The global approach of the Havana Charter of 1948, abandoned shortly thereafter, and again in the draft OECD Convention of 1967, also abandoned, should be tried once more.

The second reason is more important. A comparison of BITs shows that there is a virtual consensus between them on most of the important questions, even though there are differences of detail, as pointed out in this paper. These minor differences still stand in the way of the emergence of a body of customary law on investment. If they were eliminated by the adoption of a uniform set of rules and principles in a new global treaty or investment code, it would not be long before they, or most of them, would be recognized as customary international law which could be invoked also against (and by) states which were not party to that treaty.

We have reviewed in this paper the rules adopted by states to regulate expropriation of foreign investments. The rationale of these rules is to encourage foreign investment by reducing the risks attached to it. Protection of investments is a means to achieve the true purpose of the BITs: to promote investment. It is sometimes argued that the need for BITs is disappearing fast, firstly because the overriding priorities of environmental protection, in particular the dangers of climate change, require a reduction of industrial investment rather than its encouragement; and secondly because the danger of expropriation is a station we have passed, a policy of the days of cold war and command economies, no longer relevant at a time of world-wide privatization.

This seems a short-sighted view. While it is likely, and indeed desirable, that the rate of new industrial investment world-wide should slow down considerably in order to achieve the objectives of the 1992 Climate Change Convention and other environmental priorities, this will affect industrialized

countries more than developing ones, and industrial investment more than investment in infrastructure and services. There will still be a lot of investment in the future, most of all in restructuring industry so as to become 'sustainable'. As far as expropriation or other government measures with equivalent effect are concerned, it is true that in the last ten years there has been a sharp reduction in the use made by governments of this instrument of social and economic policy. But trends in government behaviour, whether towards liberal or planned economies, internationalist or isolationist policies, centralized or decentralized organization structures, and an infinite number of others, have always been unpredictable and often cyclical. We should use the present period of relative stability and non-confrontational relations between governments and industry, to create a solid international treaty system for the regulation of investment matters for the 21st century.

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BILATERAL INVESTMENT TREATIES
concluded or ratified by countries in South, East and South-East Asia since January 1, 1990
(according to information available as of 15.03.96)

This list contains 114 such treaties.[153] The 62 which were included in the sample used for the analyses described in this paper are marked *. The date of signature and the date of entry into force of each BIT is given below. The symbol nif [not in force] indicates that the treaty had not yet entered into force on the date stated. The source of treaty texts is given whenever available, either by reference to the national treaty series where the text has been published (see the list of abbreviations below), or by reference to *Investment Promotion and Protection Treaties* as compiled by ICSID and published by Oceana Publications Inc. (London, Rome and New York; indicated below by the symbol OP [Oceana Publications]). The text or publication details of some BITs – marked 'na' – are not yet available to the author and in some cases they appear not to have been published. Treaties listed twice are marked '+'.

	signed	in force	source
BANGLADESH			
Turkey	12.11.87	21.06.90	na
*Italy	20.03.90	20.09.94?	GU(so) 31.08.93; GU(so) 25.07.95; OP
Netherlands	01.11.94	nif 01.05.96	Trb 1995:10
CHINA			
Malaysia+	21.11.88	31.03.90	na
*Pakistan+	12.02.89	30.09.90	OP
Bulgaria	27.06.89	21.08.94	OP
USSR		21.07.90	nif 15.05.95na
Turkey	13.11.90	19.08.94	na
Papua New Guinea+		12.04.91	12.02.93na
Hungary	29.05.91	01.04.93	na
*Mongolia+	26.08.91	01.11.93	OP
Czechoslovakia	04.12.91	01.12.92	OP
*Portugal	03.02.92	01.12.92	Diario da Rep. 23.07.92
*Spain		06.02.92	01.05.93BOE 04.10.93/20.01.94
Uzbekistan	13.03.92	14.04.94	na
Bolivia	08.05.92	nif 15.05.95	na
Kyrgyzstan	14.05.92	nif 15.05.95	na
*Greece	25.06.92	21.12.93	na
Armenia	04.07.92	nif 15.05.95	na
*Philippines+	20.07.92	nif 15.05.95	OP
Kazakhstan	10.08.92	13.08.94	na
*Korea+	30.09.92	04.12.92	na
Ukraine	31.10.92	29.05.93	na

[153] One BIT (Korea-Thailand) was included in the list and in the sample for analysis, notwithstanding the fact that, marginally, it falls outside the date definition.

	signed	in force	source
*Argentina	05.11.92	01.08.94	OP
Moldova	07.11.92	01.03.95	na
Turkmenistan	21.11.92	06.06.95	na
*Vietnam+	02.12.92	01.09.93	OP
Belarus	11.01.93	14.01.95	na
*Laos+	31.01.93	01.06.93	OP
*Albania	13.02.93	nif 15.05.95	OP
Tajikistan	09.03.93	20.01.94	na
*Georgia	03.06.93	01.03.95	OP
*Croatia	07.06.93	01.07.94	OP
UAE	01.07.93	28.09.94	na
*Estonia	02.09.93	01.06.94	OP
*Slovenia	13.09.93	01.01.95	OP
Lithuania	08.11.93	01.06.94	OP
*Uruguay	02.12.93	nif 15.05.95	OP
Azerbaijan	08.03.94	01.04.95	na
Ecuador	21.03.94	nif 15.05.95	OP
Chile	23.03.94	nif 15.05.95	OP
Iceland	31.03.94	nif 15.05.95	na
Egypt	21.04.94	nif 15.05.95	na
Peru	09.06.94	01.02.95	na
Romania	12.07.94	nif 15.05.95	na
Jamaica	26.10.94	nif 15.05.95	na
Indonesia+	18.11.94	01.04.95	na
Oman		18.03.95	nif 15.05.95na
Morocco	27.03.95	nif 15.05.95	na
Israel	10.04.95	nif 15.05.95	na
Cuba	24.04.95	nif 15.05.95	na
HONG KONG			
*Netherlands	19.11.92	01.09.93	Trb 1993:10 & 109; OP
*Australia	15.09.93	15.10.93	ATS 1993 30; OP
*Denmark	02.02.94	04.03.94	Lovtidende C 1995:30
*Sweden	27.05.94	26.06.94	na
*Switzerland	22.09.94	22.10.94	na
Germany	31.01.96	nif 04.06.96	na
INDIA			
United Kingdom	14.03.94	06.01.95	TS27(1995) Cm 2797
Germany	10.07.95	nif 04.06.96	na
Netherlands	06.11.95	nif 01.05.96	Trb 1995:286
INDONESIA			
Singapore+	28.08.90	28.08.90	GG(ts)31.08.90 [re: Riau Island]
*Korea+	16.02.91	10.03.94	OP
*Italy	25.04.91	24.06.95	GU(so) 31.12.94

	signed	in force	source
Vietnam+	25.10.91	03.12.93	na
*Norway	26.11.91	01.10.94	OmFS 1995 p. 336; OP
Hungary	20.05.92	12.09.92	na
Sweden	17.09.92	18.02.93	na
Poland	06.10.92	01.07.93	na
*Australia	17.11.92	29.07.93	ATS 1993 19; OP
Egypt	19.01.94	nif 01.04.94	na
Malaysia+	22.01.94	nif 01.04.94	na
*Netherlands	06.04.94	01.07.95	Trb 94: 109 & 238
China+	18.11.94	01.04.95	na
Spain	30.05.95	nif 31.05.96	na
JAPAN			
*Turkey	12.02.92	12.03.93	37 JAIL (1994) p.189
KOREA			
Pakistan+	24.05.88	15.04.90	na
*Italy	10.01.89	25.06.92	GU(so) 23.01.92; OP
*Thailand	24.03.89	30.09.89	OP[154]
*Poland	01.11.89	02.02.90	OP
*Zaire	19.07.90		OP
*Romania	07.08.90		OP
*USSR	14.12.90	10.07.91	OP
*Indonesia+	16.02.91	10.03.94	OP
*Austria	14.03.91	01.11.91	BGB 03.10.91 p.2205; OP
*Mongolia+	28.03.91	30.04.91	OP
*Turkey	14.05.91		OP
*China+	30.09.92	04.12.92	na
Peru	03.06.93		OP
Lithuania	24.09.93		OP
*Spain	17.01.94	19.07.94	BOE 13.12.94 p.37487
Argentina	17.05.94	nif 01.06.95	na
LAOS			
*France	12.12.89	08.03.91	JO 1991 p.5793; OP
Thailand+	22.08.90		na
*China+	31.01.93	01.06.93	OP
*Australia	06.04.94	08.04.95	OP
MALAYSIA			
Italy	04.01.88	25.10.90	GU(so) 02.05.90
China+	21.11.88	31.03.90	na
*Denmark	06.01.92	18.09.92	Lovtidende C 1993:128; OP

[154] See note 153.

	signed	in force	source
Chile	11.11.92		OP
Poland	21.04.93	27.03.94	na
Indonesia+	22.01.94	nif 01.04.94	na
Zimbabwe	28.04.94		na
Argentina	06.09.94	nif 01.06.95	na
Spain	04.04.95	16.02.96	BOE 08.03.96
MONGOLIA			
*Korea+	28.03.91	30.04.91	OP
*Germany	26.06.91	nif 04.06.96	BGB 1996 II p. 50
*China+	26.08.91	01.11.93	OP
*United Kingdom	04.10.91	04.10.91	TS22 (1992) Cm 1959; OP
*France	08.11.91	22.12.93	JO 1994 p. 4469
BLEU	03.03.92	nif 29.03.93	na
*Italy	15.01.93	nif 01.05.95	GU(so) 27.12.94
*United States	06.10.94	nif 01.06.96	Senate Treaty doc. 104-10
Netherlands	09.03.95	nif 01.06.96	Trb 1995:156
*Denmark	13.03.95	nif 07.06.95	na
NEPAL			
*United Kingdom	02.03.93	02.03.93	TS55 (1993) Cm 2327; OP
PAKISTAN			
Korea+	24.05.88	15.04.90	na
Netherlands	04.10.88	01.10.89	Trb 1988:149; OP
*China+	12.02.89	30.09.90	OP
Spain	15.09.94	nif 26.04.96	na
United Kingdom	30.11.94	30.11.94	TS24 (1995) Cm 2794
Singapore+	08.03.95	04.05.95	GG(ts) 13.04.95
PAPUA NEW GUINEA			
*Australia	03.09.90	20.10.91	ATS 1991 38; OP
China+	12.04.91	12.02.93	na
PHILIPPINES			
Italy	17.06.88	04.11.93	GU(so) 12.07.90; amended in GU 58, 11.03.94
*China+	20.07.92	nif 15.05.95	OP
*Spain	19.10.93	21.09.94	BOE 17.11.94 p. 35272; BOE 05.10.95 p. 29253
France	13.09.94	nif 09.05.95	na
*Australia	25.01.95	08.12.95	ATS 1995 28
SINGAPORE			
Indonesia+	28.08.90	28.08.90	GG(ts)31.08.90 [re: Riau Island]
Vietnam+	29.10.92	25.12.92	GG(ts) 06.11.92

	signed	in force	source
Poland	03.06.93	29.12.93	GG(ts)10.12.93
Pakistan+	08.03.95	04.05.95	GG(ts) 13.04.95
Czech Rep.	08.04.95	nif 26.04.95	na
SRI LANKA			
*United States	20.09.91	01.05.93	OP; Senate Treaty doc. 102-25
THAILAND			
*Korea	24.03.89	30.09.89	OP[155]
Laos+	22.08.90		na
*Czechoslovakia	16.10.91		OP
Hungary	18.10.91		na
Vietnam+	30.10.91		na
*Peru	15.11.91	15.11.91	OP
Poland	18.12.92	10.08.93	na
Czech Rep.	12.02.94		na
VIETNAM			
*Italy	18.05.90	nif 01.05.95	GU(so) 26.03.94; OP
*Australia	05.03.91	11.09.91	ATS 1991 36; 30 ILM 1064 (1991); OP
BLEU	24.01.91	nif 29.03.93	na
Indonesia+	25.10.91	03.12.93	na
Thailand+	30.10.91		na
*France	26.05.92	10.08.94	JO 1994 p. 16222
*Switzerland	03.07.92	03.12.92	OP
Singapore+	29.10.92	25.12.92	GG(ts) 06.11.92
*China+	02.12.92	01.09.93	OP
*Germany	03.04.93	nif 04.06.96	na
*Denmark	25.08.93	07.08.94	Lovtidende C 1995:28
*Sweden	08.09.93	02.08.94	na
*Netherlands	10.03.94	01.02.95	Trb 94:82
Poland	31.08.94	nif 26.05.95	na

ABBREVIATIONS

ATS = Australian Treaty Series
BGB = (Austrian) Bundesgesetzblatt
BLEU = Belgo-Luxemburg Economic Union
BOE = Boletin Oficial de España
Diario da Rep. = (Portuguese) Diario da República
GG(ts) = (Singapore) Government Gazette (treaty series)

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[155] See note 153.

GU(so)	= (Italian) Gazzetta Ufficiale, supplemento ordinario
ILM	= International Legal Materials
JAIL	= Japanese Annual of International Law
JO	= (French) Journal Officiel
Lovtidende C	= (Danish) Lovtidende Part C (official treaty series)
OmFS	= Overenskomster med Fremmede Stater (Norwegian treaty series)
OP	= Investment Promotion and Protection Treaties compiled by ICSID and published by Oceana Publications, Inc. (London, Rome and New York)
Trb	= (Dutch) Tractatenblad (treaty series)
TS (1995) Cm	= Treaty Series (1995) (of the UK) with command paper number
UAE	= United Arab Emirates
USSR	= Union of Socialist Soviet Republics

DEMOCRATIZATION OF INTERNATIONAL RELATIONS AND ITS IMPLICATIONS FOR DEVELOPMENT AND APPLICATION OF INTERNATIONAL LAW*

M.C.W. Pinto**

The purpose of this paper is to explore whether 'democracy', a form of governance which evolved within a *community of human beings*, may be applied in the quite different context of a *collectivity of states*. In so doing, I shall refer to the context in which the call for 'democratization of international relations' has been presented; mention the elements of principle, which, I think, combined at a particular time in the post-colonial period to inspire this trend; explore the extent to which some aspects of democracy have, in fact, been transposed from the human level to that of the collectivity of States, with implications for treaty-making under the auspices of the United Nations, and for the functioning of international institutions; and suggest some areas in which the process of democratization, with limited goals, may continue in future.

1. THE CALL FOR 'DEMOCRATIZATION OF INTERNATIONAL RELATIONS'

For most of us, the term 'democracy' brings to mind the counting of votes, the aggregation of preferences for the purpose of deciding an issue, or election to public office, by sheer weight of numbers. It means the right of all persons of a prescribed age of maturity who are not affected by some disability prescribed by law, to participate in that decision or election. Of course, democracy does imply that the votes of a majority will prevail, but it also

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** Attorney of the Supreme Court of Sri Lanka; of the Inner Temple barrister-at-law; General Editor.

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, pp. 111-124

means a great deal more: it means, for example, the fair representation of interests in a legislative assembly; it means that in a representative democracy the people retain power over decisions that affect them through holding regular elections to representative office; it means constitutional protection of minority positions; and it means a separation of governmental functions to provide 'checks and balances', ultimate authority being vested in an independent judiciary with power to determine whether governmental action accords with the constitution or fundamental law.[1]

But it was a vision of democracy as the triumph of numbers – of the views, and thus the projects of the great majority of the world's peoples – that inspired the developing countries and the Non-aligned to call for the 'democratization of international relations', and continues to do so today. Thus, at the first meeting of the United Nations Conference on Trade and Development (UNCTAD) in 1964, the *Group of 77* insisted that the UNCTAD Board take decisions by a two-thirds majority, since they attached "cardinal importance to democratic procedures which afford no position of privilege in the economic and financial, no less than in the political spheres". 'Democratization of international relations' has been a stated goal of the *Non-aligned Movement* at least from the time of its Lusaka meeting in 1970,[2] and was re-iterated forcefully in its Jakarta message in September 1992.[3] The idea that democracy should prevail "within the family of nations" received endorsement from the Secretary-General of the United Nations in his *Agenda for Peace* in 1993,[4] while "expanding democracy in relations among States and at all levels of the

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[1] The following passage from a work by CHARLES BEITZ captures admirably the essence of the democratic process:

> ". . . the central virtue of democratic forms is that, in the presence of a suitable social background, they provide the most reliable means of reaching substantively just political outcomes consistently with the public recognition of the equal worth or status of each citizen. Democratic forms succeed in achieving this aim . . . less because they aggregate existing preferences efficiently than because they foster a process of public reflection in which citizens can form political views in full awareness of the grounds as well as the content of the [possibly competing] concerns of others . . . we must understand [democracy] as a deliberative mechanism that frames the formation and revision of individual political judgments in a way likely to elicit outcomes that treat everyone's interests equitably". *Political Equality: an Essay in Democratic Theory* (Princeton University Press, 1989) 113.

For a survey of aspects of the attractiveness and viability of modern democracy, see Professor DUNN's masterly concluding essay in JOHN DUNN (ed.), *Democracy, the unfinished journey 508 B.C. to A.D. 1993* (Oxford University Press, 1993) 239 et seq.

[2] "The democratization of international relations is therefore an imperative necessity of our times." (paragraph 7)

[3] Paragraph 5.

[4] Paragraphs 19, 82.

international system" is suggested as an aspect of a fifth "dimension of development" in the Secretary-General's *Agenda for Development* issued in 1994.[5]

It is important to bear in mind that democracy evolved as a form of governance among natural persons, human beings within a discrete legal and political unit. We may search in vain for any suggestion that 'democracy' prevailed or should be adopted as the constitutive principle in the world of states before the decade of the 1960s, in retrospect, the decade of decolonization. The term is not used in such a context – or, for that matter, in any context – in the Charter of the United Nations nor the Statute of the International Court of Justice, nor until recently was it used in the constituent instrument of an international organization, or, for that matter, in any multilateral convention. No treaty seeks to secure for states the equivalent of the right of the citizen described in Article 25 of the *International Covenant on Civil and Political Rights*. It would thus seem impossible to derive the prevalence of an 'inter-state' democracy from the early practice of states.

2. ORIGINS IN PRINCIPLE

However, four elements of such a concept did exist unsynthesized at the inter-state level. Thus, the doctrine of *sovereignty*, developed among European thinkers from the fifteenth century on, would eventually strengthen units of the Holy Roman Empire in the exercise of their rights, recognized by the treaty of Westphalia, to form alliances with 'foreign' powers, or to make war. A second doctrine, that of the *equality of states*, had its roots in Christian theology. It held that, as human beings were equal before God, and were entitled to be treated as equal, so, by analogy, were states.[6] Apparently resting

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[5] Paragraphs 116-136, esp. paragraph 131.

[6] "Since men are naturally equal, and a perfect quality prevails in their rights and obligations, ... Nations composed of men . . . are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom."

VATTEL, *The Law of Nations* (trans. Joseph Chitty, London, 1834) paragraph 18. The *Declaration on the New International Economic Order* (1974) recalls the Charter principle of the 'sovereign equality of States' and urges:

"Full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries."

Given the perceived levelling potential of the 'oil weapon', the step from juridical equality to participatory equality seemed a short one. A sister resolution adopted by the General Assembly

on metaphysical foundations, it generated what might be called an 'anthropomorphic' view of the state – the state in the image of man. By the middle of the nineteenth century the doctrine had gained such currency that Chief Justice MARSHALL could declare:

> "No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights."[7]

The doctrines of sovereignty and of "the equality of . . . nations large and small" – later to be mentioned separately or run together in the Charter of the United Nations, which also refers to "the sovereign equality of all its members" – were not sufficient, however, to generate the idea of transposing democracy to the inter-state level. Notions of sovereignty and equality in 1815 gave no state the *right* to attend the Congress of Vienna, nor did any State enjoy such a right of representation, much less of participation, at any of the great, essentially European conferences of the nineteenth century. Attendance then, was by invitation only; and whether an invited state would be asked for its views, or merely requested to ratify a decision, was a matter determined by a dominant group of 'Great Powers'.[8] Although the unanimous consent of all states was required for the adoption of a proposal, the intent and effect of the

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in the same year, the Charter of Economic Rights and Duties of States (1974) declared:

> "All States are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making process . . .."

On the relationship between 'equality' and 'participation' in this context, see the 'Analytical Study' by UNITAR, annexed (Annex III) to a Report of the UN Secretary-General entitled *"Progressive development of the principles and norms of international law relating to the New International Economic Order"* (A/39/504/Add.1), which observes:

> "There are two aspects to the question of participation: access, or taking part in the process of decision-making, and weight or the actual part taken in this process . . .. Obviously, equality applies to access. But neither instrument [Declaration on the NIEO, Charter of Economic Rights and Duties of States] specifies the modalities of 'full and effective participation', i.e. whether it necessarily implies 'equal participation' in the sense of equal weight in the decision-making process." (paragraphs 107-8)

[7] *The Antelope*, 10 Wheaton (US Sup. Ct.) Reports 66, 122.

[8] As one commentator has observed:

> ". . . the Congress of Vienna as a Congress of all Europe was never constituted. It remained a Congress of the Great Powers, who for their convenience had summoned the smaller Powers of Europe to meet them. The idea of a constituent assembly, imagined by some, . . . was found to be impossible. The large number of small States made such an assembly impracticable in any case. But the wishes of the masters of Europe were from the first clear and unbending on this point. They considered themselves as 'Europe', and at the Congress they asserted successfully the ascendancy of the Great Powers. The smaller States were only to be admitted at such times and on such terms as suited those who had great resources and armies at their command."

C.K. WEBSTER, *The Congress of Vienna 1814-1815* (Oxford University Press, 1919) 77.

rule was to enable a small minority of Great Powers to protect their interests. The dissent of a small State then, as now, was of little consequence.[9] Democracy in its modern form had first to be adopted more widely within each state before thought of its application to the collectivity of states could emerge. Moreover, the number of recognized States was relatively small, and interacted according to a strict hierarchy, notwithstanding formal acknowledgement of a principle of equality.

So it was that the effects of another principle had to be felt before the demand for democratization of international relations could gather momentum: the principle of *equal rights and self-determination of peoples*. Elevated from the political to the legal plane not without controversy, and gathering support inspired by President WILSON's Fourteen Points,[10] this principle too found a place in the Charter of the United Nations. Under its influence the world's 'population' of States swelled to unimagined proportions.

But the doctrines of sovereignty and equality, acting upon the large number of states emerging in the decades following World War II in the era of decolonization could still not provide the critical mass of principle needed to generate the demand for democracy in international relations. The final additive was the principle of *distributive justice* that inspired those emerging countries. In it were subsumed such ideas as the general duty of states to cooperate to 'correct inequalities and redress existing injustices', and 'preferential and non-reciprocal treatment for developing countries'. Many of the so-called new states had been led to independence by politicians who had absorbed Marxist philosophy in the universities of colonial capitals. Active in the international arena, they called for compensation for the exploitation of their countries by the former imperial powers. Their vision of a future world order could be expressed succinctly through one of the central tenets of Marxism which also carried substantial moral, if not religious authority: *from each according to his ability, to each according to his needs*.[11]

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[9] As one authority puts it, "Unanimity was possible only by the majority giving way to the minority". JAMES LORIMER, *The Institutes of the Law of Nations*, Vol. 1 (London, 1883) 47.

[10] LENIN too, advocated the principle of self-determination for quite different reasons.

[11] Although it is impossible to assess the scope of the impact of this epigram from MARX's *Critique of the Gotha Programme*, there can be little doubt that it produced a resonance in the minds of intellectuals around the world. For MARX, true communism was incompatible with any form of exchange, and what distinguished communist society from others attempting redistribution of wealth, goods and power, was the complete disappearance of exchange-value that would occur in the final stages of communism when the state itself would have no function and 'wither away'. The epigram has affinities with the basic tenets of all of the world's religions, and exercised a similar mass appeal notwithstanding its utopian character, particularly in countries subject to colonial rule or other exploitative regimes.

3. DEMOCRACY AND THE COLLECTIVITY OF STATES

When the representatives of states call for the 'democratization of international relations', they are likely to do so influenced by what we might call the 'anthropomorphic' view that the state is a person in a community composed of other such 'state-persons'. On that view, such state-persons are the repositories of 'democratic' rights and duties, rather than the natural persons (the true *demos*) of which the state-persons are composed. The method of choice for the systematic codification of international law today is the plenipotentiary conference of these 'state-persons'. Such a conference, at which legal rules will be proposed, deliberated, and adopted or rejected, does bear a superficial resemblance to a national legislature. Most often convened today under the auspices of the United Nations, the conference is likely to have before it as a basic text draft articles formulated by a broadly representative group of agreed composition, the International Law Commission, for example, or an intergovernmental negotiating committee. What in Vienna in 1815 might have been the privilege of being represented at the invitation of a Great Power, and of approving some predetermined result, has evolved at least since the Vienna Declaration on Universal Participation (1969), into a full *right of participation* by every state-person in the 'legislative' process, subsuming the right to be represented, to have access to information, to be heard on the issues, and to cast a vote equal in weight or value with the vote of every other State-person, and have the views of the majority prevail (one-state-one-vote/majority rule OSOV/M).

The modern 'legislative' conference has other 'democratic' features aimed at ensuring that proposals are discussed fairly and openly, that every effort is made to reach consensus, and, when a decision must be taken by a vote, that procedural and substantive rules agreed to in advance will determine the outcome. In general, votes on procedural issues are to be decided by a simple majority, while votes on substantive issues might be decided by unanimity, consensus or prescribed majorities depending upon the level of their importance. At least since the 1969 Law of Treaties Convention (Article 9), a majority of 2/3 of those present and voting would be required unless, by the same majority a different rule were to be adopted. All such rules are aimed, in general, at safeguarding minority positions. Protection of minority positions

is also the purpose of providing for 'cooling-off' periods to be used for consultations aimed at reconciling conflicting views.[12]

While the foregoing procedural features of a modern treaty-making conference may to some extent mirror those of a national legislature in their democratic flavour, the resemblance is superficial, and many other features of the international legislative process find no domestic parallel. To begin with, the representatives in a national legislature are *elected* directly by the people (the true *demos*) or by the people through a system of intermediate steps known and accepted by them in advance. By contrast, the representative of a state at a plenipotentiary conference will have been *appointed* by some organ of a state (a minister or a president). The connection between conference representative and people could well be remote, if it were to exist at all, notwithstanding the elected status of the appointing authority. Moreover, the legislative process lacks a system: there is no regular assembly, and no legislative programme, except possibly the work schedule of the International Law Commission, and the Sixth Committee's annual observations on priorities. Conferences are convened at the initiative of one or more states motivated essentially by their own policy imperatives.

Within a democracy of natural persons the votes of the majority are likely to be decisive as to the enactment of a law, and the organized forces of the state acting in accordance with the law of the land will begin to supplement traditional social control in securing immediate compliance with it. At a plenipotentiary conference, the votes of representatives, in effect, bind only the conference, as the initial step in the lengthy process of deliberation required before it could become binding on participating states. A collectivity of

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[12] See generally the Rules of Procedure of the Third United Nations Conference on the Law of the Sea (UNCLOS), A/CONF.62/30/Rev.3 (1974) Chapter VI; and of the United Nations Conference on Environment and Development (UNCED) A/CONF.151/2 (1992) Chapter VII. The decision-making bodies of international organizations adopt similar procedures. See for example article 161, paragraph 8 of the *UN Convention on the Law of the Sea*, on the Council of the International Seabed Authority; and Article 7 of the *UN Framework Convention on Climate Change* on the Conference of the Parties. Compare Articles 15 and 16 of the latter concerning amendment of the Convention and its annexes.

As the UNITAR 'Analytical Study' referred to (note 6 above) concedes: "It cannot be gainsaid . . . that the spirit of the majority system, especially on the international level and between sovereign States, is against the complete disregard of the right of the minority or its exclusion from the process of decision-making altogether as if it did not exist. The spirit of the majority system rather favours the debating of issues of common interest and trying to find generally acceptable solutions and different ways and means of accommodating the interests of all the segments present, so that the majority votes for 'railroading' or imposing a decision are only used as a last resort when a deadlock is reached and there is no other way of breaking it" (paragraph 14).

sovereign and equal state-persons, of widely disparate capabilities and levels of political influence and lacking an effective over-arching 'law of the land', offers a context infinitely more tolerant of arbitrary behaviour than does the collectivity of natural persons. For the efficient implementation of treaties the resources of the powerful – always a very small minority – are often essential. Safeguards for minority positions at the legislative stage become of critical importance, and the weight of majorities less significant. Minority safeguards in treaty-making – permission to 'opt out' of certain obligations, to make reservations, to withdraw from a treaty and, above all, to remain outside the ambit of a treaty by refraining from ratifying or approving it – these recognized liberties of state-persons, are not among the attributes of natural persons within a democratically organized society, who are at all times subject to the law of the land and have little scope for avoiding or modifying their legal obligations unilaterally.

Thus, while the democratic OSOV/M rule now appears entrenched as a constitutive principle of the international legislative process, minority safeguards ensure that its effects are not felt beyond the conference stage, and there is little that would compel compliance with the outcome – the text of the treaty adopted by the conference – unless and until specific democratically motivated procedures are voluntarily undertaken at the *national* legislative level. And here we may note two apparent contradictions in connection with democratization, viewed in relation to the treaty-making aspect of international relations: (1) the principle of sovereign equality, which was a powerful factor in winning for all states the democratic right to participate in treaty-making, is also the basis of the right of every state to reject the very treaty it may have helped to formulate; and (2) while democratic forms, observed at the *inter-state level* may produce a treaty text acceptable to the generality of states, democracy operating at the *national level* may result in rejection of the treaty by individual states whose participation in the treaty is of critical significance to its successful implementation. The importance of these observations is that they highlight an area upon which efforts at democratization of international relations might usefully be focussed: effective articulation of democracy at the *inter-state level*, with democracy at the *national level*.

These contradictions are of particular relevance in connection with the efficacy of treaties which, concluded in accordance with 'democratic' procedures, nevertheless establish organizations in which *some Member States are accorded preferential rights*. These organizations have in common that they are charged at least in part, with managing the transfer of resources from a small minority of affluent industrialized countries (perhaps 10 in a state-person 'population' of 185, or less than 5%), for what may be called 'community

purposes', primarily (1) the maintenance of international peace and security, and (2) raising the living-standards of the poor countries. Thus, organs like the Security Council of the United Nations and the Executive Directors of the World Bank and the International Monetary Fund must adopt decisions with regard to resource transfers that are to take effect immediately, or without renewal or confirmation of consent in each case by the transferors' national legislatures. Accordingly, the parent treaty in each case provides the transferor's representatives with safeguards: representation is assured on decision-making bodies of limited composition, otherwise re-constituted through periodic elections; and they are granted preferential voting rights such as the right to forbid or veto a decision, and voting strength according to level of contribution. To the transferor state, its national resources – whether in the form of funds, technology, expertise or units of its armed forces – are assets as much under its permanent sovereignty as its natural resources. If substantial transfers are to occur without recourse to the national legislature – we might refer to them as 'automatic transfers' – the latter would require as a condition of the state's joining the treaty, that its minority position be granted appropriate constitutional safeguards. To those state-persons whose resources are to be so transferred, democracy at both national and inter-state levels seem to require provision for such constitutional safeguards. To the potential recipients of resources, however, such measures, by suspending the operation of the OSOV/M rule, appear to distort, if not to pervert democratic forms, and, moreover, to reflect and perpetuate the inequality of states, rather than their equality.

On the other hand, the texts which created organs like the Security Council of the United Nations or the Executive Directors of the World Bank and the International Monetary Fund were adopted at conferences which by contemporary standards were based on universal participation and the OSOV/M rule, so that their 'democratic' origins could scarcely be questioned. There can be little doubt that, at such conferences, and in the subsequent ratification or accession procedures, the representatives of the majority, the less developed countries, made a choice, viz. that, in the circumstances, co-operation whereby some aspects of 'equality' might appear to be sacrificed, was preferable to no co-operation at all. Nor would it appear that such a choice is inconsistent with the freedom that characterizes democracy. For example, last year, an overwhelming number of States voted to convert the voting system of an organ created by treaty – the Council of the International Sea-bed Authority – from one based on equality, to one that conferred preferential voting rights on some industrialized countries. This safeguard was offered so that national democracies of the latter, which had hitherto exercised their right to remain outside the treaty, would then be persuaded to join. Once again the prospect that the

industrialized countries might withhold valued support was sufficient to persuade the majority to accord them the minority safeguards requested. If this interaction was inconsistent with democratic principles, it certainly did not appear from the tone or content of statements welcoming the amendment which was adopted.

In what may be the first treaty ever to prescribe, in terms, the application of 'democracy' in inter-state relations, the *1992 Rio Convention on Biological Diversity* requires that the financial mechanism foreseen in Article 21 "shall operate within a *democratic* and transparent system of governance". A sister *Convention on Climate Change*, perhaps less ambitious, provides that its financial mechanism "shall have an equitable and balanced representation of all Parties within a transparent system of governance".[13] The constitution of the Biodiversity Convention's financial mechanism would be the first attempt to produce an authentic interpretation of what democracy means in its application to inter-state relations.

4. EXPANSION OF DEMOCRATIZATION

It is evident then, that many aspects of the participatory element of democracy have already been transposed from the human to the state level. Fundamental differences between a society or community of human beings, and the collectivity of states make it extremely unlikely that an important feature of that system - OSOV/M - could ever be comprehensively applied among states. However, there are other areas in which the process of democratizing international relations could make substantial progress. The broad objective of such efforts should be to allow the wishes of the human community - the true *demos* - behind the apparatus of the state more effectively to influence decision-making at the international level.

To that end, the current practice among many states whereby the effective leadership of a delegation to a treaty-making conference is left to appointed[14]

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[13] *UN Framework Convention on Climate Change*, Article 11, paragraph 2, and Article 21, paragraph 3.

[14] LORIMER long ago observed: ". . . the leading objection to treaties as a source of the law of nations, as well as the chief cause of their untrustworthiness as separate transactions, consists in the necessity which exists, or is supposed to exist, for their being negotiated and even ratified by the executive independently of the legislative factor in national affairs, and the consequent risk of their failing to represent the national will . . . the international effect of this supposed necessity, is to reduce treaties negotiated by constitutional States very nearly to the level of those negotiated by despotic States". LORIMER, op. cit. n.9, pp. 42-3.

diplomatic or technically qualified persons, rather than the elected representatives of the people, should be examined. Consideration should be given to early and comprehensive (rather than merely formal) involvement in the treaty-making process of *members of the national legislature* familiar with the subject-matter of the treaty, reflecting where possible a multi-party approach. We may even look to a time when treaty-making might have become so institutionalized that a state would hold special elections to determine who should represent the *demos* at a conference. Of particular importance would be the routine inclusion in treaty-making procedures, of *formal commitment by states concerning timely national consideration and action upon treaty texts that have been adopted, coupled with institutional monitoring and reporting requirements regarding action or lack of action on the matter*[15]. Such measures could promote the better articulation, now needed, between democracy at the inter-state level and democracy at the level of the national legislature.

With the aim of reaching the people – the true *demos* – and mobilizing opinion, democratic features related to the *availability of information* should be maintained. This would apply to all fora where decisions are to be taken, such as treaty-making conferences or the work of established organs, but would be of special relevance to the work of organs of limited membership. Such democratic features would include 'transparency', 'openness', and 'accountability', given effect to *inter alia* through the availability of records of debates in as much detail, and in as timely a manner as possible, subject to the demands of economy. Video-conferencing facilities and interpretation services have developed to an extent that makes it feasible to hold at least some phases of multilingual conferences without the expense and other resource-related inconveniences of overseas travel.

The aim of presenting the sense of public opinion as distinct from governmental policy on issues could also be served by incorporating into the treaty-making process at both the national and international level, procedures for *consulting non-state entities*, in particular, legal persons such as commercial corporations, as well as other bodies generally referred to as 'non-governmental organizations'.

'Regional representation' or representation on a geographical basis, incorporated in the UN Charter itself as an article of faith, should be reconsidered in the light of some inherent weaknesses, and, to the extent possible, refined. The extent of differentiation of constituencies to be represented, such

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[15] Distinguished precedents exist: see the procedures for dealing with Conventions adopted by the International Labour Conference, *Constitution of the International Labour Organisation*, Articles 19, 22, 30.

as sub-regions, which now varies greatly depending on the region, should be generalized. *Greater differentiation of constituencies* would also make more effective the prevailing practice of *'rotation'* of representative capacity. If, on the other hand, some states were to find representation on a regional basis less than satisfactory, representation of a group that crosses geographical lines should be recognized.

Permanent membership and preferential voting rights conferred on representatives in organs charged with managing the 'automatic transfer' of resources from their states, are now among the safeguards of minority positions inherent in democracy as it prevails among state-persons. Additional *categories of criteria for permanent membership* may need to be recognized, such as size of population and size or future potential of an economy. Where effective regional integration exists among states at the national level, as within the European Union, the basis on which permanent membership of the group as such could be admitted should be studied, with a view to its more generalized application. Expansion of permanent membership and, where appropriate, conferment of preferential voting rights should, however, be balanced by a proportionate *increase in the numbers of non-permanent or periodically elected members*, to maintain undiminished the scope and variety of participation in the work of the organ concerned.

5. AN INDEPENDENT JUDICIARY

One of the major achievements of the international community in the twentieth century, and a landmark in progress toward democratization of international relations, has been the establishment by treaty of the Permanent Court of International Justice (PCIJ) and its successor, the International Court of Justice. Although the International Court of Justice is an integral part of the United Nations, and its budget within the control of the General Assembly (Statute, Articles 32, 33), the Court is conceived along the lines of an independent judiciary in a democratic system of governance: many provisions of Charter and Statute seek to make the Court 'separate' in the exercise of its powers, and not subject to control by the electors who place the judges in office – the representatives of the State-persons members of the General Assembly and the Security Council. Moreover, the seat of the Court is The Hague, physically removed from the headquarters of its parent institution, New York, and its politically charged atmosphere.

Neither the Charter nor the Statute of the Court expressly contemplate procedures for the purpose of having the Court declare whether or not the actions

of an organ of the United Nations are in conformity with the Charter.[16] On the other hand, its position as the "principal judicial organ of the United Nations" (Article 92 of the Charter); its general jurisdiction under Article 36 (1) of its Statute to deal with "all cases which the parties refer to it"; the scope of the advisory jurisdiction granted to it pursuant to Article 65, whereby it may address "any legal question at the request of whatever body may be authorized . . . to make such a request", and some of the Court's own pronouncements (notably in the *Namibia*, *Lockerbie* and *Bosnia (Provisional Measures)* cases in all of which decisions of the Security Council were discussed), may indicate that the Court would not be precluded from reviewing action taken by an organ of the United Nations in the light of the Charter, provided there were valid jurisdictional grounds for doing so.[17]

It may be expected that a process of democratization should lead to consideration of the composition of the Court itself. Its Statute contains no indication of the "main forms" of civilization or the "principal" legal systems which, by Article 9 are to be "represented" on the Court, nor would it seem feasible for it to have done so. However, if "civilizations" or "legal systems" are related to religious origins, as is frequently the case, it is obvious that important civilizations and legal systems are either not represented or are disproportionately represented in the Court as presently composed.

Thrown back upon the more readily applicable principles of equity and geography as the practical means of giving effect to Article 9, it would seem difficult to maintain that a membership of 15 judges, thought to be adequately 'representative' in 1921 when the League's membership was less than 30, should still be considered adequately representative of a United Nations membership of nearly double that number in 1946, and more than six times that number today. Moreover, if on the International Law Commission a membership of no less than 34 is currently considered necessary for representation of 'civilizations' and 'legal systems', it is difficult to see how a membership of 15 is sufficient for the same purpose on the Court. By contrast,

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[16] A proposal at the San Francisco Conference to confer on the Court a general power to resolve disputes concerning interpretations of the Charter, could not be adopted. UNCIO Docs. Vol. 3, p. 633.

[17] For a review and analysis of the arguments for and against recognition of a power of judicial review in the International Court of Justice, see LUCIUS CAFLISCH, 'Is the International Court entitled to review Security Council Resolutions adopted under Chapter VII of the United Nations Charter?', paper presented at the *Qatar International Law Conference* 22-5 March 1994. See also a paper presented at the same Conference by THOMAS M. FRANCK, 'The political and judicial empires: must there be a conflict over conflict-resolution?', and G.R. WATSON, 'Constitutionalism, Judicial Review, and the World Court', in 34 *Harvard International Law Journal* (1993), 1-46.

the International Tribunal for the Law of the Sea is to be composed of 21 judges, while in at least two regional courts, viz. the European Court of Justice and the European Court of Human Rights, each member state may appoint a judge.

A process of democratization would seem to indicate the desirability of a *modest expansion of the Court's membership from 15 perhaps to 23*, in order to make it more 'representative' of the UN's expanded membership. Although not an ideal solution,[18] such a course may be needed *inter alia* in order to balance the prospective increase in the number of permanent members of the Security Council which will probably mean a corresponding increase in the number of informally 'reserved' seats on the Court, reducing still further the number of places to which the generality of states could be elected. In addition, a *new 'gentlemen's agreement' should seek to promote opportunities for all States* to have their qualified candidates elected to the Court, and abandonment of practices that restricted those opportunities in the past. Thus, states could agree to show restraint in the matter of successive candidacies of sitting judges, or of candidacies of their other nationals to succeed them; and a state could agree not to 'claim' for one of its nationals the remainder of a term of a judge of its nationality who died in office (a practice that seems inconsistent with the letter and spirit of the Statute), if one of its nationals in the past completed a full nine-year term.

[18] There is considerable weight in arguments against such an increase, including that of operational inefficiency. However, it is difficult to avoid the conclusion that such an expansion would help maintain the Court's representational character, since pressure for informal 'reservation' of seats is not likely to diminish. It would, of course, be necessary to convince current and future permanent members of the Security Council of the fairness implicit in expansion.

SOME CRITICAL OBSERVATIONS ON THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY

Ando Nisuke*

1. INTRODUCTION

By the end of its forty-seventh session in July 1995, the International Law Commission (hereafter ILC) had adopted some fifty-six draft articles on the topic of State Responsibility.[1] The first thirty-five articles, which had been provisionally adopted on first reading in 1980, constitute Part One of the draft and deal with "the origin of international responsibility".[2] The next fourteen, which have been provisionally adopted so far, constitute Part Two and deal with the "content, forms and degree of international responsibility".[3] In addition, at its forty-seventh session the Commission adopted seven more draft articles which should be included in Part Three dealing with "Dispute settlement procedures".[4]

The draft as a whole has not been completed, despite the fact that more than forty years have passed since the Commission started its work on the topic in 1955.[5] However, considering that Part One forms the basis of the entire draft and that all of the thirty-five draft articles of Part One have been adopted with commentaries, it may be worthy of some observations.[6] This paper attempts to point to some problems concerning the basic premises as

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* Professor of International Law, Faculty of Law, Kyoto University, Japan.

[1] *Report of the International Law Commission on the Work of its Forty-Seventh Session 2 May-21 July 1995*, GAOR, Fiftieth Session, Supp. No. 10 (A/50/10) paras. 235, 340-342 and 364. The number (56) includes Article 11 of Part Two for which no commentary has been adopted yet. It does not include Articles 1 and 2, which are attached to the Annex to Part Three.

[2] Ibid., para. 232.

[3] Ibid., paras. 232 and 235.

[4] Ibid., paras. 233, 236 and 364.

[5] YbILC 1955, Vol. I, p. 190 para. 2.

[6] In fact, a number of observations have been published. See, for example, M. SPINEDI & B. SIMMA (Eds.), *United Nations Codification of State Responsibility* (1987).

Asian Yearbook of International Law, Volume 5 (Ko Swan Sik *et al.*, eds.; 90-411-0375-9
, pp. 125-144

well as the content of the draft articles of Part One, but before discussing the issues, a quick look into the history of the draft seems to be in order.

2. A SUMMARY HISTORY OF THE DRAFT ARTICLES

When the ILC adopted a list of fourteen topics for codification in 1949, "State Responsibility" was included among them together with "Treatment of Aliens".[7] F.V. GARCÍA-AMADOR, who was nominated as Special Rapporteur for the topic of state responsibility in 1955,[8] submitted six reports before his membership of the Commission expired in 1960.[9] Of particular interest were the revised draft articles attached to his last report, entitled "Responsibility of the State for injuries caused in its territory to the person or property of aliens".[10] The draft consisted of twenty-seven articles and, as the title suggested, it comprised both substantive rules concerning the treatment of aliens by a state and procedural rules concerning implementation of responsibility which results from a state's violation of those substantive rules. GARCÍA-AMADOR's approach to the topic was a traditional one in that it dealt only with the responsibility of a state for violation of its obligations with respect to the treatment of aliens in its territory.[11]

For a variety of reasons, the ILC did not spend much time on discussing GARCÍA AMADOR's reports. In 1962, the Commission established a sub-committee of ten, headed by R. AGO, whose mandate was to discuss general questions relating to its work on the topic of state responsibility and to report to the Commission's next session about the directives to be given to a new Special Rapporteur.[12] During the sub-committee's discussions, some members emphasized that the study on the topic should begin with a well-defined sector such as state responsibility for injuries to aliens, while others argued that the issue of specific rules concerning the treatment of aliens should not be confused with the issue of general rules on state responsibility resulting from a violation of any substantive rule of international law and that the Commission

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[7] YbILC 1949, p. 190 para. 69.
[8] YbILC 1955, Vol. I, p. 190 para. 2.
[9] YbILC 1956, Vol. II, p. 173 et seq.; YbILC 1957, Vol. II, p. 104 et seq.; YbILC 1958, Vol. II, p. 47 et seq.; YbILC 1959, Vol. II, p. 1 et seq.; YbILC 1960, Vol. II, p. 40 et seq.; YbILC 1961, Vol. II, p. 1 et seq.
[10] Ibid. 1961, Vol. II, p. 46 et seq.
[11] For the past codification attempts attached to GARCÍA-AMADOR's initial report, see YbILC 1956, Vol. II, p. 176-180 and 221 et seq.
[12] YbILC 1962, Vol. I, p. 45 paras. 1-5 (637th meeting); YbILC 1963, Vol. II, p. 227.

should deal with these general rules.[13] In the end the latter argument prevailed, and on the basis of the sub-committee's report the ILC decided to adopt a new approach to the topic of state responsibility.[14] It marked a drastic departure from the traditional approach endorsed by GARCÍA-AMADOR's draft.

The characteristics of the new approach may be summarized as follows:
(1) The ILC should codify general rules governing international responsibility of a state, that is, the responsibility arising from a violation, not of specific rules such as those related to the treatment of aliens, but of any rule, conventional or otherwise, of international law. Those general rules mean "the rules which govern all the new legal relationships that may follow an internationally wrongful act of a state, regardless of the particular sector to which the rule violated by the act may belong";[15]
(2) The Commission divided all the rules of international law into two types – 'primary' or 'secondary' rules – and decided that it should deal exclusively with secondary rules in codifying the general rules on state responsibility. Primary rules mean those rules which impose specific obligations on a state in one or another sector of inter-state relations, while secondary rules are the rules which are concerned with determining the legal consequences of failure to fulfil obligations established by primary rules;[16] and
(3) accordingly, the draft to be codified should relate only to the responsibility of a state for internationally wrongful acts, that is, the responsibility of a state for a violation of primary rules. In other words, the draft would exclude the question of liability for injurious consequences arising from internationally lawful acts.[17]

3. SOME PROBLEMS OF THE DRAFT ARTICLES

3.1. Problems concerning Basic Premises

The above three characteristics of the new approach may be regarded as 'basic premises' on which the ILC has developed its codification work. However, in this writer's view, all the three premises are not free from problems.

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[13] YbILC 1963, Vol. II, pp. 227-228 para. 4.
[14] Ibid., p. 228 para. 6.
[15] YbILC 1973, Vol. II, p. 170 para. 42.
[16] Ibid., p. 169 para. 40.
[17] Ibid., p. 169 para. 38. As a matter of fact, the ILC decided in 1979 to take up the matter for codification and has been working on it since.

3.1.1. General Rules of Responsibility and Responsibility for Specific Issues

It is true that the traditional rules of international law concerning state responsibility have evolved around the question of responsibility of a state for injuries caused in its territory to the person or property of aliens.[18] At the same time it has long been recognized that the question of state responsibility does arise not only from a violation of a state's obligations with respect to the treatment of aliens but also from a violation of any other obligation under international law. In fact, during the 1949 discussions of the ILC on the choice of topics for codification, G. SCELLE pointed out that the question of state responsibility would recur constantly during the study of the majority of the subjects which the Commission had already placed on the list of topics for codification.[19] Thus, it is not without reason that the Commission switched in 1962 from the traditional approach of GARCÍA-AMADOR to the current approach of codifying general rules of state responsibility for a violation of any rules of international law.

Some of the draft articles of Part One are stipulated in such general and abstract terms that it is difficult to grasp their implications. For example, Article 1 provides, "Every internationally wrongful act of a State entails the international responsibility of that State". According to the commentary of the Commission, Article 1 is intended, first, to state the basic rule of state responsibility. Secondly, it is intended to cover every kind of new relations resulting from an internationally wrongful act of a state, whether such relations are limited to the offending state and the injured state or extend to other subjects of international law as well. Thirdly, Article 1 is intended to clarify that the offending state does incur international responsibility. Fourthly, it is intended not to admit any exception to the basic rule that an internationally wrongful act of a state involves the international responsibility of that state. Lastly, Article 1 is intended to avoid the formula which may suggest that international responsibility results exclusively from a wrongful act, thus leaving room for the existence of liability for a lawful act.[20] All these intentions are important, but it is extremely difficult to read all of them into the very general and abstract stipulation of Article 1.

In a similar vein, Article 2 provides, "Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility". Again, the commentary explains that the

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[18] See the title of GARCÍA-AMADOR's last report.

[19] YbILC 1949, p. 50 para. 32.

[20] YbILC 1973, Vol. II, pp. 175-176 paras. 9-13.

Article deals with what domestic law terms 'delictual capacity' or 'capacity to commit wrongful acts'. It is intended, according to the commentary, to ensure that a violation of an international obligation committed by a member state of a federal state is attributable to the latter even in case the former possesses international personality. Article 2 is also intended to cover the situation where an organ of a state commits internationally wrongful acts in the territory of another state. In such eventuality the article is so stipulated as to render not the territorial state but the state of that organ responsible under international law.[21] The provisions of some other articles of Part One, namely Article 7 paragraph 1 and Article 12 paragraph 1, clarify these intentions, but considering that the commentary does not constitute part of the draft articles, it is almost impossible to read these intentions into the general and abstract stipulations of Article 2.

When the ILC discussed the first three draft articles contained in AGO's second report, KEARNEY noted that, while the Special Rapporteur was proposing a number of general rules on the abstract aspects of state responsibility, rules limited to pure, abstract responsibility might prove to be too metaphysical for the kind of international society that existed in the contemporary world.[22] Already in 1962 during the discussion of the above-mentioned sub-committee, BRIGGS pointed out that the scarcity of materials on the aspects of state responsibility, except in the field of treatment of aliens, would necessitate the Commission's work to be in the nature of legislation rather than codification and that AGO's proposal for the outline of work was a little too abstract.[23] Later MCDOUGAL was to say, "The . . . recent work of the [International Law] Commission has been at such a high level of abstraction as to shed but a dim light upon specific controversies."[24]

In this connection it might be useful to have a glimpse of the responsibility system in domestic law. For example, responsibility for an act of an individual is roughly divided into either criminal or civil responsibility, depending upon the nature of the act in question. The methods of attributing responsibility are respectively regulated by rules of criminal or civil procedure. Civil responsibility is further divided into responsibility in family matters and responsibility in property matters. The latter is again divided into responsibility for tort and responsibility for contract, and the change of social circumstances as well as the development of technology requires the evolution of new types of responsi-

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[21] Ibid., pp. 177-178 paras. 2 and 5-6.

[22] YbILC 1970, Vol.I, p. 217 para. 32.

[23] YbILC 1963, Vol.II, p. 231.

[24] M.S. MCDOUGAL, H.D. LASSWELL & L. CHEN, *Human Rights and World Public Order* (New Haven: Yale University Press, 1980) p. 762 n. 92.

bility with corresponding methods of attribution and discharge. Compared with these various types of responsibility in domestic law, responsibility in international law is far more simple. Nevertheless, the ILC draft Article 19 divides internationally wrongful acts into international crimes and international delicts, and if an attempt is made to codify general rules covering both categories of acts, then their formulation is likely to be general in nature and abstract in content. It is indeed questionable whether a convention composed of provisions of such general and abstract terms would prompt states to convene an international conference for its adoption, but the ILC should have been aware of this possibility when it decided to codify 'general' rules of state responsibility in 1962.

3.1.2. Primary Rules and Secondary Rules

While the ILC divides the rules of international law into primary or secondary rules,[25] the distinction between the two categories is not always clear. Furthermore, it is doubtful what practical merits entail from the categorical distinction between the two types of rules.

The question of compensation for nationalization of private foreign property is a case in point. It is generally agreed that, in the absence of treaty provisions to the contrary, nationalization of such property is lawful on condition that (1) it serves a public purpose of the nationalizing state and (2) the measures of nationalization are not discriminatory. But there is a difference of views as to whether the payment of compensation for the nationalized property is a third condition for the lawfulness of nationalization.[26] According to those who consider it to constitute the third condition, the payment of compensation should be regarded as a primary rule, whereas it should be regarded as a secondary rule in the view of those who consider the payment not to be a condition of lawfulness but merely a legal consequence of nationalization. It might be added that state practice does not seem to provide a clear-cut indication as to whether the payment of compensation belongs to a primary or a secondary rule.[27]

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[25] See *supra*.

[26] Compare, in this respect, the 1958 resolution of the International Law Association (hereafter ILA) and the statement of R. DELSON prior to the adoption of that resolution. ILA, *Report of the Forty-Eighth Conference* (New York, 1958) pp. xi & 155 respectively. See also, ibid., pp. 161-183.

[27] *Encyclopedia of Public International Law*, Instalment 8 (Max Planck Institute for Comparative Public Law and International Law; Amsterdam: North-Holland, 1981) pp. 218-219.

This case also suggests that secondary rules are closely linked to primary rules. When the ILC discussed AGO's second report in 1970, REUTER pointed out that, although responsibility might be held to have a derived secondary character, a very large part of responsibility lay in failure to comply with what were called 'standards' in English,[28] referring to the standards of treatment of aliens which concern primary rules. While expressing appreciation for the Special Rapporteur's report, ELIAS warned that the intellectual effort which had gone into the report might lead to emphasizing distinctions of which the international community might not be fully aware.[29] ROSENNE, too, expressed doubt whether the distinction between primary and secondary rules described in the report could be fully and consistently maintained. He was not certain that imputability would operate in an identical way, regardless of the content of the primary rule, non-observance of which was the generator of responsibility.[30]

Indeed, the following examples typically illustrate the link between primary and secondary rules. A material breach of a bilateral treaty by one state party entitles the other state party to invoke its termination or suspension.[31] When diplomatic privileges are abused by a member of a diplomatic mission, the sending state may waive the immunity from the receiving state's jurisdiction for that member, or the receiving state may notify the sending state that the member is *persona non grata*.[32] A prisoner of war may be brought to trial before a domestic court of the enemy state with respect to a violation of laws of war committed by him prior to his capture.[33] In all these cases primary rules dictate secondary rules, or, to put it the other way round, the application of a secondary rule is contingent upon the violation of a specific primary rule, and this is not an unusual phenomenon in international law. Reflecting on AGO's remark that any effort to combine rules of substance and rules of procedure might lead to dangerous confusion, ROSENNE contended that the development of substantive international law was bound to demonstrate more clearly the need for parallel development of the international law of procedure.[34]

If so, what practical merits can be expected to derive from a rigid separation of secondary from primary rules? According to BAXTER:

> "The circumstances under which responsibility attaches and the remedies to be provided for violations of the rules of law cannot be divided from the

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[28] YBILC 1970, Vol. 1, p. 188 para. 8.
[29] Ibid., p. 221 para. 76.
[30] Ibid., p. 220 para. 58.
[31] Vienna Convention on the Law of Treaties, Art. 60 para. 1.
[32] Vienna Convention on Diplomatic Relations, Art. 9 para. 1 and Art. 32 para. 1.
[33] *Encyclopedia of Public International Law*, Instalment 4, pp. 296-297.
[34] YBILC 1970, Vol.I, p. 221 para. 68.

> substantive rules of conduct themselves. The nature of responsibility will vary with the nature of the rule violated. The remedy, the reparation, will likewise vary according to the rule violated, the responsibility engaged, and the procedure followed in seeking vindication of the wrong."[35]

Consequently, a codification of exclusively secondary rules, as detached from corresponding primary rules, is most likely to end up with mere enumeration of various procedural rules to attribute and discharge responsibility. In fact, the ILC's work on Part Two of state responsibility seems to be proving that possibility. It is again doubtful if states are persuaded to hold an international conference in order to adopt a convention composed of such enumeration of secondary rules.

3.1.3. Responsibility for Wrongful Acts and Liability for Lawful Acts

The third premise of the ILC's work on state responsibility is that it should deal only with responsibility for internationally 'wrongful' acts, as distinguished from liability for injurious consequences of 'lawful' acts. Indeed, since 1979, the ILC has been working on the topic of "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law".[36] However, there are cases where the distinction between responsibility for wrongful acts and liability for lawful acts is not clear. As a result, practical merits of the distinction are not certain either.

Reference has already been made to the payment of compensation for nationalization of private foreign property.[37] If such payment is considered one of the conditions for the lawfulness of nationalization, non-payment of compensation makes nationalization unlawful, thus entailing state responsibility for a wrongful act. However, if payment of compensation is not a condition for lawfulness but merely a legal consequence of nationalization, then the issue of payment falls under the topic of liability for lawful acts. Of course, in the latter view, if the nationalizing state refuses to pay the compensation, such refusal itself will constitute a failure to fulfil its obligation and entail responsibility of that state. It must be asked, however, what practical merits exist in distinguishing responsibility for wrongful acts from liability for lawful acts.

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[35] R.R. BAXTER, 'Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens', 16 *Syracuse Law Review* (1965) p. 748.

[36] See *supra*.

[37] See *supra*.

The relevance of the distinction is explained by the ILC as follows:

> "The Commission fully recognizes the importance, not only of questions of responsibility for internationally wrongful acts, but also of those concerning the obligation to make good any harmful consequences arising out of certain lawful activities, especially those which because of their nature present certain risks. The Commission takes the view, however, that questions in this latter category should not be dealt jointly with those in the former category. In view of the entirely different basis of the liability for risk and the different nature of the rules governing it, as well as its content and the form it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp."[38]

Nevertheless, the Commission's discussion on draft Article 23 concerning "Breach of an international obligation to prevent a given event" illustrates the circumstances where it is difficult to distinguish the two.

AGO's original draft Article 23 provided: "There is no breach by a State of an international obligation requiring it to prevent a given event unless, following a lack of prevention on the part of the State, the event in question occurs."[39] When the draft was introduced to the Commission, REUTER stated that he would personally prefer an interpretation based on the idea that, when the risk could not be calculated in advance, it could be judged only by its effect in the light of the material damage caused. In his opinion, since the risk would not have been apparent before the material damage occurred, the obligation to prevent the risk would not have been apparent either.[40] Similarly, DIAZ GONZÁLEZ feared that the wording of the draft as it stood left him in doubt as to whether there were any limitations on the obligation of the state to prevent a given event from occurring. Citing the case where a visiting head of a foreign state was attacked despite all the necessary precautions of the receiving state, he considered that the only obligation of the latter state in such a case was to apprehend and prosecute the attacker and that it could not be held responsible for the occurrence of attack itself.[41] On that occasion AGO explained that draft Article 23 was not to provide for absolute obligations and should exclude the case where the event occurred despite the fact that the state had taken adequate preventive measures.[42] The fear expressed by DIAZ GONZÁLEZ is partly due to the difficulty of defining the scope of preventive

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[38] YBILC 1975, Vol. II, p. 54 para. 33.
[39] YbILC 1978, Vol. II Pt. One, p. 37 para. 19.
[40] Ibid., Vol.I, p. 7 para. 23.
[41] Ibid., p. 9 paras. 1-2.
[42] Ibid. pp. 9-10 para. 4.

obligations, but it is also due to the difficulty of distinguishing responsibility for wrongful acts from liability for lawful acts.

AKEHURST, who was critical of the ILC's approach to the topic of "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", had the following to say:

> "Since compensation is also [. . .] payable for wrongful acts, it may be wondered whether there is any real difference between a duty to pay compensation for a lawful act and a duty to pay compensation for a wrongful act. It is submitted, however, that the distinction is important for two reasons. First, the amount of compensation payable for a lawful act is probably less than the amount of compensation payable for a wrongful act [. . .]
> The second point is that a certain stigma attaches to the commission of an unlawful act. States may therefore be reluctant to pay compensation for wrongful acts because they are unwilling to admit that they have done anything wrong. They may be more willing to pay compensation for lawful acts, because such payments do not imply a confession of wrongdoing [. . .]."[43]

He then concluded that "in other respects liability for lawful acts is similar to liability for wrongful acts".[44] There may not be a universal acceptance of AKEHURST's conclusion, but the fact remains that practical merits of distinguishing responsibility for wrongful acts from liability for lawful acts are not at all certain.

Since 1985 BARBOZA was the Special Rapporteur for the ILC's work on the topic of liability for lawful acts. In an article published in 1988, he emphasized that responsibility for risk (*la responsabilité (causale)*) was not an exception to responsibility for wrongful acts but that the two responsibilities represented different aspects of a larger category (*genre*).[45] As a matter of fact, in one of its annual reports relating to state responsibility the ILC does not deny a degree of 'overlap' of the obligation of a state for reparation resulting from its wrongful acts with its obligation to pay compensation for injurious consequences arising from lawful acts.[46] Neither does that report deny a degree of 'overlap' of a state's obligation to compensate for injurious consequences of lawful acts with its obligation for reparation resulting from acts whose wrongfulness is precluded under the provisions of Part One (Art.

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[43] M.B. AKEHURST, 'International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law', 16 *Netherlands Yearbook of International Law* (1985) pp. 14-15.

[44] Ibid. p. 16.

[45] J. BARBOZA, 'La responsabilité (causale) à la Commission du Droit International', 34 *Annuaire Français de Droit International* (1988) pp. 520-522.

[46] YBILC 1980, Vol. II Pt. Two, p. 62 para. 42.

29: consent of the injured state; Art. 31: force majeure and fortuitous event; Art. 32: distress; and Art. 33: state of necessity).[47]

3.2. Problems concerning the Content of the Draft Articles

The thirty-five draft articles on state responsibility adopted by the ILC, which constitute Part One dealing with "origin of international responsibility", are not free from problems in their content either. For example, it is questionable whether the list of enumerated "circumstances precluding wrongfulness" is an exhaustive one. It is also not clear whether some of these circumstances overlap with each other.[48] In this paper special attention will be drawn to the following three issues: (1) the distinction between 'international crimes' and 'international delicts' as stipulated in Article 19 and the relevance of the distinction to the provisions of Part Two; (2) the relation between 'obligation of conduct' and 'obligation of result' as reflected in Articles 20-23; and (3) the time factor concerning 'complex acts'.

3.2.1. Distinction between International Crimes and International Delicts and its Relevance to the Provisions of Part Two

Draft Article 19 divides internationally wrongful acts into two categories - international crimes and international delicts - and defines an international crime as an "act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole". As examples of international crimes, the Article refers to aggression, colonial domination, slavery, genocide, apartheid and massive pollution of the environment. An international delict is "any internationally wrongful act which is not an international crime" as defined above. The question that may be raised concerns the propriety of dividing internationally wrongful acts into the two categories as well as the relevance of such distinction to the provisions

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[47] Ibid.

[48] See, for example, the remarks of RIPHAGEN and NJENGA in YBILC 1979, Vol. I, p. 196 para. 1 et seq. and p. 203 para. 9 et seq. See also, A. GATTINI, *Zufall und Force Majeure im System der Staatsverantwortlichkeit anhand der ILC-Kodifikationsarbeit* (Berlin: Dunker Humblot, 1991); J. BARBOZA, 'Necessity (Revisited) in International Law', in J. MAKARCZYK (Ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague: Martinus Nijhoff, 1984), p. 27 et seq.; and J.J.A. SALMON, 'Faut-il codifier l'état de nécessité en droit international?', in ibid., p. 235 et seq.

of Part Two where the ILC should deal with "the content, forms and degree of international responsibility".

Earlier in 1976, when AGO submitted draft Article 19 (originally Article 18) for consideration by the ILC, he emphasized the necessity of distinguishing among different kinds of internationally wrongful acts on the basis of the importance of the obligations breached, stating that the distinction between simple offenses and "international crimes" should entail consequences with respect to the subject entitled to demand compliance with the rules of international law and with respect to the forms of responsibility as well.[49] YASSEEN argued that, since the obligations of the two categories were not of equal weight, a special regime of responsibility should apply to the breach of obligations of vital interest to the international community.[50] In line with YASSEEN, SETTE CAMARA referred to the redress under Chapter VII of the United Nations Charter as a prospective content of such special regime,[51] and RAMANGASOAVINA stressed that the concept of international crimes would entail not only reparation but also sanctions.[52]

It must be pointed out, in this connection, that under draft Article 30 countermeasures constitute one of the circumstances precluding wrongfulness and that under draft Article 5 paragraph 3 of Part Two all states other than the state breaching the international obligation, are regarded as 'injured State' with respect to international crimes. In 1984 RIPHAGEN, the successor to AGO as Special Rapporteur, submitted a draft Article 14 paragraph 1 of Part Two, which provides: "An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole", together with a draft Article 15, which provides: "An act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter".[53] Put all together, these provisions make all states other than the state breaching the international obligation, injured states and authorize them to resort to 'legitimate countermeasures', including sanctions under Chapter VII of the United Nations Charter.

RIPHAGEN's draft Articles 14 and 15 entailed a lengthy discussion in the ILC, but in the end the Commission did not adopt them. The reason for the non-adoption was that many members considered it necessary to limit the scope

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[49] YBILC 1976, Vol. I, pp. 59-60 para. 32.
[50] Ibid., p. 63 para. 16.
[51] Ibid., p. 68 para. 7.
[52] Ibid., p. 76 para. 26.
[53] YbILC 1984, Vol. II, pp. 259-260 para. 1.

of 'injured States' which were entitled to resort to countermeasures. USHAKOV, for example, while recognizing the existence of obligations *erga omnes*, could not share the view that an international crime necessarily injured all states within the international community because not all the states were equally affected by the crime. When one state committed an act of genocide in its territory, he doubted that any other state could be regarded as injured party.[54] Similarly, SINCLAIR could not believe that, if a Mediterranean state caused enormous damage to the coast of neighbouring states by marine pollution, a land-locked state on another continent had the same entitlement to claim reparation as those neighbours did.[55] To MAHIOU the crime of aggression did affect the direct victim more seriously than other states. Though it would be difficult to determine how states were injured differently, he considered that a hierarchy of injurious consequences of internationally wrongful acts should be taken into account in determining their legal effects.[56]

The necessity to limit the scope of injured states implies the necessity to re-examine the concept of an international crime as stipulated in draft Article 19. During the ILC's discussion of draft Article 19 in 1976, TAMMES expressed some hesitation to the use of the term 'international crime' for an act of a state because the term had been used to describe acts of an individual in the Commission's Draft Code of Offenses against the Peace and Security of Mankind. He was not at all certain that international legal thinking had already evolved to the extent as to make such classification feasible.[57] Likewise, KEARNEY noted that an author quoted in the Special Rapporteur's report regarded a regime of racial discrimination as an international crime, which would authorize the third state to resort to reprisals against its perpetrator. Since that would allow large states to intervene in the affairs of small states, he advised the Commission to take a cautious approach to the question of international crimes.[58] Already in 1970, when the ILC discussed AGO's second report, REUTER pointed out that the problem of penal (criminal) responsibility might be called the problem of sanctions, that the term sanction applied to punishment as well, and that punishment came under a special regime as opposed to a general regime which the Commission should study first.[59]

It is noteworthy that SIMMA, while appreciating as a sign of progress the introduction of the concept of international crimes in the ILC's draft on state responsibility, warns against the danger of new conceptions making headway

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[54] Ibid., Vol. I, p. 277 para. 4.
[55] Ibid., p. 304 para. 6.
[56] Ibid., p. 128 para. 5.
[57] YbILC 1976, Vol. I, p. 64 paras. 23-24.
[58] Ibid., p. 77 paras. 36-37.
[59] YbILC 1970, Vol. I, p. 187 para. 4.

in the absence of simultaneous progress in institution-building within the international community.[60] In any event ARANGIO-RUIZ, the current Special Rapporteur on state responsibility, proposed in his fifth report that: (1) the Commission should reconsider the problematic features of the formulation of draft Article 19 on second reading; (2) it should also reconsider the propriety of a clear-cut dichotomy between 'crimes' and 'delicts'; and (3) it should update the list of examples of international wrongful acts constituting international crimes, provided that such listing was desirable.[61]

3.2.2. Relation between Obligation of Conduct and Obligation of Result

The ILC divides international obligations of a state into three types according to their content: obligations to adopt a particular conduct, obligations to achieve a specified result, and obligations to prevent the occurrence of a given event. Thus, draft Article 20 provides, "There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation". Similarly, draft Article 21 paragraph 1 provides: "There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation". Furthermore, draft Article 23 provides: "When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result".

The provisions are again general and abstract and raise two problems: first, in practice there are a number of cases where it is difficult to determine to which of the three types a particular obligation belongs. Another problem is: why is it necessary to divide a state's obligations into the three types and what practical merits does such division entail?[62]

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[60] B. SIMMA, 'Bilateralism and Community Interest in the Law of State Responsibility', in Y. DINSTEIN (Ed.), *International Law at a Time of Perplexity* (Dordrecht: Martinus Nijhoff, 1989) p. 844.

[61] *Report of the ILC on the Work of its Forty-Fifth Session (A/48/10)*, paras. 329-331.

[62] It is clear from the formulation of Article 23 that the obligation to prevent the occurrence of a given event falls under the larger obligation to achieve a specified result. Therefore, the problem is if it is always possible to classify an international obligation of a state as either an obligation of conduct or an obligation of result and what practical merits such classification entails.

AGO's draft of these three articles was, in essence, similar to the one adopted by the Commission.[63] When the draft articles were discussed by the ILC in 1977, many members were critical of the division of obligations into the three types and, in particular, the division between obligations of conduct and obligations of result. For example, VEROSTA wondered whether such a division was valid in all cases and referred to the difficulty of categorizing the obligation to protect diplomatic missions or agents: was there a breach of an obligation of conduct or of result in the event of an assault on a diplomatic agent if the receiving state had done its best to prevent such assault?[64] Likewise, QUENTIN-BAXTER was concerned if every international obligation could be classified as either of the two. For him, the obligation of a coastal state to guarantee the right of innocent passage as well as the obligation under the 1949 Geneva Conventions to punish perpetrators of 'grave breaches' could have the characteristics of both types of obligations.[65] EL-ERIAN expressed his doubt about AGO's classification of a state's obligation to protect aliens as that of result because it could be described as an obligation of conduct as well.[66] SAHOVIC pointed out that, even in the case of draft Article 20 dealing with obligations of conduct, what ultimately mattered was the result. Therefore, he was not certain what importance should be attached to the distinction between the result aimed at by an international obligation and the means to be used to achieve that result.[67]

Theoretically, it is not impossible to distinguish between an obligation of conduct and an obligation of result. However, as illustrated by the discussion in the Commission, the application of this distinction in factual situations does raise a number of difficulties. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination, whose provision of Article 2 paragraph 1(c) is quoted in the Commission's commentary as a case of an obligation of conduct, affords a good example.[68] Article 2 paragraph 1(c) provides: "Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have an effect of creating or perpetuating racial discrimination [. . .]". Thus, a state party with a law of apartheid is obliged to amend or repeal it, which is seemingly a case of an obligation of conduct. But, seen in wider context, amendment or repeal of the law in question is one

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[63] YbILC 1977, Vol. II Pt. One, p. 8 para. 13 and p. 20 para. 46; YbILC 1978, Vol. II Pt. One, p. 37 para. 19.
[64] YbILC 1977, Vol. I, p. 231 para. 17.
[65] Ibid., p. 224 paras. 3-5.
[66] Ibid., p. 225 para. 15.
[67] Ibid., p. 220 para. 16.
[68] YbILC 1977, Vol. II Pt. Two, p. 15 para. 11.

of the means to eliminate racial discrimination, which is the very objective of the convention as a whole and is obviously an obligation of result.

Of course, it can be maintained that an obligation of result differs from an obligation of conduct in that, while the former allows a state to choose the means to attain an end, the latter does not allow such choice.[69] However, the case quoted above clearly indicates that an obligation of result can be implemented only through an obligation of conduct. At the same time, as pointed out by SAHOVIC, each obligation of conduct has its own objective and, if that objective is seen in wider context, an obligation of conduct may be construed as consisting of a series of minor obligations of conduct. In fact, the ILC's commentary on draft Article 20 admits that a question of interpretation may arise as to whether a particular obligation of international law is of one type or another and that this should be settled by an international tribunal.[70]

It must be asked, then, why it is necessary to distinguish between the two types of obligations and for what practical merits. The same commentary emphasizes that the distinction between an obligation of conduct and that of result is important in determining when and how the breach of each of these obligations occurs. In other words, the conditions in which an international obligation is breached vary according to whether the obligation requires the state to take some particular actions or only requires it to achieve a certain result, while leaving it free to choose the means of doing so.[71] This question will be analyzed in the following sub-section.

3.2.3. Moment and Duration of the Breach of an International Obligation by a 'Complex Act'

The ILC's draft Articles 24 to 26 deal with the time factor in case of breach of international obligations. In those Articles, acts of a state which constitute a breach of its international obligation are divided into those extending in time and those not extending in time. The former type of acts is further divided into 'composite acts', consisting of a series of actions or omissions in respect of separate cases, and 'complex acts', consisting of a succession of actions or omissions by the same or different organs of a state. However, with regard to the provisions concerning the moment and duration of the breach of an international obligation by a complex act, the following

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[69] Ibid., pp. 13-14 para. 8.
[70] Ibid., p. 13 para. 4.
[71] Ibid., p. 13 para. 5.

problem arises which relates to the distinction between an obligation of conduct and an obligation of result.

Draft Article 18 paragraph 5 provides: "[T]here is a breach of [an] international obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force [. . .], even if that act is completed after that period". But, according to draft Article 25 paragraph 3, the breach of an international obligation by a complex act occurs "at the moment when the last constituent element of that complex act is accomplished", and the time of breach "extends over the entire period between the action or omission which initiated the breach and that which completed it". As an illustration of such a situation, the commentary states that:

> "if an international obligation of conventional origin requires the State to allow the nationals of a given foreign country to practice a particular profession, and if the administrative authority dealing with an application to practice that profession rejects the applications [*sic*], the rejection is not in itself a definitive breach of the international obligation in question. It will not be possible to conclude that such a breach exists so long as the result required by the obligation can still be achieved, either by review of its initial decision by the same authority, or by rescission or alteration of that decision by a higher authority."[72]

In other words, the breach occurs only when the final decision, administrative or otherwise, of the state is reached by which the foreign national is ultimately refused to practice the profession, and the duration of the breach extends from the time of the initial rejection to that of the final refusal.

All in all, however, the provisions of the draft articles concerning the moment and duration of the breach of an international obligation by a complex act are extremely complicated and somewhat contradictory, and the complication as well as the contradiction seems to derive, at least in part, from the premise that a complex act is linked to an obligation of result. The commentary quoted above clearly explains that the breach of the obligation comes into existence only when the result required by the obligation is not achieved by the last of a succession of actions by the state organ concerned.[73] Nevertheless, the illustration provided by that commentary can be more easily explained by linking a complex act with an obligation of conduct. Suppose that the conventional obligation of the state to allow foreign nationals to practice a particular profession constitutes an obligation of conduct, then its breach

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[72] YbILC 1976, Vol. II Pt. Two, p. 94 para. 23.

[73] Ibid.

occurs at the moment when the administrative organ rejects a foreign national's initial application. The subsequent refusal by the higher organs is merely to confirm the first rejection and the amount of damage caused to the applicant is to be calculated from the moment of rejection of the initial application. As a result, it is not necessary to distinguish the moment of breach from the duration of breach.

Again, suppose that the treaty in question is amended in order to exclude foreign nationals from practising that profession before the application has reached the final stage, then it would be difficult to explain the situation under the premise that a complex act is linked with an obligation of result. True, draft Article 18 paragraph 5 provides that the breach of an international obligation by a complex act begins with the initial action or omission of that act occurring within the period during which the obligation is in force, even if the complex act is only completed after that period. However, since under Article 25 paragraph 3 the breach of an international obligation by a complex act is deemed to occur at the moment when the last constituent of that complex act is accomplished, there is no such occurrence if the obligation at issue is no longer in force at that moment. Besides, the basic premise of draft Article 18 paragraph 1 stipulates: "An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State".

Having scrutinized the provisions of the ILC draft articles on the time factor, KARL considers that there is a certain inconsistency in wording as far as the 'time of commission' of the complex act is concerned.[74] In the view of SALMON, the notion of complex act is not only confusing but also dangerous and useless.[75] KATO suspects that the concept of a complex act as well as the distinction between an obligation of conduct and an obligation of result was introduced in order to vindicate AGO's doctrine on the nature of local remedies in international law.[76] It is true that the ILC's draft Article 22 stipulates, "When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, [. . .] there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available [. . .]".

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[74] W. KARL, 'The Time Factor in the Law of State Responsibility', in M. SPINEDI and B. SIMMA op.cit. n. 6.

[75] J.J.A. SALMON, 'Le fait étatique complexe: une notion contestable', 28 *Annuaire Francais de Droit International* (1982) p. 738.

[76] N. KATO, 'Kokunaiteki Kyusai Censoku no Hoteki Seikaku to (Fukugou Koui)' [The legal nature of the principle of exhaustion of local remedies and complex act]", 90 *Kokusai-ho Gaikou Zasshi* [Journal of International Law and Diplomacy], No. 6 (Feb. 1992) p. 26.

This draft Article qualifies the international obligation concerning the treatment of aliens as an obligation of result. On the other hand, there has been a long-standing controversy between the doctrine which regards the requirement of exhaustion of local remedies as a substantive rule and that which regards it as a procedural rule, and AGO has been an ardent advocate of the latter.[77]

While this paper will not enter into an elaborate analysis of the criticism on the concept of a complex act, yet reference should be made to REUTER's remarks during the ILC's discussion in 1977 when draft Article 22 was first introduced. To REUTER the introduction of the provision on exhaustion of local remedies was confusing because, while the issue of exhaustion of local remedies related to the treatment of aliens, the ILC had earlier decided to deal, not with specific rules of state responsibility concerning treatment of aliens, but with general rules governing responsibility of states for any wrongful act.[78]

4. SOME CONCLUDING OBSERVATIONS

This paper has made an attempt to point to some problems concerning the basic premises, as well as the content, of the draft articles of Part One of the ILC's codification work on the topic of state responsibility. We submit that the ILC's premise to deal with general rules on the topic by focusing on what is termed 'secondary rules' has lead to the adoption of rather general and abstract rules. We also submit that the ILC's other premise of distinguishing responsibility for wrongful acts from liability for lawful acts is not free from problems. Furthermore, we have concluded that the distinction between international crimes and international delicts as well as its relevance to the provisions of Part Two is not necessarily clear. Similarly, the division of international obligations into obligations of conduct and obligations of result and, in that connection, the relevance of the concept of a complex act are not convincing.

Perhaps, these problems were bound to arise once the Commission decided to deal with general rules governing state responsibility for any wrongful act. As noted above, codification of exclusively secondary rules as detached from corresponding primary rules concerning the topic of international responsibility of states is likely to entail an enumeration of general and abstract provisions. In that sense the ILC might reconsider its approach to the topic and start codifying rules of state responsibility in a limited, specific field such as the treatment of aliens. The Commission itself noted that there has been sufficient

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[77] See R. AGO, 'Le délit international', 68 RdC (1939-II) pp. 14-17.

[78] YBILC 1977, Vol. I, pp. 259-260 paras. 8-9.

accumulation of state practice in this field.[79] Also, state practice has not been insufficient in such other fields as international rivers, good neighbourliness and marine pollution. In addition, new practices are developing in the field of state activities in outer space as well as in the field of environmental protection. After successful codifications of rules on state responsibility in various specific fields, there may emerge a consensus of the international community to codify some general and probably basic rules on state responsibility covering all fields of international law. It is highly doubtful if the ILC's work on state responsibility has been based on such a consensus.

This does not mean that the ILC's work on state responsibility has been entirely useless. On the contrary, the provisions of draft articles in Chapter II of Part One concerning 'attribution' have successfully clarified several controversial problems such as the attribution of *ultra vires* conduct of state organs or of conduct of organs of a federal unit.[80] Besides, the voluminous commentary attached to each draft article provides practitioners and academicians with an impressive array of materials on which to develop their analysis of wide-ranging questions on state responsibility. In evaluating some thirty-years' work of the ILC on the topic of international responsibility of states, the following observation by ZEMANEK is indeed suggestive:

> "For the codification of controversial rules of customary law it is [. . .] suggested to introduce an intermediate step, more persuasive than authoritative, between custom and convention. That intermediate step should essentially function as a device for building a new consensus. Instruments less stringent than treaties, such as declarations, restatements or codes should be used according to the state of the rules which they incorporate. They could also be arranged in a sequence, gradually edging States into conforming their actions and expectations to the proposed rules and thereby paving the way for a successful convention at a later stage. This is admittedly a slow and perhaps frustrating process. Yet it seems more promising than the adoption of a still-born codification convention for the archives of chancelleries."[81]

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[79] See supra.

[80] See the provisions of draft Art. 7 para. 1 and Art. 10.

[81] K. ZEMANEK, 'Codification of International Law: Salvation or Dead End?', in *Le droit international à l'heure de sa codification: Études en l'honneur de Roberto Ago* (Milano: Dott. A. Giuffré, 1987) 600-601.

EFFECTUATION OF INTERNATIONAL LAW IN THE MUNICIPAL LEGAL ORDER: THE LAW AND PRACTICE IN INDIA*

V.S. Mani**

An examination of effectuation of international law in the Indian municipal legal order at once involves both a doctrinal perception and a functional assessment of the role a municipal legal order plays in the implementation of international law through its normative regime as well as its authoritative institutional mechanisms. The present paper, therefore, encompasses an adumbration of a perception of the role of the municipal legal order in giving effect to international law, and an overview of the framework of law and practice of India in this respect.

1. A DOCTRINAL PERCEPTION

The reality of the decentralised structure of the international community points to the formidable difficulties in the implementation of international law, both at the international as well as the national level. Implementation of international law involves recognition and effectuation of rights and obligations and the goal-values underlying the norms warranting community action. But the recognition is based on an interpretation, value judgement and prioritisation preferred by each member state of the international community. The functions of law-making, law-implementation and adjudication, which are usually exercised by centralised institutions in the municipal legal order, are decentralised on the international plane, leaving individual states to perform these functions. It is indeed extremely difficult for nation states to subordinate their 'individual wills' to their 'real wills' the cumulation of which forms the

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** Professor of International Space Law, International Legal Studies Division, School of International Studies, Jawaharlal Nehru University, New Delhi.

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, pp. 145-174

'General Will' of the international community – if one were to apply ROUSSEAU'S theory to the international legal order. States tend to exercise considerable discretion in this 'international state of nature', even where no scope for discretionary action is permitted under the international legal order. In the face of this reality, the principle of good faith becomes a norm of fundamental importance, seeking to ensure both integrity of the international legal order and its fair compliance by the state system. That there is no impartial centralised international machinery charged with the task of effectuation of international law further aggravates the problems of international law compliance.

A second doctrinal problem relates to eventual transformation of the nature and structure of state sovereignty, from the absolute concept of sovereignty to a functional concept. The functional concept of sovereignty views a state's claim to sovereignty in terms of the function it performs. From this point of view, validity of a sovereignty claim is correlative to the role it fulfils for the benefit of a community. One aspect of this view is that for the functions which it does not perform, or whose performance it shares with other states and/or entities (both within and outside its territorial boundaries), a state cannot raise a blanket claim of 'exclusive and absolute' sovereignty. It can only claim so much of sovereignty as adequate to enable it to perform its functions effectively.

Another, but more critical, aspect of the functional concept relates to the pluralistic interests of human society both within and outside the political boundaries of a state. Pluralistic interests of human beings are the basis for the multiplicity of associations and groups in pursuit of fulfilment of different, yet often overlapping, interests, and the sovereign state is only, even if pre-eminently, one such association, distinguished though it is with the aura of unique political and legal authority. This authority does not, however, exist to the exclusion or in supersession of other associations. The coexistence of these associations both within a state as well as transcending its political boundaries demonstrates the non-exclusiveness and non-absoluteness of sovereignty both externally and internally, and the porosity and artificiality of political boundaries. The fundamental functional touchstone of all human associations, including a sovereign state, is, as alluded to earlier, the level of human well-being or what LASKI calls 'social good', achieved through each of them. This, indeed, implies that a state's claim to sovereignty is correlative to its functional utility to the community it seeks to serve and its legitimacy derives

from its social acceptability by the generality of that community, evidently corresponding to the functional utility.[1]

This view may ominously point to a chaotic situation of 'now-you-see, now-you-don't' in respect of conditions of perceptibility, tangibility, and operability of sovereignty, and to anarchy of competing claims to jurisdiction by diverse national and transnational groups and associations. But since human interests are interrelated and often inclusive – both as between humans as well as between interests – each influencing the other, each coexisting with the other, there is a need for co-ordination among them, among the functions of associations. This indeed is the function of a state and its sovereign authority. The state not only performs the function of co-ordination, it also fills in roles failed by an association, or not served by any association. It is thus expected to perform the ultimate function of the arbiter, representing the whole community, over issues of co-ordination of social action, over the rights and duties of individuals and groups.

What determines the operability of state sovereignty is this 'ultimate' function in a national society, and the contextual need to perform it either in co-operation with or to the exclusion of, other sovereign states. The role of international law and organisation, then, is to facilitate this co-operation and co-ordination of action between states, and to protect the exclusivity of action as between them. Indeed, it is the generality of states which, as the recognised representatives of national communities and the units of international society, make the choice between international action and national action, or even harmonise or amalgamate elements of international and national action at various degrees of concurrent, co-ordinate or complementary spheres of competence.

Yet the exercise of this freedom of choice is determined by the following compulsion:

> "Just as, . . ., no individual can find freedom outside the common rules of his society, so also, no state can find freedom save by accepting limitation of its sovereignty by the will formed by the common decision of a society of states."[2]

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[1] This view is generally based on pluralism and Fabian socialism. See especially, HAROLD J. LASKI, 4 *Grammar of Politics* (London, 4th ed., 1938, reprint 1960), chapters I, II (sovereignty), III (Rights), IV (Liberty and Equality), VII (Authority as Federal), XI (International Organization). See also V.K. KRISHNA MENON, 'The Modern state and International Law', 1 IJIL, (1960-61) 116-127.

[2] LASKI, ibid., p. 166.

Thus, state sovereignty cannot be seen in simple terms of domestic jurisdiction versus international jurisdiction. It has to be seen in terms of contextual allocation of functions by national societies to both the national state as well as co-ordinating mechanisms at the transnational levels, on the basis of voluntary acceptance of the need for such allocation by the generality of the international community of these national societies. The end result is international law – a cobweb of norms and institutions, with many sources from the transnational and international interactions, and many others from the similarity of national experiences, whose levels of clarity, identifiability, integrity and operability correspond to those functions they are called upon to espouse, facilitate and promote, whether in the international arena, or in the national arena, or both.

The question, therefore, is not one of supremacy of international law over national law,[3] but of coexistence and co-ordination of both. Both monistic and dualistic theories fail adequately to recognise the pluralistic nature of international and national societies and the nature, scope and range of functions which their respective legal regimes and institutions are expected to perform corresponding to it. The system is typified by the dual features of autonomy and co-ordination of spheres of action at diverse levels in varying contexts. The fact is that international law is borne out of the need to fulfil certain functions to serve corresponding transnational and national societal interests. When a national legal order recognises and implements international norms, it does so in fulfilment of this realisation rather than other compulsions. The social rather than the legal or formal nature of obligations is the chief motive force behind the implementation of international norms within the national legal order. The social, and hence the legal, obligation is need-based.

To put it differently, international law is founded on the coincidence of sovereign wills of states determined by the force of societal interests, both national and transnational, promoting international, co-ordinate and national action. The implementation of international law through the national legal order is thus a function of the level of performance of the national legal order of its own societal responsibilities, of its acknowledgement and commitment made on the international plane. In this sense, it is at once a matter of both international and national obligations. This also partly explains some of the problems of implementation – in terms of reservations or ambivalence a nation

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[3] For a discussion of this issue in terms of state attitudes in the context of the 1970 Friendly Relations Declaration, see V.S. MANI, *Basic Principles of International Law* (New Delhi: 1993) 155-63.

may evince in respect of a rule of international law, and also its inadequacy or unsuitability to fulfil the needs of a national society.

Even in a larger sense, implementation of norms is a perennial jurisprudential and sociological problem. There is always a gap between a norm and its total implementation. While the ultimate test of validity of a norm is its general social acceptability, its inadequate implementation or instances of its violation do not per se affect the jural character of the norm itself although they may raise questions of accountability of the implementing authority and/or the need for a review of the implementing mechanism.

That the degree of compliance of law can never be hundred per cent was recognised by the International Court itself. In the Nicaragua Case the Court ruled:

> "It is not to be expected that in the practice of states the application of the rules [of international law] in question should have been perfect . . . The Court does not consider that for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that the instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."[4]

These observations are particularly relevant to any examination of harmony between international law and a municipal legal order. The respective autonomy of both the legal orders is presumed, and an instance of non-effectuation of international law through a municipal legal order is treated as a breach of the former to be dealt with under the rules of international responsibility.

2. THE INDIAN LAW AND PRACTICE[5]

2.1. The international personality of India and the applicable law

The existence of India as an international person predates the granting of formal independence by the British Parliament in 1947; predates its achieve-

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[4] ICJ Rep. 1986, p. 14 et seq., at p. 98, para 196.

[5] The author wishes to acknowledge his indebtedness to and his heavy reliance on, the valuable contributions made by P. CHANDRASEKHARA RAO, *The Indian Constitution and International Law* (New Delhi, 1993), and T.S. RAMA RAO, 'Some Problems of International Law in India', 6 *Indian Year Book of International Affairs* (1957) 3-15.

ment of even a modicum of self-government. It was an original member of the League of Nations, and a party to a number of international agreements. Indeed, under traditional international law, the concept of free consent in the negotiation and conclusion of treaties in particular, and in the assumption of international obligations in general, did not exist, and the principle of sovereignty, without the principle of self-determination, stayed as a formal shell without reference to the people's will. What was good for Britain was good for India too. The British imprint over the legal processes and institutions in India was indelible; India became a 'common law country'. India's ancient cultural and legal traditions suffered a definite break with history with the advent of European colonialism, except perhaps in some isolated 'Indian states', i.e., Indian principalities that had at any rate accepted the British suzerainty or sovereignty, and also, in the realm of some aspects of the private law (personal law).

Undertaking international obligations, whether through treaties or through international customary law (being part of the common law, thanks to the Blackstonian myth), by pre-independent India was indeed anomalous.[6] It implied a misrepresentation that India was capable of effectuating those obligations in its domestic realm acting on its own, which it was not, at any rate at least until its 1935 Constitution ushered in a communal, semi-self-government. Surely from the point of view of international law, it is not difficult to impute responsibility for the breaches of India's international obligations, including the obligation to effectuate them through its municipal law, to the British Government in London. Was it perhaps to wash their hands off such problems that the British made independent India to undertake to fulfil all prior obligations? One wonders. If so, India would have been better off, had it opted for the status of a 'newly independent' state along with Pakistan.

India's situation was anomalous in another sense too. The territorial boundaries of British India did not exactly coincide with those of the post-independent India and Pakistan. Most international obligations are territorial in application. If British India had the monopoly over the name 'India' on the international plane, its implementation of international obligations in the territories of the Indian subcontinent which were not included in the British Indian territories must also follow such international representation. There were 562 Indian principalities enjoying varying degrees of 'sovereignty' on the subcontinent. One doubts whether the British authorities in London or in New Delhi had such legal competence fully to effectuate international law over

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[6] On the anomalous status of pre-independent India, see T.T. POULOSE, 'India as an Anomalous International Person', 44 BYIL (1970) 201-12.

territories not directly under their administration. This situation also raises questions of territorial succession of India and Pakistan to erstwhile international law obligations, in view of the territorial changes.

In other words, the Devolution Agreement of 1947 concluded by Britain with pre-independent India and Pakistan whereby India took over the previous obligations of British India, did not conclusively resolve all problems of state succession. Indeed, the international legal validity of the agreement is itself extremely doubtful under modern international law.[7] For one thing, such devolution agreements are devised as an independence package and one is not sure how far they are vitiated by the circumstances of 'duress' or 'undue influence' with the erstwhile colonial Power keen to ensure continuance of the interests of its nationals or transfer of old obligations to the newly independent state, as a precondition for grant of independence. Secondly, such arrangements may run counter to the sovereign right of the new state freely to decide whether or not to continue old obligations. Finally, the very competence of the entities which have not become sovereign states to conclude such arrangements binding on them after independence is rife with considerable legal difficulties, particularly from the point of view of the domestic law.

The question, so far as India was concerned, was whether its government, prior to independence, had constitutional competence to conclude the devolution agreement. One doubts very much if it had. From the domestic law point of view, however, it was perhaps the feat of the Indian Independence Act enacted by the British Parliament in 1947 that formed the legal justification for the continuation of the pre-independence legal system through independence. This of course assumes that sovereignty belonged to the British Crown and that it devolved upon independent India (i.e., at least upon those parts of the territory of India which had earlier been part of British India). Such an assumption does run contrary to the status of a colonial territory under modern international law as, according to the principle of self-determination, a territory under colonial administration is not an integral part of the metropolitan territory of the Administering Authority whose power is only to administer the colonial territory in order to prepare the people therein to achieve self-government and a status of their choice. Upon exercise of their choice, the people shall be entitled to sovereignty in terms of their choice. In this sense, during colonial rule, their sovereignty was in a state of suspended animation, it did not belong to or merge with that of the colonial Power, although some of the rights of sovereignty were exercised, during colonial rule, by the colonial

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[7] See IAN BROWNLIE, *Principles of Public International Law* (Oxford, 3rd ed., 1979, 1985 reprint) 653.

Power, for the benefit of the people. In other words, the colonial Power could not grant sovereignty to a people who chose to become an independent state, as it could not grant what it did not possess. The colonial territory becomes a sovereign state, by the operation of international law and at the will of its people, not by the feat of a colonial legislature. Viewed in this light, so far as British India was concerned, the 'lapse of paramountcy' of the British Crown pursuant to Section 7 of the Indian Independence Act only meant the lapse of the colonial Power's erstwhile authority to exercise some of the sovereign rights on behalf of British India. But vis-à-vis the 562 Indian princes, the lapse of paramountcy meant reversion of sovereignty and these states became, once again, sovereign states.[8]

Notwithstanding the above anomalies concerning the international personality of the pre-independent India and the question of its continuity post-independence, the continued application of municipal law remained unaffected. The relevant provisions of the Government of India Act, 1935, including section 292 (the 1935 Constitution), and section 18 of the Indian Independence Act, 1947, with due alterations, became part of the Constitution of the independent India, 1950. The India (Consequential Provisions) Act, 1949, an Act of the British Parliament, ordained that all laws in force should have the same application in relation to India, as if India had not become a Republic.[9] It is interesting to note that section 18(3) of the Indian Independence Act sought to ensure the continued application of "the law of British India and of the several parts thereof" as existed before independence, subject of course to any subsequent statutory changes.[10]

As Justice KERR of the English Court of Appeal discovered in *Dalmia* v. *National Bank,* a 1978 case, most part of the Indian law is "basically statutory, but it also incorporates large portions of the common law, in particular in the law of torts". This situation evolved mainly through the original jurisdiction of the High Courts of Bombay, Calcutta and Madras by virtue of their 18th century charters, and the jurisdictions of the Mufassil Courts (i.e., the lower courts situated outside these three presidency towns) and the appellate jurisdiction of the High Courts, pursuant to a number of general and special enactments (whether by the British Parliament or under the authority of the Viceroy or the governors) requiring these courts to apply the principles of

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[8] Magher Singh *v.* Principal Secretary, AIR 1953 Jammu and Kashmir 25, cited in RAMA RAO, loc.cit. n. 5, p. 11, fn. 21.

[9] RAMA RAO, loc.cit. n. 5, p. 10. The Indian Independence (International Arrangements) Order 1947 sought to give legal effect to the devolution agreement, within the Indian municipal law.

[10] Dalmia *v.* National Bank (1978), 2 *Lloyds Reports* 223 at 235, cited in P.C. RAO, op.cit. n. 5, pp. 119-201.

"justice, equity and good conscience". These principles are "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances".[11]

2.2. The Indian Constitution and International Law: Basic Provisions

The basic provisions of the 1950 Constitution of India, by virtue of which international law becomes implementable through the municipal law of India are Articles 51 and 372.[12]

2.2.1. Article 372

Article 372 provides that "Subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution, shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority". Explanation I to Article 372 clarifies that the term 'law in force' shall include a law "passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed . . .".

The principal implications of Article 372 for the effectuation of international law through the realm of Indian municipal law are as follows: first, the carrying forward of the law as it stood at the commencement of the Constitution on 26 January 1950 shall be "subject to the other provisions of this Constitution". While the Constitution may be amended pursuant to the procedures laid down in the Constitution itself (such as in Article 368), the pre-Republic law, to be effective after the commencement of the Constitution, must pass the test of compatibility with other provisions of the Constitution as they stand at the material time when the test is being applied. This requirement ensures the supremacy of the Indian Constitution within the Indian municipal law, vis-à-vis the accumulated body of law previously applicable in the territory that now constitutes the Republic of India. Should there be any inconsistency between the pre-existing international law (as incorporated in the law in force immediately before the commencement of the Constitution) and the Constitution, the latter shall prevail, and the former shall be invalid to the

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[11] Justice KERR in Dalmia *v.* National Bank, *supra* n. 10, citing Waghela Rajsanji *v.* Shek Masludin (1887), 14 *Indian Appeals* 89, 96.

[12] P.C. RAO, op.cit. n. 5, p. 117.

extent of inconsistency.[13] The inconsistency may be in respect of a provision,[14] a series of provisions,[15] or the 'basic features' of the Constitution.[16] It is not surprising, therefore, that Article 13(1) proclaims that "all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part [i.e., Part III on Fundamental Rights] shall, to the extent of such inconsistency, be void".[17]

Second, the term "all the law", read with explanation, includes common law, other customary law of India and the statute law in force at the time of commencement of the Constitution. Evidently, international law as it existed immediately before the commencement of the Constitution as part of the common law and the statute law in force immediately before that date has continued in force in India.[18]

Third, the expression "all the law in force" means that the law, to be eligible for continuance in operation, must have been in force immediately before 26 January 1950. This is a test easier to apply in respect of that part of pre-1950 international law which had been incorporated into the then Indian statute law, than with regard to other parts of that law which had been incorporated in the Indian common law. On an in-depth study of the relevant case-law on the subject, P. CHANDRASEKHARA RAO culls out the following principal test, "[b]efore any principle is accepted as a 'law in force' on account of its being a principle of common law of England", and hence of India (if one may add):

(i) that the principle had become part of the common law of England;
ii) that before the Indian Constitution came into force, the same principle was accepted and applied by the Indian courts; and

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[13] See P.C. RAO, op.cit. p. 118, relying on S.I. Corporation *v.* Secretary Board of Revenue, AIR 1964 SC 207, at 213-15.

[14] State of West Bengal *v.* Corporation of Calcutta, AIR 1967 SC 997 at 1007, cited in P.C. RAO, ibid., n. 10.

[15] Ibid.

[16] Kesavananda Bharati *v.* State of Kerala, AIR 1973 SC 1462.

[17] Article 13(2a) clarifies that 'law' includes, *inter alia*, "custom or usage having in the territory of India the force of law".

[18] Section 3(29) of the General Clauses Act, 1897, while defining the 'Indian Law' makes a distinction between "any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act", and other law in force in India. The latter is the 'Indian Law'.

(iii) that the principle so accepted as the common law of India continued to be in force by reason of Article 372 of the Constitution.[19]

Fourth, "in the territory of India" encompasses not only the territory of the former Dominion of India but also the territories of Indian rulers under British suzerainty.[20]

Fifth, "immediately before the commencement of this Constitution" means that international law as it stood incorporated in the Indian common law and statute law as at 25 January 1950 shall continue to be in force through 26 January 1950 until altered by the legislature or other competent authority. Any change in the English common law after that date shall not affect the Indian law, unless such change is incorporated into the Indian law.[21] However, this clearly clothes the Indian courts with power to determine, with reference to the critical date of the Constitution:

(a) whether a rule of international law was indeed such a rule (on the basis of the criteria for the determination of an international customary law rule);
(b) whether the pre-1950 English common law recognised it as such;[22]
(c) whether it was or it could have been part of the English common law applicable to the Indian conditions (Indian common law); and
(d) whether it is in conformity with the other provisions of the Constitution.

Finally, while the phrase "immediately before the commencement of this Constitution" has the effect of 'freezing' the international customary law as incorporated in the common law as it stood on the critical date, the Indian courts are likely to be moved by the principles of "justice, equity and good conscience", and even 'defreeze' it by recognising the inane evolutionary character of international law, particularly taking into account their own Constitutional responsibility under Article 51 and the responsibilities of the executive and the legislature under the other provisions of the Constitution, such as Articles 73 and 253. Evidently, the term "other competent authority" in Article 372 includes the courts in performance of their basic law-finding and law-declaring functions.

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[19] P.C. RAO, op.cit., p. 124. He bases his premises on a study of a number of cases, particularly State of West Bengal *v.* Corporation of Calcutta, AIR 1967 SC 1007; Dalmia *v.* National Bank, *supra* n. 10, p. 22; Director of Rationing and Distribution *v.* Corporation of Calcutta, AIR 1960 SC 1355; Commissioner of Income Tax *v.* A.P.V. Mir Osman Ali, AIR 1966 SC 1260.

[20] See the General Clauses Act, 1897, Section 3(213).

[21] P.C. RAO, op.cit., p. 119.

[22] For an extensive discussion of the English case law on the question of recognition and incorporation of international law in the English common law, P.C. RAO, op.cit., pp. 55-76; RAMA RAO loc.cit. n. 5, pp. 27-41. See also J.N. SAXENA, 'Relation of International law to Internal Law', 12 *Banares Law Journal* (Varanasi) (1976) 46-60.

2.2.2. Article 51

With the marginal note "Proclamation of International Peace and Security", Article 51 of the Indian Constitution proclaims as follows:

> "The state shall endeavour to:
> (a) promote international peace and security;
> (b) maintain just and honourable relations between nations;
> (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and
> (d) encourage settlement of international disputes by arbitration."

CHANDRASEKHARA RAO points out that this formulation was inspired by the Declaration of Havana adopted on 30 November 1939 by the Second Conference of American States Members of the International Labour Organisation.[23]

Introducing this provision in the Constituent Assembly, B.R. AMBEDKAR, Chairman of the Drafting Committee, said: "The propositions contained in this new article are so simple that it seems to be super-arrogation to try to explain them to the House by any lengthy speech".[24] Nor was there any lengthy debate except a few statements on the importance of peace and security for the peace and economic and social progress of the country, and on the importance of arbitration of disputes to avoid war.

A few principal features of Article 51 may be identified. First, Article 51 enshrines one of the "Directive Principles of State Policy", embodied in Part IV of the Constitution. The Directive Principles, Article 37 clarifies, are not enforceable through a court of law, but ". . . are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws".
As AMBEDKAR said in the Constituent Assembly,

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[23] The Declaration in its dispositif proclaimed ". . . unshaken faith in the promotion of international cooperation and in the imperative need for achieving international peace and security by the elimination of war as an instrument of national policy, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organised peoples with one another". Cited in P.C. RAO, op.cit., p. 4, quoting from B. SHIVA RAO, *The Framing of India's Constitution, Select Documents* Vol. 2 (1967) 150.

[24] *Constituent Assembly Debates*, Vol. 7 (1948-49) 595, cited in P.C. RAO, op.cit., pp. 4-5.

> "It is the intention of the Assembly that in future both the Legislature and the Executive should not merely pay lip service to these principles enacted in this Part, but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of the governance of the country."[25]

Second, in respect of Article 51, the state conduct cannot be made justifiable at least for three reasons. One, as a Directive Principle, it has been rendered so by Article 37. Two, the Article 51 obligation is for the state to 'endeavour' to promote, to maintain, to foster, and to encourage certain conditions. An obligation to endeavour cannot easily be amenable to tests of justiciability. Three, in the realm of foreign policy and international relations, success or failure of these endeavours will depend upon the international milieu, and attitudes and conduct of individual countries in respect of whose relations with India Article 51 requires executive and legislative action.

Third, the phraseology of Article 51 indicates that its drafting leaves much to be desired. It mixes up between foreign policy goals and elements of international law. Promotion of international peace and security is surely an admirable goal of any foreign policy. It is indeed a fundamental goal of international law which is one of the instrumentalities available for states in their endeavour to achieve this goal. Evidently, Article 51(a) and (b) are mutually inclusive. "Just" refers to justice and underscores the importance of justice to the relations between nations. "Foster" respect for international law is bad drafting. Is India required to 'foster' respect for international law in its own conduct or as between nations? Why only "foster respect", why not simply 'respect international law'? Why the separate mention of "international law" and "treaty" obligations?[26] Does not "international law" include treaties? Why not 'international law including treaty obligations'? The preference for settlement of disputes through arbitration has perhaps been due to the influence of the League of Nations system on the founding fathers of the Indian Constitution. Yet one is not sure, if by "arbitration" they meant third party arbitration; they probably did, in view of the popularity of third party arbitration during the League era.[27]

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[25] Constituent Assembly Debates (1948-49), Vol. 7, p. 476, quoted in P.C. RAO, op.cit., p. 3.

[26] One does not understand why England-trained lawyers should make this mistake. One has, of course, seen even eminent political scientists making it. See for instance, HAROLD J. LASKI, op.cit.n. 1, p. 600 (while dealing with the League of Nations).

[27] According to P.C. RAO, the inclusion of arbitration was the result of an inadequate understanding on the part of the Constituent Assembly of the system of settlement of international disputes under the United Nations Charter. See P.C. RAO, op.cit. n. 5, p. 6.

Finally, it is surprising, as CHANDRASEKHARA RAO rightly observes, that the drafting of Article 51 was influenced by a little-known international instrument, rather than, say the United Nations Charter, the ignorance of whose existence is impossible for one to attribute to its draftsmen.[28]

The generally accepted rules of interpretation of statutes such as the rule of harmonious construction and the golden rule of avoiding absurdity should support the proposition that Article 51(c) would mean 'foster respect for international law including treaty obligations in the dealings of states and peoples with one another'. The term 'international law' should be interpreted in terms of Article 38(1) of the Statute of the International Court of Justice, a treaty to which India is a party.[29] International law primarily applies to the relations of states and the draftsmen of Article 51 must have meant this when they drafted "in the dealings of organised peoples with one another", a phrase taken out of the Havana Declaration, 1939. Indeed, in terms of the functional test introduced by the International Court of Justice in the Reparations case[30] 'the peoples', too, have *jus standi* under international law commensurate with the function they perform in relation to applicable rules of international law, such as those flowing from human rights law.

That Article 51 and, hence, the rules of international law are *per se* non-justiciable in the realm of Indian municipal law calls for two qualifications. In the first place, as emphasised in the Constituent Assembly, non-justiciability does not affect the nature or depth of the obligation cast upon the executive and legislative wings of government to strive in good faith to achieve the objectives set by the Directive Principles. "State actions, including actions of the instrumentalities and agencies of the state, must not only be in conformity with the Fundamental Rights guaranteed by Part III of the Constitution, but must also be in accordance with the Directive Principles of State Policy prescribed in Part IV".[31] Secondly, to the extent that the fundamental rights under Part III are evolutionary in character and that their exposition in the hands of the judiciary takes this into account, even absorbing in its stride many elements of the Directive Principles, the latter have ceased to be non-justiciable. The Indian Supreme Court has in fact declared that its tasks

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[28] P.C. RAO, ibid.

[29] J.N. SAXENA interprets 'international law' in Article 51(c) to mean customary international law. See SAXENA, loc.cit. n. 22, p. 49. One would opt for the more liberal interpretation in terms of Article 38(1) of the ICJ Statute, for obvious reasons.

[30] ICJ Rep. 1949, p. 174.

[31] P.C. RAO, op.cit. n. 5, p. 3, citing in support Central Inland Water Transport Corporation *v.* Brojo Nath, AIR 1986 SC 1571 at 1617.

encompass advancement of the human rights jurisprudence.[32] Additionally, the effect of Article 37 on the judiciary is that

> "while Courts are not free to direct the making of legislation [in fulfilment of the Directive Principles *per se*], Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. This command of the Constitution must be ever present in the minds of Judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of State Policy."[33]

The judicial function may, in appropriate cases, even justify filling up of any gaps in the Constitution or in other statutes. But the Courts will be most circumspect in performing this 'legislative' function; they may invoke it only "in the case of clear necessity and when reason for it is found in the four corners of the statute itself".[34]

2.3. Executive and Legislative Powers in Respect of External Relations

Besides the Directive Principle embodied in Article 51, the Constitution of India contains provisions relating to foreign relations law.

Under Article 73, the executive power of the Union (the Central Government) extends to:

> "(a) the matters with respect to which Parliament has power to make laws; and
> (b) the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement."

The executive power is, of course, subject to the provisions of the Constitution.[35]

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[32] P.C. RAO, ibid., p. 148, citing Ajay Hasia *v.* Khalid Mujib, AIR 1986 SC 487, at 493 and M.C. Mehta *v.* Union of India, AIR 1987 SC 1086 at 1089, 1097.

[33] U.P.S.E. Board *v.* Hari Shankar, AIR 1979 SC 65 at 69, *per* CHINNAPPA REDDY, J., cited in P.C. RAO, op.cit., pp. 124-5.

[34] Income Tax Commissioner, Calcutta *v.* National Taj Traders, AIR 1980 SC 485 at 489, cited in P.C. RAO, op.cit., p. 125, who also cites a recent affirmation of this doctrine of necessity in Sub-Committee on Judicial Accountability *v.* Union of India, AIR 1992 SC 320.

[35] Article 256 seeks to ensure that the executive power of states (provinces) conform to the laws made by Parliament; Article 257 seeks to ensure that it does not impede or prejudice the executive power of the Union. Article 258 provides for delegation of executive power from the Union to states.

The legislative power under the Indian Constitution is shared by Parliament and state legislatures "subject to the provisions of this Constitution".[36] The Constitution enumerates three lists of subjects – the Union List, the State List and the Concurrent List – in respect of which the legislative power may be exercised,[37] provided that the legislative power of Parliament overrides that of the state legislature in respect of the Concurrent List.[38]

A number of items on the Union List relate to India's external relations. They include items 1 (Defence of India), 2 (Armed forces of the Union), 3 (Deployment of forces), ("Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India"), 10 ("Foreign affairs, all matters which bring the Union into relation with any foreign country"), 11 ("Diplomatic, consular and trade representation"), 12 ("United Nations organisation"), 13 ("Participation in international conferences, associations and other bodies and implementing of decisions made thereof"), 14 ("Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries"), 15 (War and peace), 16 (Foreign jurisdiction), 17 (Citizenship, naturalisation and aliens), 18 (Extradition), 19 (Admission into, and emigration and expulsion from India; passports and visas), 21 ("Piracy and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air"), 25 (Maritime shipping and navigation), 29 (Airways, aircraft and air navigation), 31 (Post and telegraph, telephone, wireless, broadcasting and "other like forms of communications"), 37 (Foreign loans), 41 (Trade and commerce with foreign countries) and 57 (Fishing and fisheries beyond territorial waters). By virtue of Item 97 read with Article 248, Parliament retains residuary legislative power in respect of "any matter not enumerated" in any of the three Lists.

The effect of Article 73 is that the executive power of the Union (the Central Government) encompasses the whole of the Union List and the Concurrent List, particularly the above-noted subjects directly relevant to external relations, subject of course to the other provisions of the Constitution, and also to any law made by Parliament.

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[36] Article 245 of the Indian Constitution.

[37] Article 246 and the Seventh Schedule of the Constitution.

[38] Article 254.

2.4. Making and implementation of Treaties

Two aspects of the relationship between treaties and the Indian Constitution may be considered, namely treaty-making and treaty-implementation.

2.4.1. Treaty-Making

Following the Commonwealth practice, treaty-making in India still continues to be regarded as a function falling within the executive powers of the Union, by virtue of Article 73 read with Article 246 and Item 14 of the Union List, Seventh Schedule to the Constitution. Indeed, Parliament has power to enact a law regulating treaty-making power pursuant to Article 246 and Item 14 and other Items of the Union List, but it has not done so. Hence the continuance of the Commonwealth practice. The point to note, however, is that there is nothing in the Constitution preventing the Executive from deviating from the Commonwealth practice so long as such deviation is not inconsistent with any of the provisions of the Constitution.[39]

The Government of India has made the following statement on the treaty-making power of the executive in India:

> "Parliament has not made any laws so far on the subject [of treaties] and until it does so, the President's power to enter into treaties remains unfettered by any internal constitutional restrictions.
>
> In practice, the President does not negotiate and conclude a treaty or agreement himself. Plenipotentiaries are appointed for this purpose and they act under full powers issued by the President. It is however, the President who ratifies a treaty."[40]

This is in line with the British, and hence the Commonwealth, practice. The executive claims the prerogative to decide whether or not to make and ratify a treaty. The legislature comes into the picture only if the treaty calls for any legislation to facilitate its implementation within the country or any

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[39] This point is material to Article 46 of the Vienna Convention on the Law of Treaties, 1969, whereby a state's consent to a treaty may be invalidated on ground of a manifest violation of a rule of its internal law of fundamental importance.

[40] *Law and Practice Concerning the Conclusion of Treaties* (United Nations Legal Series: New York, 1953) 63, quoted in C.G. RAGHAVAN, 'Treaty Making Power under the Constitution of India', in S.K. AGRAWALA, ed., *Essays on the Law of Treaties* (New Delhi, 1972) 217-250 at 219.

specific allocation of financial resources. This practice has its origin in the British constitutional convention whereby the Crown is not only the executive, but also the fountain-head of law and justice. In other words, legally there is a mythical fusion of the three organs of government under the Crown.

This fusion was a reality in the days of the divine right of kings, but is only a myth now, in view of the emergence of democratic principles. The concepts of parliamentary sovereignty and cabinet accountability impose serious limitations on the powers of the executive. Yet the ghost of history continues to haunt representative government including its conduct of foreign relations. In recent times, however, questions have been raised against the so-called executive prerogative. A case in point has been the nation-wide debate recently witnessed in Britain on the need for a national referendum to decide whether or not the country should ratify the Maastricht Treaty. The debate clearly transcended party affiliations. The need to consult the people was particularly highlighted in view of the serious abridgement of British sovereignty which the Maastricht Treaty involved.

Apart from the British heritage, other justifications for the executive discretion to decide on the participation in treaties include (a) the cabinet accountability to Parliament, and (b) the mandatory requirement of parliamentary approval implicit in adoption of a piece of enabling legislation. Unfortunately, both these justifications do not adequately fulfil the need for prior parliamentary approval for assumption of international obligations by the Union Government binding the country. The cabinet accountability comes into play only after the event, i.e., after the country has been committed to treaty obligations. The government of the day could lose the confidence of Parliament, but a change of government does not *per se* terminate or alter the international obligations already accepted by the outgoing government. The termination (if not provided for in the treaty itself) or alteration of a treaty already in force may have to be renegotiated – i.e., it is subject to further agreement of the parties and may carry with it special costs in terms of practical politics. The other requirement of parliamentary approval through enabling legislation is clearly subject to two limitations. One, it arises only after the executive has committed the country to a treaty and therefore, on the international plane, the treaty obligations will have full force regardless of whether or not Parliament enacts a piece of enabling legislation. Two, not all treaties may require enabling legislation, and therefore, where there is no need for enabling legislation, Parliament will have little chance of even discussing the pros and cons of the treaty, even if such a debate may be of mere academic interest. In other words, the current practice whereby the executive exercises absolute discretion in committing the country definitively with respect to a treaty is clearly an anachronism and out of step with the principles of

parliamentary supremacy in a democracy in which the people are supposed to govern themselves through their elected representatives.

There are at least four principal reasons why the consent of the peoples' representatives, if not the people themselves, must be a prerequisite for India, or for that matter for any democratic polity, to be bound by a treaty. First, when the current Commonwealth practice came to be established, the number of treaties negotiated between nations was very limited, and so were the scope and range of subjects covered by those treaties. Those were the days of limited government. But the post-Second World War international relations witnessed a horizontal as well as vertical expansion of matters covered by treaties and agreements, precisely because of the phenomenal expansion of the role of government in the governance of a country and of the scope of international relations. The recent negotiations on the issues of protection of the environment through the Rio Summit and of international trade through the Uruguay Round highlight this. The recent Indo-European Union treaty on economic matters is a similar example of a treaty, though of a non-universal character. One could add to the list items like human rights. These are fundamental issues that most directly and substantially affect the lives of individuals transcending the artificial boundaries of national jurisdiction and those of federal-state relations. It is, therefore, not only desirable but essential to bring the acceptance of the people to bear on a definitive decision on the participation of a country in a treaty involving such issues. Parliamentary consent thus legitimises acceptance of serious restraints on state sovereignty, both externally as well as internally. In fact it would greatly facilitate national compliance with a treaty. The criticality of such consent to coalition governments, or governments surviving on a razor-thin majority can hardly be exaggerated.

Secondly, one needs to emphasise time and again that India is a federation of states. The federal principles must be given full effect even if the Indian federalism is a much watered down version of the original concept, in comparison with the United States, Canada, or Australia. The Senatorial advice and consent, the *sine qua non* of the American Constitution, is based on respect for the federalist principles. The Rajya Sabha, or the Council of states (which is the Upper House of Parliament) could perform a similar function.

Thirdly, the rule of prior parliamentary consent is likely to act as a shield greatly assisting the executive in protecting, as far as possible, the legitimate interests of the country.

Finally, as already noted above, there is a need to enforce the principles of cabinet accountability and parliamentary supremacy. This cannot be meaningfully achieved by the current Commonwealth practice whereby

Parliament is confronted with a *fait accompli*, when the executive comes before it, after undertaking binding international obligations through treaties.[41]

Article 73(a) of the Indian Constitution in fact places both the executive and Parliament at par with each other, except that the latter may regulate executive 'discretion' by enacting a law. As the jurisdictions of both the Union executive and the Union legislature are co-extensive by virtue of this provision, and as both are subject to the provisions of this Constitution, the so-called Commonwealth practice of untrammeled executive prerogative in treaty matters is not exactly in consonance with the provisions of the Indian Constitution.[42]

It is submitted that in order to limit the executive discretion to acceptable levels in undertaking treaty obligations, to make the principle of parliamentary supremacy meaningful and realistic, and to obviate any hiatus between undertaking of treaty obligations on the international plane and their effectuation in the realm of municipal law, Parliament should urgently consider passing a law stipulating some form of prior parliamentary consent as a prerequisite to ratification or accession to an international agreement. In the absence of such a specific law, there is no way to restrain the government of the day from committing the country to international obligations of serious consequences, including substantial surrender of national sovereignty, even amounting to compromising the basic structure of the Indian Constitution.[43]

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[41] The executive has not followed a consistent practice of consulting Parliament before ratification of or accession to a treaty by it. Thus, for instance a resolution was moved by the relevant minister seeking parliamentary approval of the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 and of its ratification by the Government. The resolution was passed authorising the Government to ratify the Convention, see, M.N. KAUL and S.L. SHAKHDAR, *Practice and Procedure of Parliament* (New Delhi, 4th ed., 1991) 588, cited in P.C. RAO, op.cit., p. 132. See also K. NARAYANA RAO, 'Parliamentary approval of treaties in India', *Indian Yearbook of International Affairs*, Vol. 9-10 (1960) 22-39.

[42] On the limits of application of the Crown prerogatives to India, see State of West Bengal *v.* Corporation of Calcutta, AIR, 1967 SC 997, discussed at length in P.C. RAO, op.cit. pp. 120-123. RAO predicts a functional approach to be adopted by the Indian judiciary.

[43] RAGHAVAN rightly refers to the invalidity of a treaty entered into by the executive, if it leads to a change in the form of government as set up by the Constitution, for it could not have been the intention of the Constitution that a power conferred by it should be used to alter or destroy the constituent instrument itself. See RAGHAVAN loc.cit. n. 40, p. 246. In fact RAGHAVAN anticipated the need for parliamentary enactment on the treaty-making power of the executive, more than two decades ago. See RAGHAVAN, ibid., p. 228.

There is an urgent need for an informed and non-partisan public debate on this vital matter in India.[44]

2.4.2. Treaty implementation

Thus the Union executive enjoys somewhat unbridled power in the conclusion of treaties and in deciding the extent to which India should be bound by a treaty.[45] Implicit in this power is the duty to carry out the obligations under the treaty both within and outside the realm of Indian municipal law. Steps must be taken to incorporate the treaty into the body of the Indian domestic law, should such incorporation be necessary for the effectuation of the treaties in that realm. Indeed, it is the responsibility of the executive to see that there is no time gap between assumption of international obligations by India and their implementation as the state is expected, pursuant to Article 51 of the Constitution, to foster respect for treaty obligations (under Article 73 executive powers are subject to this and other provisions of the Constitution). At the same time it must also be noted that what cannot be implemented, for constitutional or other reasons, should not be undertaken by the executive as a feat of its prerogative. India, though in the august company of many other countries, does not have an enviable record of prompt ratification of treaties which it has arduously negotiated, or of their prompt implementation through domestic legislation, despite the often professed policy to the contrary. One of the reasons for this appears to be the endemic lack of co-ordination among the

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[44] For a critical analysis of some of the Indian judicial pronouncements which show a "tendency of undue deference to the executive, in all matters relating to foreign affairs", see T.S. RAMA RAO, 'Some Constitutional Aspects of Treaty-Making Power in India', in S.K. AGRAWALA, op.cit. n. 40, pp. 251-8. For a more conservative assessment of the judiciary's role, see P.C. RAO, op.cit., pp. 197-231 on 'Acts of state', and 'Facts of state'.

[45] It is, of course, common knowledge that the reservations made by a state while becoming a party to a treaty, to be valid, must be compatible with the object and purpose of the treaty - see Article 19 of the Vienna Convention on the Law of Treaties, 1969. At times, however, a reservation made in respect of domestic law may be invalidated by the developments in domestic law of the reserving country. For instance, with reference to the right of compensation for victims of unlawful arrest or detention in violation of the Covenant on Civil and Political Rights, 1966, India's Instrument of Accession to that treaty declared that there was no such right enforceable under the Indian legal system (see 20 IJIL (1980) 118, para II). But this has been countermanded by judicial rulings under Article 21 of the Constitution, whereby there is now a right to compensation for unlawful arrest and detention. See for instance the Rudul Shah case, *Supreme Court Cases* (SCC) (1983) 4, p. 141; Bhim Singh *v.* J&K, AIR 1986 SC 494; Rajalakshmi *v.* UT of Pondicherry, SCC (1992) Supplement 2 p. 27; Saheli *v.* Commissioner of Police, Delhi, AIR 1990 SC 513.

various government departments each of which functions like a monolithic leviathan.

Article 253 of the Constitution provides as follows:

> "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association, or other body."[46]

Additionally, Article 260 envisages making of a law to regulate the exercise of foreign jurisdiction by the government of India, pursuant to an agreement with the Government of any territory, not part of India.[47]

P. CHANDRASEKHARA RAO, on the basis of case-law, identifies the following categories of treaties requiring constitutional amendments or legislation by Parliament:

(i) treaties involving cession of territory;
(ii) treaties whose implementation requires addition to, or alteration of, the existing law;
(iii) human rights covenants and other instruments.[48]

Indeed, no exhaustive enumeration of the various types of treaties requiring parliamentary legislation is possible. As a general rule, as Justice SHAH observed in *Maganbhai Ishwarbhal Patel* v. *Union of India*:[49]

> "The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the state. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty."

CHANDRASEKHARA RAO rightly notes that although India became a party to a number of treaties, "the number of treaties which have been incorporated

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[46] It is interesting to note, from the point of view of international law, that this provision uses the phrase "treaty, agreement or convention", and Item 14 of the Union List repeats this. It perhaps means a 'treaty, however named', and if so construed, Article 253 would be in harmony with Article 1(a) of the Vienna Convention on the Law of Treaties, 1969, embodying the definition of a treaty.

[47] See Foreign Jurisdiction Act 1947, a pre-independence enactment.

[48] P.C. RAO, op.cit. pp. 137-48.

[49] AIR 1969 SC. p. 783, also cited in RAGHAVAN, loc.cit. n. 40, pp. 224-5.

into Indian law, either fully or partly, is small".[50] On an analysis of nineteen such selected statutes incorporating treaties, RAO finds that three different legislative methods have been used by Parliament, namely:

(1) making provisions in compliance with the relevant provisions of the treaties without enacting the treaty provisions;[51]

(2) annexing to the statute in a schedule to it, those provisions of the treaty which required enforcement under Indian law;[52] or

(3) reproducing the whole of the treaty in the schedule to the statute.[53]

It is needless to say that the first two methods are likely to play havoc with the process of effectuation of treaty obligations through the Indian law in so far as they encourage subjectivity and selectivity in identification of treaty provisions requiring statutory incorporation.[54] They also defeat the application of the basic rule of interpretation of treaties that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",[55] in so far as the truncated reproduction or municipal law redraft of the treaty provisions may fail to assist the judiciary seeking to implement the treaty through the statute law, constrained as it is to be bound by the authority of the Legislature.[56]

International lawyers are likely to be fascinated by the last phrase employed in Article 253 of the Constitution, namely "or any decision made at any international conference, association or other body", at a time when they continue to argue over the legal significance of resolutions of international organisations. A similar phrase is found in Item 13 of the Union List. Evidently, the legislative competence of Parliament under Article 253 is regardless of the international legal significance of any decision of an international conference, association or other body. If Parliament feels a decision of an international conference to be important enough to be legislated

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[50] P.C. RAO, op.cit., p. 149.

[51] E.g. the United Nations (Security Council) Act, 1947; the Merchant Shipping Act, 1958; the Tokyo Convention Act, 1975; the Anti-hijacking Act, 1982; the Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982. For an examination of the last three enactments, see V.S. MANI, 'Aviation safety, international terrorism and the law', 12 IJIL (1992) 1-59 at 40-8.

[52] E.g., the Diplomatic Relations (Vienna Convention) Act, 1972.

[53] E.g., the Arbitration (Protocol and Convention) Act, 1937 and the Geneva Conventions Act, 1960.

[54] This is indeed besides the point that P.C. RAO makes regarding the municipal law language and treaty obligations. See P.C. RAO, op.cit., p. 151.

[55] Article 31 of the Vienna Convention on the law of Treaties, 1969.

[56] See, e.g. V/O Tractorexport *v.* Tarapore & Co, AIR 1971 SC 1, discussed in P.C. RAO, op.cit., pp. 173-6.

on, it may do so. "[I]nternational conference, association or other body" does not have to be inter-governmental, although it may encompass inter-governmental meetings. The words "international . . . association or other body would undoubtedly include inter-governmental organisations (other than the United Nations, because Item 12 of the Union list specifically refers to that organisation). CHANDRASEKHARA RAO points out that the modern environmental legislation in India was largely inspired by the 1972 Stockholm Conference.[57]

The role of the judiciary in interpretation and application of statutes enabling implementation of treaties is equally important. As the Guardian of the Constitution, it has the responsibility to facilitate action in implementation of treaties, the functions of treaty-making and treaty-legislation being constitutionally approved functions. However, it appears that the Indian judiciary has not been able to evolve a uniform approach to construction of treaty-implementing statutes and that it tends to be seriously inhibited by its essentially municipal law orientation. Hence one agrees with CHANDRASEKHARA RAO's recommendation that the judiciary has, through Article 51, a constitutional duty to apply the principles of interpretation embodied in the Vienna Convention on the Law of Treaties, 1969. These principles have by now become part of international customary law.[58]

2.5. Implementation of International Customary Law

Some of the issues relating to whether and how international customary law is part of the Indian municipal law have already been discussed earlier, particularly in the context of Articles 372 and 51 of the Constitution. CHANDRASEKHARA RAO discusses *Gramophone Co. of India* v. *Birendra Bahadur Pandey*.[59] Since his study, the Indian Supreme Court had occasion to deal with some aspects of the interface between international customary law and Indian municipal law in *M.V. Elizabeth and others* v. *Harwan Investment and Trading Pvt. Ltd.*,[60] which now appears to be the *cause célèbre* on the subject. The sole question for the decision of the Indian Supreme Court in this case was whether any courts in the state of Andhra Pradesh or in any other state in India (including the High Courts and the Supreme Court) had admiralty

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[57] P.C. RAO, op.cit., pp. 190-194.
[58] Ibid., pp. 177-8.
[59] AIR 1984 SC p. 667, P.C. RAO, note 5, pp. 181-183.
[60] SCC (1993) Supplement (2), 433 (also in 3 AsYIL (1993) 183 et seq).

jurisdiction to proceed in rem against the arrested ship on a cause of action concerning carriage of goods from an Indian port to a foreign port. There was an array of earlier High Court decisions holding that the Indian High Courts' admiralty jurisdiction was determined in terms of the British Admiralty Courts Act, 1861, that it remained unaffected by the statutory changes in Britain, and that the High Courts' admiralty jurisdiction was limited and distinct from their other jurisdictions. According to these decisions, the Indian High Courts and the Supreme Court would not have the jurisdiction to grant the remedy sought.

The Supreme Court's decision was handed down by a Bench of two judges (Justice T.K. THOMMEN and Justice R.M. SAHAI, with the former giving the main judgement and the latter a short concurring one). The Court rejected outright the above reasoning of the earlier High Court decisions. Justice THOMMEN said at the outset:

> "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."[61]

Justice THOMMEN, on an examination of an array of British and British-Indian statutes, observed:

> "The wide jurisdiction vested in the English Courts is derived from ancient principles of Maritime Law developed by custom and practice as well as from subsequent statutes many of which incorporated the provisions of International Conventions unifying the laws practised in several maritime countries."[62]

The learned judge, after a perceptive excursus into the evolution of maritime law in England, France and some other civil law countries, said:

> "Maritime law is as much a part of the general legal system as any other branch of the law . . .. [T]his branch of the law . . . is no longer treated as a separate and independent branch."[63]

The judge asserted that in tracing the history of admiralty law in India, it is "misleading and incorrect to confine it to statutes", and that this is so in the

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[61] Ibid., p. 449, para. 18.
[62] Ibid., p. 454, para. 33.
[63] Ibid., pp. 463-4, para. 59.

case of the law obtaining in Britain.[64] "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", he reminded the Court.[65] Also, "where substantive law demands justice for the party aggrieved, and the statute has not provided the remedy, it is the duty of the Court to devise procedures by drawing analogy from other systems of law or practice".[66]

Thus the Court, speaking through Justice THOMMEN, ruled that it was

> "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."[67]

The Court noted that

> "[i]t 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."[68]

The judgment also referred to the Brussels Convention relating to the Arrest of Seagoing Ships, 1952, the Maritime Liens and Mortgages Conventions of 1926 and 1967, the Brussels Convention on Bills of Lading, 1924, the UN Convention on Carriage of Goods by Sea, 1978, and various other conventions to some of which India is a party and to many, still a non-party.

The Court found that "Indian statutes lag behind the development of international law" in comparison with the statutes in England and other maritime countries.[69] "In the absence of any statute in India comparable to the English statutes on admiralty jurisdiction", the Court said,

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[64] Ibid., p. 465, para. 65.
[65] Ibid., para. 66.
[66] Ibid.
[67] Ibid., p. 466, para. 67.
[68] Ibid., p. 467, para. 71, citing NAGENDRA SINGH, *International Maritime Law, British Shipping Laws*, Vols. I to IV, in support.
[69] Ibid., p. 469, para. 76.

> "there is no reason why the words 'damage caused by a ship' appearing in Section 443 of the [Indian] Merchant Shipping Act, 1958 should be so narrowly construed as to limit them to physical damage and exclude any other damage arising by reason of the operation of the vessel in connection with the carriage of goods."[70]

The Court then suggested that the gap in admiralty law should be plugged:

> "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."[71]

Referring to the various Brussels Conventions to which India is not a party, the Court said that these Conventions were "the result of international unification and development of 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."[72]

The following comments on the case are in order. First, the Court's concern in the case was, essentially, the fact that there were gaps in the statute law of India in respect of the law of admiralty. There were two kinds of gaps, one in relation to the jurisdiction of the state High Courts and the other in relation to the extent of remedy available under the Indian Merchant Shipping Act, 1958. Second, as regards both, the Supreme Court relied heavily on the 'judicial sovereignty' of the people vested in the Courts of record (i.e., the State High Courts and the Supreme Court) through the Constitution of India; their plenary and unlimited inherent powers to dispense justice according to the principles of "justice, equity and good conscience", rather than being constrained by the "imperial statutes of the bygone era" which had fallen into the dustbins of history, even in the metropolitan countries. Finally, to fill up these gaps, the Court relied, in equal measure, on the developments in international

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[70] Ibid., p. 473, para. 79.
[71] Ibid., p. 475, para. 85.
[72] Ibid., p. 476, para. 86.

maritime law, construing international conventions having evolved from the generally shared principles of the various legal systems (although the Court's analysis was largely inveighed by its analysis of the English, the American and some of the civil law systems), speaking variously about "general principles of law" common to the legal systems of the maritime countries, general principles of different legal systems, "principles of international maritime law", principles of "international common law", and principles of international customary law, all in one breath! Indeed, it is often difficult to distinguish one category from the other. Even in terms of Article 38(1) of the Statute of the International Court, there is so much of give and take and mutuality of influence between the different sources of international law (the Court also spoke of "transnational law", "maritime law", "comparative law", "private and public international law" all at one go without bothering to distinguish between them).

The Court's observations that the various maritime conventions have evolved on the basis of general principles of law drawn from various legal systems and that, therefore, the principles embodied in these conventions are binding even on countries which had not become parties to these conventions, are significant. The Court was in fact referring to the interface between general principles of law, treaty law and international customary law by one single sweep! By the same feat, the Court suddenly filled up the hiatus in the Indian statute law. The utilization of international law, the Court having incorporated it as part of the "common law of India", to plug the gaps in the Indian statute law is remarkable!

Equally important are the two pieces of the Court's advice to the legislature and the executive. First, the Court said, the entire maritime law of India should be subjected to an expert-scrutiny and research so that an updated piece of legislation was put in place in lieu of the existing archaic one. Second, noting that the non-ratification by India of many treaties, the formulation of some of which was contributed by "active and fruitful Indian participation", was due to circumstances such as lack of co-ordination among the various Government departments, the Court suggested the constitution of "an adequate and specialised machinery for implementation" of these treaties, to "facilitate adoption of internationally unified rules by national legislation", and proposed a role for the Law Commission of India at par with that of its counterpart in England.[73] Hopefully, the executive and Parliament would take follow up actions.

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[73] Ibid., p. 477, para. 91.

3. CONCLUSION

The purpose of this paper has been to present an overview of some of the principal issues involved in the effectuation of international law through the Indian municipal law. It in no ways claims to be an exhaustive treatment of the subject. Indeed, in view of space limitations, it has even stayed clear of an in-depth examination of the Indian statute law and common law against the whole gamut of international law, to evaluate how far the Indian law has been able to assimilate the latter into its body juridic. Without such an evaluation no study can be considered complete.

The above presentation points to a number of conclusions. The effectuation of international law in India is facilitated through incorporation of treaties into the internal law through legislation and incorporation of specific rules and principles of international law into the Indian common law by the Indian courts following the Commonwealth practice. Often, the judiciary is presented with opportunities to play an active role in this regard. Even when a treaty has not been specifically incorporated into the Indian law, the courts may, as far as possible, interpret the Indian statute law in harmony with the principles embodied in the treaty, thereby avoiding gaps in implementation of international treaty obligations undertaken by India.

As regards international customary law, the *M.V. Elizabeth* case has shown that the Indian courts can play an activist role in evolving an Indian common law, in recognizing, interpreting and incorporating into that law even the most recent principles and rules of international law developed on the basis of multilateral treaties to which India may not even be a party. This case is indeed a trail-blazer in the realm of effectuation of international law through Indian municipal law.

However, the Indian judicial decisions often show a municipal lawyer's ignorance or inadequate understanding of various aspects and concepts of international law, including the processes of international law-making. CHANDRASEKHARA RAO's recent work has been aimed, *inter alia*, to clarify to the Indian municipal lawyers and judiciary the various important aspects and concepts of international law relevant to the judicial task of their effectuation into the internal law of India, which duty is cast upon the judiciary under Article 51 of the Constitution.[74]

The Supreme Court has, in the *M.V. Elizabeth* case, highlighted the problem of lack of co-ordination among the various Government departments in respect of effectuation of treaty principles into the municipal law of India.

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[74] P.C. RAO, op.cit. n. 5.

This problem has seriously affected not only the ratification of or accession to international agreements, but also getting them incorporated into municipal law once India became a party thereto. However, one is not sure to what extent the Law Commission of India can play the 'crucial role' in the specialized co-ordinating machinery proposed by the Supreme Court. It is submitted that this role should be performed by the Legal and Treaties Division of the Ministry of External Affairs and the Ministry of Law & Justice, working together. One finds that the former is often sidelined in matters having a bearing on international law. The Law Commission has enough work to do in the realm of codification of municipal law and review of the statute law as such. It is a different question, however, if the Commission has, with its current manner of working, found itself on the periphery of the law-making process in India. If so, part of the blame must be borne by the Commission itself. One hopes that, should the Government of India decide to take follow-up action on the suggestions of the Supreme Court, it would not limit these exercises to the confines of its bureaucracy, but would liberally draw upon the plentiful professional expertise available outside.

THE UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP) - AN ASSESSMENT

Said Mahmoudi*

1. INTRODUCTION

The protection of the environment at national, regional and international levels is a relatively new concern. Although one may find national legislation or international agreements from the turn of the century with some bearing on the environment, they are not normally considered as 'environmental' legal acts or documents since their adoption was very often instigated by considerations other than care for the environment and its components.[1] Not until the end of the 1950s and the beginning of the 1960s were the effects of intensive post-war reconstruction and the pressure of high-tempo full-production policies on the environment seriously considered, and only then did the concern for the status of the environment find concrete expression in the form of legal rules and principles. That is why very many of the legal measures specifically adopted with the main objective of protecting the environment originated only since the middle of the 1960s.

Having this background in mind, it is easy to understand why 'protection of the environment' - one of the most debated subjects of our time - was not mentioned in the Charter of the United Nations and did not appear in the UN's agenda until the late 1960s.[2] With regard to the bitter experience of the two World Wars, the main task of the UN was expected to be to contain the use of force against the territorial integrity of the member states

* Professor of International Law, University of Stockholm.

[1] One often-repeated example is the 1901 Convention for the Protection of Birds Useful to Agriculture. Even the title of the convention clearly shows that the main objective is not to protect the birds as a part of biological diversity, but to use them in an economic activity. A. KISS, *Droit international de l'environnement,* Pedone, 1989, p. 5.

[2] In this respect, the UN Charter is comparable with the 1957 Treaty of Rome, which established the European Economic Community (EEC). The word 'environment' was not mentioned in that Convention either. However, the EEC, like the UN, used to rely on its implied powers for environmental legislation.

Asian Yearbook of International Law, Volume 5 (Ko Swan Sik *et al.*, eds.; 90-411-0375-9
 pp. 175-198

and to secure respect for human rights. To fulfil this task, the Charter provided the UN with a number of broadly formulated competencies which would permit the Organisation to act in virtually any field of human well-being. In this respect, mention should particularly be made of the Economic and Social Council (ECOSOC) which, because of its mandate and powers, could easily involve itself in environmental issues, and act as a catalyst by making recommendations to UN members, the General Assembly and specialised agencies.[3] This was how the UN, while lacking any expressed mandate, could start directly addressing environmental issues towards the end of the 1960s.[4]

The first major and concrete step was taken in 1972 when the UN Conference on the Human Environment (the Stockholm Conference) was convened. The Stockholm Conference is generally considered as the starting point for international environmental law, a conference which "drew attention to the right of human beings to an environment of quality",[5] and which "marked the culmination of efforts to place the protection of the biosphere on the official agenda of international policy and law".[6] One of the main results of the Stockholm Conference was the decision to recommend launching the United Nations Environment Programme, UNEP, a specific machinery within the UN system to deal exclusively with environmental issues. However, UN involvement in environmental issues has not been limited to UNEP. It has, through its specialised agencies and other affiliated organs, played an important role in the protection of the environment.[7] In addition, the UN made invaluable contributions to the development of international environmental law through its regional commissions.[8]

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[3] UN Charter, Article 63.

[4] Cf P. BIRNIE, 'The UN and the Environment', in: ROBERTS & KINGSBURY, eds., *United Nations, Divided World: The UN's Roles in International Relations* (Clarendon Press, 1993) p. 335. BIRNIE refers to the doctrine of implied powers and effective interpretation, and opines that the powers of the UN were expressed in such comprehensive terms that an extensive interpretation would permit the Organisation to deal with environmental issues. Even in the EEC, environmental measures were adopted despite any explicit Community competence in this area. The situation there, however, changed in 1987 when, through the Single European Act, the Community received specific legislative competence in the field of environment.

[5] BIRNIE, p. 328.

[6] L.K. CALDWELL, *International Environmental Policy* (Duke University Press 1990) p. 55.

[7] CALDWELL names those specialised and affiliated agencies which have been involved in environmental questions. They are: FAO, GATT, IAEA, ICAO, ILO, IMO, ITU, UNESCO, WHO and WMO. Ibid., pp. 339-340.

[8] There are five UN regional commissions: Economic and Social Commission for Asia and the Pacific; Economic Commission for Africa; Economic Commission for Europe; Economic Commission for Latin America; Economic Commission for Western Asia.

The role of the Economic Commission for Europe (ECE) should be particularly underlined here.[9]

The role of the United Nations in general and the work of any of its organs or specialised agencies with respect to the environment could be subject of a separate study. This paper is mainly concerned with the UN's principal environmental establishment, UNEP. Thus, after a short account of the genesis of UNEP, its structure and its legal status, its contribution to the development of international environmental law and its potential for global environmental protection will be briefly commented on.

2. THE GENESIS OF UNEP

The establishment of UNEP should be seen in the light of the events which led to the convocation of the Stockholm Conference in 1972, the circumstances governing that Conference and the attitude of states toward the issues of environment and development.

Although national and some regional approaches to environmental problems, particularly through the efforts of non-governmental organisations, had been initiated in several countries and regions during the 1960s, the need for internationally concerted steps and more comprehensive policies was greatly felt. Seriously concerned about large-scale environmental problems and fully aware of the need for international action, Sweden in December 1967 submitted to the General Assembly a proposal for the convocation of a UN Conference on this issue. The Swedish proposal was referred to ECOSOC, which on 30 July 1968 adopted a resolution requesting the UN to convene a Conference on the Human Environment.[10] The General Assembly agreed, and unanimously decided on 3 December the same year to convene the first UN Conference on the Human Environment in Stockholm in June 1972.[11] A preparatory commission was established at the same time as a range of studies on important relevant problems was initiated. An important report by the UN Secretary-General in May 1969 elucidated the activities and programmes of UN bodies relative to the

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[9] The adoption of the 1979 Geneva Convention on Long-Range Transboundary Air Pollution (18 ILM p. 1442) and the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (30 ILM p. 800), e.g., was due to the efforts of the ECE.

[10] ECOSOC Resolution 1346 (XLV).

[11] UNGA Resolution 2398 (XXIII).

human environment.[12] The report clearly demonstrated that environmental issues were being dealt with sectorally,[13] a situation which the Stockholm Conference was expected to change through its holistic approach. The prime objective of the Conference, as spelled out in the General Assembly resolution, was:

> "to provide a framework for comprehensive consideration within the United Nations of the problems of the human environment in order to focus the attention of Governments and public opinion on the importance and urgency of this question and also to identify those aspects of it that can only or best be solved through international co-operation and agreement."[14]

This purely 'environmental' objective was contested by the majority of the developing states. For Sweden, as the country which had taken the initiative to the Stockholm Conference, as well as for a number of other industrialised countries which had observed the devastating effects on the environment of hasty economic development and full industrialisation, the main concern was of course environmental protection. Developing countries, on the other hand, considered the environmental movement as a threat to their development aspiration and "a colonialist conspiracy to thwart development by imposing upon them extra costs and prohibitions that developed states had not faced in the nineteenth and early twentieth centuries in implementing their pollution-generating, resource-consuming industrial revolutions."[15] To overcome this problem and reconcile the concerns for environment and development, the preparatory commission of the Stockholm Conference arranged a meeting of scholars from different disciplines at Founex, Switzerland in 1971. One of the main findings of this meeting was that environmental damage probably results not only from the development process itself, but also from lack of development. Consequently, environmental problems in developing countries could be overcome by the process of development itself.[16] This finding somehow paved the way for the developing countries to come to Stockholm, albeit some with hesitation.

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[12] Report of the Secretary-General, 'Problems of the Human Environment', *UN doc.* E/4667. The Secretary-General had in the previous year submitted another report to the same effect, *UN doc.* E/4553.

[13] Cf. BIRNIE, p. 340.

[14] UNGA Resolution 2398 (XXIII), last preambular paragraph.

[15] BIRNIE, p. 338. KISS quotes a developing country delegate in the Conference as saying "let me die polluted". KISS, *Droit,* p. 36.

[16] For a detailed account of the Founex meeting, see CALDWELL, p. 52; BIRNIE, p. 338.

The whole work of the Stockholm Conference and the results achieved were marked by the schism between the concern of the developed states for the environment and the apprehensions of the developing countries over the undesirable effect of environmental measures on the pace of development. Of the six subjects included in the Conference agenda, one dealt exclusively with development and environment. Another concerned the international organizational implications of action proposals. The Conference, which was held between 5 and 16 June 1972 with delegates from 113 states, concluded its work by adopting an Action Plan and a Declaration of Principles, and by recommending the establishment of an environmental fund and new UN machinery for administering and directing the UN environmental programme. UNEP was planned not as a specialised agency with independent powers, but rather as a small secretariat within the framework of the UN Secretariat. The Conference recommendation also provided for a fifty-four-state Governing Council for the implementation of the UN environmental programme.

On 15 December 1972, the General Assembly upon the recommendations of the Stockholm Conference adopted a Resolution under the title of institutional and financial arrangements for international environmental co-operation.[17] This Resolution underscored that while the responsibility for action to protect the environment could be exercised more effectively at the national and regional level, environmental problems of broad international significance would fall within the competence of the United Nations system. It further emphasized the sectoral responsibilities of the organisations within the UN system. The Resolution then referred to the report of the Secretary-General on the results of the Stockholm Conference concerning the urgent need for a permanent institutional arrangement within the United Nations system for the protection of the environment, and established UNEP, its Governing Council and Environment Fund.

The developing countries succeeded in increasing the size of the Governing Council to fifty-eight states. The four additional seats were to accommodate greater representation from Asia. The developing countries further succeeded, through UNGA Resolution 3004 (XXVII), in changing the location of UNEP from its expected site in Geneva to Nairobi, Kenya.[18] The initiative for this change came from some newly independent African states and gained support among all developing countries to mark

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[17] UNGA Resolution 2994 (XXVII). The General Assembly adopted eleven resolutions concerning the recommendations of the Stockholm Conference, Resolutions 2994 to 3604 (XXVII).

[18] CALDWELL, p. 69.

the dissatisfaction with the fact that no UN body was located in a developing country.[19] The choice of Nairobi was generally considered necessary to encourage the participation of the developing countries. It was also interpreted as a clear indication of the influential role that developing countries were going to play in UNEP. Even if politically perhaps a necessity, the location of UNEP in Nairobi definitely complicated the performance of one of its main functions: co-ordination with other UN bodies and contact with governments, environment movements and the mass media.[20]

Thus UNEP's Governing Council was established with the predomination of the developing countries. The UNEP Charter underscored that it should pay special attention to the situation of developing countries.[21] The early manifestation of control by developing countries over the choice of site and the composition of the Governing Council was construed by several observers in the West as an indication that UNEP would become another forum for the voicing of frustrations of ex-colonial states and a new channel for development assistance. However, later developments demonstrated that these misgivings were ill-founded since developing countries soon recognised the seriousness of environmental problems and the significant role that UNEP could play as a professional body in combating these problems.[22] This change of attitude among the majority of the developing countries is probably because UNEP has managed to give the international environmental movement universality, legitimacy and acceptability.[23]

UNEP's terms of reference as spelled out in General Assembly Resolution 2997 (XXVII) are broadly and somewhat vaguely formulated. UNEP is required, inter alia,

> "to promote international co-operation in the field of the environment, and to recommend, as appropriate, policies to this end, [and] to provide general policy guidance for the direction and coordination of environmental programmes within the United Nations system."[24]

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[19] The fourth paragraph of Resolution 3004 (XXVII) notes that the headquarters of the United Nations and of the specialised agencies are all located in developed states in North America and Western Europe. To apply the principle of equitable geographical distribution, the General Assembly decided, according to the last paragraph of the same Resolution, to locate the environmental secretariat in a developing country, namely, in Kenya.

[20] CALDWELL, pp. 69-70; BIRNIE, p. 343.

[21] UNGA Resolution 2997 (XXVII), part I, para. 2(f).

[22] CALDWELL, p. 71.

[23] Ibid., p. 83.

[24] UNGA Resolution 2997 (XXVII), part I, para. 2(a) and (b).

This rather unspecified mandate clearly excludes enforcement or supranational decision-making powers, but at the same time leaves it up to UNEP's Executive Directors to use the increasing public pressure and push for more than what a literal interpretation of its mandate may permit.[25]

The 1992 UN Conference on the Environment and Development at Rio de Janeiro (the Rio Conference) proposed an expansion of UNEP's mandate. According to this proposal, UNEP should concentrate on the following priority areas: strengthening its catalytic role in stimulating and promoting environmental activities and considerations throughout the UN system, promoting international co-operation in the field of environment, environmental monitoring and assessment, dissemination of environmental information, further development of international environmental law, promotion of the widest possible use of environmental impact assessments, facilitation of information exchange on environmentally sound technology and provision of training, promotion of sub-regional and regional co-operation development, providing technical, legal and institutional advice to governments, upon request, in establishing and enhancing their national legal and institutional frameworks, supporting governments in the integration of environmental aspects into their development policies, and further developing assessment and assistance in cases of environmental emergencies.[26] It was also proposed that this expansion of functions were to be accompanied by an increase of expert staff and financial resources, as well as closer co-operation with UNDP and the World Bank.[27]

3. UNEP'S STRUCTURE

Both before and during the Stockholm Conference, the new UN institution for the coordination of environmental measures was conceived as a secretariat relatively small in comparison to other UN bodies. This was even enshrined in UNEP's Charter.[28] UNEP as a small secretariat started

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[25] BIRNIE points out that "[d]espite the constraint imposed on UNEP by its organisational and financial framework and terms of reference, its first two Executive Directives seized the opportunities provided by ambiguities in the latter to expand UNEP's role". BIRNIE, pp. 347-348. See also CALDWELL, p. 79.

[26] *Agenda 21,* Chapter 38, para. 22.

[27] Ibid., para. 23.

[28] UNGA Resolution 2997 (XXVII), part II, para. 1, which provided that "a small secretariat shall be established in the United Nations to serve as a focal point for environmental action and co-ordination within the United Nations system in such a way as to ensure a high degree of effective management."

its work in 1973 with a staff of approximately 100 employees headed by an Executive Director and controlled by a Governing Council. The number of staff has doubled since.[29] These professionals are located both a headquarters in Nairobi and in UNEP's regional offices around the world including in Geneva, Vienna, Bangkok and Mexico.

The Governing Council, as mentioned, consists of representatives of 58 states, which are not required to be members of the United Nations. They are elected by the General Assembly on the basis of equitable geographical distribution. The Council usually meets biennially in Nairobi to deliberate policy matters, issue decisions and set UNEP's agenda.[30] Apart from promoting and co-ordinating international co-operation for the protection of the environment, it is obliged to receive reports from UNEP's Executive Director concerning the implementation of environmental programmes within the UN system, to keep the world environmental situation under review, to review the impact of national and international environmental measures on the developing countries, and to review and approve annually the programme of utilisation of resources of the Environment Fund.[31] The Governing Council reports annually to the General Assembly through ECOSOC.[32] ECOSOC thereby has the possibility to transmit its own comments on the report. One significant implication of the Council mandate is that it should ensure that UNEP keeps within the limits deliberately put on it, and concentrates on supporting the programmes of others rather than introducing its own great scheme.[33]

UNEP is headed by an Executive Director elected by the General Assembly on the nomination of the UN Secretary-General for a term of four years. So far, UNEP has had three Executive Directors: MAURICE STRONG (Canada), MUSTAFA TOLBA (Egypt) and ELISABETH DOWDESWELL (Canada). The main functions of the Executive Director include: to provide substantive support to the Governing Council, to co-ordinate environmental programmes within the UN system, to advise the UN's specialised agencies on the formulation of environmental programmes, to bring to the attention of the Governing Council any matter which he/she deems to require con-

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[29] Annual Report of the Executive Director of the United Nations Environment Programme, 1987, p. 149.

[30] C.A. PETSONK, 'The Role of the United Nations Environment Programme (UNEP) in the Development of International Law', 5 *American University Journal of International Law and Policy* (1990) 355.

[31] UNGA Resolution 2997 (XXVII), part I, para. (c)-(g).

[32] Ibid., part I, para. 3.

[33] BIRNIE, p. 345.

sideration, and to administer the Environment Fund.[34] In performing its functions, the Executive Director is fully under the authority and policy guidance of the Governing Council.

The funding of UNEP has been insufficient and this is one reason for its restricted role. There are two sources of funding. The administrative costs of UNEP and its Governing Council are borne by the UN budget and the costs of operational programmes by the Environment Fund.[35] The latter is a voluntary fund based on pledging of voluntary contributions by UN members. These have always been inadequate for UNEP to finance the environmental programmes of general interest. One observer considers that developed states have, through the inadequacy of their financial contributions, tried to ensure that UNEP does not gain the power "to interfere with industrial development, encroach on the roles of existing sectoral organisations, or seek itself to become a specialised agency".[36] The initial contribution to the fund was $ 20 million. It has fluctuated during the years, but UNEP has at all time lacked enough money to finance all its urgent plans. The UNEP budget for 1992-93 was $ 150 million and for 1994-1995 it was $ 120. The leading role that UNEP has played in recent years with respect to international co-operation concerning global environmental problems, such as depletion of the ozone layer, climate change and biological diversity, has enhanced its position. This is formally acknowledged in *Agenda 21* adopted by the Rio Conference,[37] and it is expected that the rich UN members would now like to increase UNEP's budget.[38]

4. UNEP'S LEGAL STATUS

The discussions which preceded the Stockholm Conference were not only about environmental problems in need of urgent international action, but also about the type of international institutional arrangement required for addressing the problem. Three options were generally suggested. One was the establishment of a new organisation outside the UN system, consisting only of those states that were responsible for causing the environ-

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[34] UNGA Resolution 2997 (XXVII), part II, para. 2(a)-(j).

[35] Ibid., part II, para. 3.

[36] BIRNIE, p. 345.

[37] See *supra*, note 26.

[38] The 18th session of the UNEP governing body, which met in Nairobi in May 1995, discussed the 1996-1997 budget of UNEP. Due to world fiscal constraints the expected budget for this period will be $ 105 million. See 18 *International Environment Reporter* (June 1995) 450.

mental problems, namely the major industrialised and polluting states of the West.[39] This proposal was never taken seriously since not only was it unrealistic with respect to the role the developing countries were expected to play by not committing the same mistakes as the West,[40] but also it could seriously discredit the authority of the United Nations in other fields.[41]

The second proposal, which was tabled by UN Secretary-General U THANT, advocated a powerful new agency within the UN system, a specialised agency, with the authority to ensure that agreed measures were actually carried out. This proposal did not meet much enthusiasm either. One reason was the general attitude towards existing specialised agencies, their huge expenditures, ineffective working methods, rigidness, and poor output. The other reason was the fact that many of the specialised agencies including WMO, WHO, FAO, UNESCO and ICAO were already engaged in environmental activities, and it made no sense to remove these activities from existing specialised agencies and place them in a new agency. Even the specialised agencies themselves were strongly against the establishment of a new agency with a leading role in the field of the environment. The most important reason was that, given the nature of environmental problems at that time, it was deemed appropriate and adequate from the viewpoint of efficiency to have a limited number of states represented in the new institution with a secretariat of experts and scholars and not bureaucrats.[42]

The third alternative was to expand the work of the existing specialised agencies and other organs to carry the new load of environmental affairs instead of establishing a new organ.[43] This was the option which was favoured by the specialised agencies. Even this option was not attractive to the states since it was generally realised that the type of international environmental policy which was looked for cut across the traditional specialities of specialised agencies. It required an overall perspective, which no specialised agency could achieve. CHAYES, in a prophetic commentary in 1972, stated that the viable alternative would be "some form of a high level

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[39] G. KENNAN, 'To Prevent a World Wasteland: A Proposal', 48 *Foreign Affairs* (1970) 401.

[40] This theme was of great concern within the UN. The sixth preambular paragraph of UNGA Resolution 2398 (XXIII), e.g., contains "the strong hope that developing countries will, through appropriate international co-operation, derive particular benefit from the mobilisation of knowledge and experience about the problems of the human environment, enabling them, *inter alia,* to forestall the occurrence of many such problems".

[41] Cf. A. CHAYES, 'International Institutions for the Environment', in HARGROVE, ed., *Law, Institutions & the Global Environment* (Oceana Publications Inc., 1972) p. 5.

[42] Ibid., pp. 6-7.

[43] Ibid., p. 8.

policy planning, co-ordination and review unit within the UN proper".[44] And that is exactly what UNEP is.[45]

UNEP is not a specialised agency. Specialised agencies, according to the definition in Article 57 of the UN Charter, are established by intergovernmental agreements. They have wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields. They are legal and autonomous entities with their own membership and organs. They are brought into relationship with the United Nations through entering into agreements with the ECOSOC. Such agreements must be approved by the General Assembly. In these agreements, the specialised agencies agree that ECOSOC co-ordinates their activities through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the members of the United Nations.[46] In the agreements with ECOSOC, specialised agencies undertake to submit regular reports to the organ.[47]

The absolute majority of the specialised agencies either already existed at the time of the League of Nations or their establishment was foreseen by the end of World War II.[48] The UN has been reluctant to establish new specialised agencies despite the need in many new areas for centralised international co-operation. Instead, it has a number of subsidiary organs including funds and programmes. These United Nations bodies have some degree of administrative autonomy, with a staff which is part of the Secretariat and a governing body which is elected by the ECOSOC or the General Assembly. They are under the control of the main organs of the

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[44] Ibid., p. 9.

[45] The general views about the future institutional mechanism were described in *UN doc.* A/CONF. 48/11, dated 10 January 1972, under the title of "International Organisational Implications of Action Proposals". According to this document, there was agreement between states that nothing new should be set up until it was clear what needed to be done and that existing institutions could not do it. Cf. P. THACHER, 'The Role of the United Nations', in HURRELL & KINGSBURY, eds., *The International Politics of the Environment* (Clarendon Press, 1992) 186.

[46] UN Charter, Article 63.

[47] Ibid., Article 64.

[48] Six specialised agencies were already established by 1945: ITU (1865), UPU (1874), ILO (1919), FAO (1945), IMF and IBRD (1945). Three were continuations of pre-World War II institutions: UNESCO, WHO and WMO. IMCO (later IMO) is the specialised agency which was established after World War II. IAEA is not considered a specialised agency since, unlike other specialised agencies it submits its reports directly to the General Assembly and not to the ECOSOC. It can also report, when appropriate, to the Security Council. Cf. M. ELMANDJRA, *The United Nations System: An Analysis* (Faber and Faber, 1973) 85-86, 118.

UN, and normally are forced to keep within a tight budget not requiring much funding.

UNEP is a subsidiary organ[49] of the General Assembly established under Article 22 of the UN Charter, as an autonomous and independent unit within the broader framework of the UN Secretariat.[50] It has no independent powers and no supranational authority.[51] It plays a primarily co-ordinative role. Unlike some specialised agencies, it cannot monitor or enforce the law. It derives its authority from the mandate which has been given to it by the General Assembly. It has so far applied an extensive interpretation of its mandate.[52]

The specialised agencies' resistance to UNEP's co-ordination and leadership role, shown at the time of its inception, has moderated with the passage of time. This is partly due to the growth of national concern, mainly in the developing countries, which is reflected in the work of the governing bodies of the specialised agencies. But the reluctance of the industrialised countries to establish a new specialised agency for the environment, which was strongly pointed out before the Stockholm Conference, has continued. When in 1991 the strengthening of UNEP was being discussed by the preparatory commission for the Rio Conference, one of the ideas put forward by some states was to transform UNEP into a specialised agency. However, the Conference rejected the idea.[53]

Given the nature of the problem and political circumstances of the time, the decision at the Stockholm Conference not to establish a new specialised agency was both understandable and prudent. However, transformation of UNEP into a specialised agency now after more than twenty years of

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[49] The UN Charter recognises, in Article 7, only two categories of organs for the United Nations: i.e. the principal organs (General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice, and Secretariat) and subsidiary organs, which may be established by the General Assembly (Article 22), by the Security Council (Article 29) or by ECOSOC (Article 68). However, lack of definition for subsidiary organs in the Charter seems to have given rise to controversies on whether all units established by these three principal organs shall be called subsidiary organs or some of these units can be termed as organs of e.g. the General Assembly. In the practice of the United Nations, UNCTAD, UNIDO and UNCDF are termed as organs of the General Assembly whereas UNHCR, UNDP, UNEP, UNICEF, UNITAR and some other units are categorised as subsidiary organs. For discussion, see ELMANDJRA, pp. 48-49; B. SIMMA, *The Charter of the United Nations: A Commentary* (Oxford University Press, 1994) 196-197.

[50] The General Assembly has the authority according to Article 23 of the Charter to establish such subsidiary organs as it deems necessary for the performance of its functions.

[51] BIRNIE, p. 342.

[52] Its Executive Directors have seized the opportunities to expand UNEP's role. Ibid., p. 347.

[53] BIRNIE, p. 344.

successful activity may have some advantages. The concern shown before the Stockholm Conference about the risk of policy-making paralysis in a new specialised agency with an open membership of the majority of the countries having different environmental priorities, appears now to be over.

Following over two decades of activity, UNEP now has its own working routines and a well-balanced composition of professional staff. There is, therefore, little risk that, in case of transformation into a specialised agency, it will suffer from problems related to the staffing patterns, regulations and practices of other such agencies. UNEP as a specialised agency with an autonomous legal personality, large membership and increased budget would be much better equipped to launch long-term environmental programmes. As a subsidiary organ – a programme – UNEP is dependent on voluntary contributions from states. As a specialised agency, it would have an approved budget based on proportionate contributions of all its members.[54] As a subsidiary organ created by and under the authority of the General Assembly, its policies and activities are constantly examined and controlled by the Assembly. The General Assembly can indeed change its agenda, or simply dissolve it.[55] As a specialised agency, it would keep its independent status while related to the United Nations.

More importantly, UNEP's independent status as a specialised agency would permit it to request, under Article 96(2) of the UN Charter, advisory opinions from the International Court of Justice on matters of principle.[56] The General Assembly has indeed the power, according to Article 96(2) of the Charter, to authorise even subsidiary organs to request advisory opinions. However, such authorisation has nog yet been given. In contrast, the General Assembly, through the approval of the agreements between the specialised agencies and the ECOSOC by virtue of Article 63(1) of the Charter, has implicitly authorised these agencies to request advisory opin-

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[54] The budget of specialised agencies and the apportionment of financial responsibility of the member states are approved by the governing bodies of these agencies. However, the General Assembly, according to Article 17(3) of the Charter "shall consider and approve any financial and budgetary arrangements with specialised agencies referred to in Article 57 and shall examine the administrative budgets of such specialised agencies with a view to making recommendations to agencies concerned".

[55] SIMMA, p. 196.

[56] In the absence of such a possibility for UNEP, a specialised agency – WHO – has recently requested the advisory opinion of the Court on the legality of the use by a state of nuclear weapons in armed conflicts, a matter which certainly has a significant environmental implication. ICJ Rep. 1993, p. 467.

ions of the Hague Court.[57] As a specialised agency, UNEP would most probably receive such authorisation.

5. UNEP'S FUNCTIONS AND ACTIVITIES

The basic functions of UNEP, as spelled out in General Assembly Resolution 2997 (XXVII), are the dissemination of information, fostering of understanding, and assistance to other agencies' programmes.[58] Under this broad mandate, the Governing Council in its biennial meetings sets UNEP's agenda. The point of departure in all UNEP's activities is to build awareness of the relation between environment issues and development issues. The initial meetings of the Governing Council were strongly characterised by the political manoeuvring of each group of states to consolidate its own position. For the developing countries, development-relevant questions had priority whereas the industrialised states were basically concerned with environmental problems.

A first task of UNEP was the establishment of a global assessment programme - Earthwatch. This was a component of the Action Plan adopted by the Stockholm Conference.[59] It was to include a Global Environmental Monitoring Service (GEMS) and an International Referral Service, a world-wide data network for environmental information.[60] The latter later changed name to International Referral System for Sources of Environmental Information - INFOTERRA. Earthwatch's task was world-wide monitoring to detect significant changes in critical environmental conditions, to gather information, to stimulate scientific research, to evaluate and review the information and the result of the research, and to link by computer nationally held information.[61] UNEP also created an International Register of Potentially Toxic Chemicals (IRPTC). Through this register, UNEP has been able to assist particularly the developing countries to establish their own chemicals information system. GEMS is a well-functioning service, and its activities today cover over 140 countries. INFOTERRA, in contrast, is not yet fully utilised.

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[57] SIMMA, p. 1012. The only specialised agency which has not received authorisation is UPU. Specialised agencies which have so far used this possibility include UNESCO, WHO and IMO.

[58] CALDWELL, p. 74.

[59] Action Plan, Section C, first paragraph.

[60] Ibid, Recommendation 101.

[61] CALDWELL, p. 72; BIRNIE, p. 342; Action Plan, Section C.

The industrialised countries considered the establishment and proper functioning of Earthwatch as UNEP's most important and urgent task. The developing countries, relying on their numerical strength, managed in the first session of the Governing Council in 1973 to downgrade this programme to demonstrate their political power and to underline their own priorities.[62] This difference of attitudes was soon replaced by a common understanding of the significance of Earthwatch, which has recently expanded considerably. The developing countries have indeed benefited most from this programme.[63]

As regards UNEP's co-ordinating role, the Stockholm Conference provided specifically for the establishment of the Environmental Co-ordination Board (ECB), chaired by the Executive Director and under the auspices of the United Nations Administrative Committee on Co-ordination (ACC).[64] The main function of this Board was to ensure co-operation and co-ordination among all bodies concerned with the implementation of environmental programmes. ECB was soon discontinued, and its task was entrusted to ACC, which consists of the heads of the specialised agencies and other bodies under the chairmanship of the Secretary-General. As regards the environment, ACC has, pursuant to the Rio Conference, established an Inter-Agency Committee on Sustainable Development[65] and another unit named Designated Officials for Environmental Matters. UNEP plays a significant role in both bodies, and acts as the secretariat for the latter.[66] A concrete step within the framework of UNEP's co-ordinating function is the adoption of a programme on Awareness and Preparedness for Emergencies at the Local Level (APELL) and the establishment in 1991 of a UN Centre for Urgent Environmental Assistance.[67] The purpose is to address assessment of and responses to manmade environmental emergencies, including industrial accidents.

UNEP co-sponsored a survey in 1979 of nine international financing agencies, which revealed a general absence in the agencies of systematic

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[62] CALDWELL, ibid.

[63] According to THACHER, the Stockholm Conference's Action Plan consisted of three functional components, namely, an assessment programme (Earthwatch), management activities, and supporting measures. He maintains that assessment functions under UNEP's Earthwatch have been well discharged by the UN system whereas the result of UNEP work with respect to management actions at the national level is less impressive. THACHER, p. 187.

[64] Resolution 2997 (XXVII), Part IV, para. 14.

[65] It consists of FAO, IAEA, IMO, UNDP, UNEP, UNESCO, WHO, WMO and the World Bank.

[66] Cf. BIRNIE, pp. 346-347.

[67] UNGA Resolution 44/224 (1989); UNEP/GC. 16/9(1991).

attention to environmental impacts of different financial projects. As a result of this survey, UNEP drew up a Declaration of Environmental Policies and Procedures related to economic development. The Declaration was signed in 1980 by all major multilateral funding agencies in Europe, Latin America, Asia and Africa as well as the World Bank, FAO, UNDP, the European Community and the Organization of American States.[68] Following the adoption of the Declaration, a Committee of International Development Institutions on the Environment (CIDIE) consisting of UNEP, UNDP and the above-mentioned intergovernmental financial institutions was established for which UNEP acts as secretariat.

UNEP publishes an annual report on *The State of the World's Environment*. By reporting in this way on environmental problems and development of protection measures at national, regional and international levels, it partially fulfils its monitoring function in general but also indirectly monitors environmental law enforcement in particular.

The priority areas of UNEP have been revised many times. Its initial programmes, adopted in the first session of the Governing Council in 1973, gave priority to the following items: human settlements; land, water and desertification; education, training, assistance and information; trade, economics and transfer of technology; oceans; conservation of nature, wildlife, and genetic resources; and energy.[69] Some of these items are still on the list of UNEP's priorities while some others, e.g. energy, no longer appear on this list. At present UNEP carries out a four-pronged programme: sustainable management and use of natural resources, sustainable production and consumption, a better environment for human health and well-being, and globalisation trends and the environment.[70]

The Rio Conference advocated an expanded mandate and a more active role for UNEP. In *Agenda 21,* which is the most important document of the Conference, it is stated that:

> "In the follow-up to the Conference, there will be a need for an enhanced and strengthened role for UNEP and its Governing Council. The Governing Council should, within its mandate, continue to play its role with regard to policy guidance and co-ordination in the field of environment taking into account the development perspective."[71]

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[68] Cf. THACHER, p. 191.

[69] CALDWELL, p. 72.

[70] 18 *International Environment Reporter* (June 1995) 451.

[71] *Agenda 21,* Chapter 38, para. 21.

The development perspective of environmental measures and the environmental aspects of development policies, which have been UNEP's real challenge since its inception, constitute the core of the concept of sustainable development. This concept, with its emphasis on the need for a balance between economic development and preservation of the environment for the present and future generations, found definitive political endorsement by over a hundred heads of government and state in Rio. As one of the results of this high-level political recognition of the need for integration of environment and development and the complementarity of these two processes, the Conference decided to establish a special Commission for Sustainable Development (CSD). The main purpose of this Commission is to ensure an effective follow-up of the Conference, to strengthen international co-operation, and to rationalise the intergovernmental decision-making processes with respect to the integration of environment and development as well as to follow up the implementation of *Agenda 21*.[72] The CSD's terms of reference presage a close and special relation between this new organ and UNEP.

Finally, mention should be made of UNEP's close relation with a broad range of non-governmental organisations. The contacts between these organisations and specialised agencies or UN subsidiary organs are not unprecedented, but the nature of UNEP's work requires closer contacts with non-governmental organisations. Of particular importance is the relation between UNEP on the one hand, and IUCN (now World Conservation Union), WWF, ICSU, Friends of the Earth and Greenpeace on the other. These, as well as some other non-governmental organisations, have regular communication with UNEP's Liaison Offices in Nairobi and New York.

6. UNEP AND THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

UNEP did not receive any explicit mandate in Resolution 2997 (XXVII) to work for the development of international environmental law. However, it was argued that the General Assembly had there given its own authority to UNEP "to promote international co-operation in the field of environment",[73] and in delegating this authority the General Assembly arguably

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[72] Ibid., Chapter 38, para. 11. The CSD was established according to Article 68 of the UN Charter.

[73] UNGA Resolution 2997 (XXVII), part I, para. 2(a).

had drawn on its own authority to encourage the progressive development of international law. Thus, the Governing Council received authority to promote the development of international environmental law, and it draws on this authority when it requests the Executive Director to develop conventions and guidelines.[74]

Agenda 21 transformed UNEP's de facto competence in international environmental law into an explicit authority. Accordingly, UNEP shall concentrate its efforts to:

> "further development of international environmental law, in particular conventions and guidelines, promotion of its implementation, and co-ordinating functions arising from an increasing number of international legal agreements, inter alia, the functioning of the secretariats of the Conventions, taking into account the need for the most efficient use of resources, including possible co-location of secretariats established in the future."[75]

The lack of explicit competence in the field of environmental law was the main reason for rather disorganised measures by UNEP during its first ten years. Aware of this problem, the Executive Director at the request of the Governing Council assigned a special working group of Senior Government Officials Expert in Environmental Law to work out a plan for the development of environmental law. The result of the work of this group was adopted in 1982 under the title of *Montevideo Programme.*[76] This programme called for development of the law in three major subject areas, namely, land-based marine pollution, protection of the stratospheric ozone layer, and the transport, handling and disposal of toxic and dangerous wastes.[77] In addition, eight other areas were identified which should in the second place be target for legal development: environmental emergencies, coastal zone management, soil conservation, transboundary air pollution, international trade in potentially harmful chemicals, prevention of pollution of rivers and other inland waters, legal and administrative mechanisms for the prevention and redress of pollution damage, and environmental impact assessment.[78] The *Montevideo Programme* working group concluded that

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[74] PETSONK, p. 355.

[75] *Agenda 21,* Chapter 38, para. 22(h).

[76] The Montevideo Programme for the Development and Periodic Review of Environmental Law, in H. HOHMANN, *Basic Documents of International Environmental Law*, Vol. I (Graham & Trotman/Martinus Nijhoff, 1992) pp. 70-78.

[77] Ibid., part II, section I.

[78] Ibid., part II, section II.

guidelines, principles and conventions should be developed in the three major subject areas. Besides, action should be taken in accordance with the programme's strategies for the other eight subject areas. Finally, according to the working group, the work of UNEP in the development of environmental law should be promoted.[79] The *Montevideo Programme* was revised in 1992 by a group of experts from 81 countries, and this revised programme was adopted by the UNEP Governing Council in May 1993.[80] The areas named in the programme concern principles, substantive matters, and institutional matters. UNEP's environmental law activities since 1982 generally follow the *Montevideo Programme.*

In addition to the very important assistance to developing countries in shaping their own environmental legislation, UNEP's contribution to the development of international environmental law normally takes the form of guidelines, action plans and conventions. Adoption of such documents usually starts by seeking scientific consensus on an environmental problem. The next step is the development of a legal strategy by legal-technical working groups which review draft legal texts prepared by UNEP's Environmental Law Unit. All states may participate in these groups. Once the legal and technical issues are more or less settled, UNEP tries to consolidate political support for the planned measures against the environmental problem. The text of a guideline, adopted by consensus by the legal-technical working group, is sent to the Governing Council for possible adoption. Guidelines are not legally binding, but they very often find expression in national laws or other binding documents. If the text adopted by the working group is a draft convention and there is enough political support for it, a diplomatic conference will be convened for the formal adoption of the convention.[81] The greater part of the law-making efforts of UNEP is devoted to guidelines and action plans. In some cases, a next step will be to proceed with the work for adopting a convention on the basis of the guidelines and action plans. However, these 'soft-law' documents have the advantage of avoiding the controversies about scientific uncertainty or economic implications of the proposed measures.[82]

UNEP's guidelines concern completely different subjects. So far over 10 such guidelines have been adopted, including guidelines on shared natural resources (1973), co-operation in weather modification (1980),

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[79] UNEP's Conclusions and Recommendations of Montevideo, 1981, 2(a), (b) and (c), in HOHMANN, Vol. 1, p. 69.

[80] UNEP/GC. 17/5 (1993).

[81] PETSONK, pp. 365-366.

[82] BIRNIE, p. 351.

offshore mining and drilling (1982), land-based pollution of the marine environment (1985), management of hazardous waste (1987), environmental impact assessment (1987) and exchange of information on chemicals in international trade (1989).[83] The language of these guidelines is permissive and vague, clearly showing the intention of the drafters not to imply any legal obligation. As regards action plans, the 1984 Action Plan for Biosphere Reserves,[84] together with several other international documents, led to the adoption of the 1992 Convention on Biological Diversity.

UNEP has drafted, negotiated and obtained adoption for a number of important conventions in international environmental law. Here, a distinction should be made between agreements adopted within the framework of UNEP's Regional Seas Programme and international agreements in other fields of environmental law. The Regional Seas Programme contains regional conventions for the protection of marine environments.[85] Inspired by the 1974 Convention for the Protection of the Baltic Sea (Helsinki Convention), one of the first steps taken by UNEP was to invite in 1975 the coastal states around the Mediterranean to adopt the Mediterranean Plan of Action. This was a non-binding document, which became the basis for the adoption of the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution in 1976. This Convention, like the Helsinki Convention, has a holistic approach to marine environmental problems. The adoption of the Barcelona Convention gave rise to what is coined as the '*Barcelona process*'. The characteristic of this process is that a number of states with broadly disparate interests agree first on a non-binding instrument, and later make that agreement legally binding in a framework convention. The ambiguous language of the framework convention permits a greater number of states to become parties, with the option of undertaking specific obligations under the protocols appended to the convention.[86] The *Barcelona process* was effectively applied in the adoption of a range of conventions for different regional seas, all with the same holistic approach

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[83] For the text of these documents, see HOHMANN, Vol. 1, pp. 54-190.

[84] UNEP/GC. 13/L.6.

[85] These conventions, in contradistinction to other legal documents which are prepared by UNEP's Environmental Law Unit, are worked out by the Ocean and Coastal Areas Programme Activity Centre (OCAPAC).

[86] PETSONK, pp. 365-366. Five different protocols on different types of marine pollution in the Mediterranean have been adopted. The parties to the Barcelona Convention have to join at least one of these protocols. For discussion on the Convention and its protocols, see P. SAND, *Marine Environment Law in the United Nations Environment Programme*, UNEP, 1988.

to environment problems.[87] The adoption of these regional conventions has always been facilitated by the fact that marine pollution, as against other environmental nuisance, is the most tangible problem, with direct and immediate undesirable effects. States have always given priority to the combat against marine pollution.

Different from the regional seas conventions are the conventions which UNEP has so far worked out in other areas where states have had varying degrees of enthusiasm and devotion. The first was the 1985 Vienna Convention for the Protection of the Ozone Layer.[88] The Vienna Convention was adopted further to the decisions in the *Montevideo Programme,* and, building on the Barcelona model, was followed by the Montreal Protocol on Substances that deployed the Ozone Layer.[89] However, in contrast to the *Barcelona process,* the Convention was not preceded by a non-binding document. The Convention and its Protocol, which have been amended a couple of times, are generally considered as most important documents in international environmental law. The reason is that so many countries have for the first time agreed to take concrete measures on an important environmental problem, and have in fact done so. This is particularly important because, despite negative economic implications of the adopted measures for both developing and developed countries, the Convention has succeeded in its objectives in the relatively very short time which has elapsed since its adoption. Even recalcitrant states such as India and China have ratified the Montreal Protocol.

Another result of UNEP initiative is the important 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal.[90] The adoption of this Convention was preceded by the 1985 UNEP Cairo Guidelines and Principles for the Environmentally Sound Management and Disposal of Hazardous Wastes.[91] The negotiations did

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[87] These conventions and related protocols are for the protection of the marine environment in the Persian Gulf (1978, given in 17 ILM, p. 511), West and Central African Region (1981, 20 ILM, p. 746), the Southeast Pacific (1981, SAND, ibid., p. 84), Red Sea and Gulf of Aden (1982, SAND, ibid., p. 114), the Caribbean Sea (1983, 22 ILM, p. 227), East Africa (1985, HOHMANN, Vol. 2, p. 1032), the South Pacific (1986, HOHMANN, Vol. 2, p. 1060) and Zambezi River Basin (1987, 27 ILM, p. 1112). In addition, an action programme for the protection of the Marine and Coastal Environment of the Northwest Pacific Region (NOWPAR) was adopted on 14 September 1994.

[88] 25 ILM, p. 1370.

[89] 26 ILM, p. 1541.

[90] 28 ILM, p. 657.

[91] HOHMANN, Vol. 1, p. 148.

not then achieve a total ban of export of hazardous wastes because waste traffic was of economic significance, but a later review conference did.[92]

UNEP's intensive involvement in environmental impact assessment and its pressure for an international agreement on this subject led to the adoption of the 1991 Convention on Environment Impact Assessment.[93] One of the two major conventions adopted at the Rio Conference, the Convention on Biological Diversity, was also prepared by UNEP.[94] This is a framework and comprehensive convention which has taken particular account of the economic dimensions of biological resources and their management.

Finally, mention should be made of another role of UNEP relative to the implementation of international environmental law. UNEP serves as secretariat for a number of important international conventions including the 1985 Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[95] and the Convention on the Conservation of Migratory Species of Wild Animals.[96] The secretariats of these conventions have legal status independent from UNEP. UNEP is not party to any convention, and does not have any legal relationship with these secretariats except where a convention, pursuant to the consent of UNEP, expressly provides rights and obligations for it. By exercising its co-ordination function, UNEP contributes to the effective implementation of the conventions and better operation of the secretariats.[97]

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[92] For a detailed discussion on the role of UNEP in the preparation and negotiation of this convention, see, K. KUMMER, 'The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention', 41 *International and Comparative Law Quarterly* (1992) p. 530; PETSONK, pp. 374-381.

[93] This convention was prepared by the Economic Commission for Europe, but it was indeed thanks to UNEP's active involvement both through its 1987 guideline on goals and principles of environmental impact assessment and recommendation of senior advisers to the Executive Director, that its adoption became possible. Cf. PETSONK, p. 358.

[94] The Governing Council's decision on the preparation for an international legal instrument on the biological diversity of the planet (15/34) was adopted on 25 May 1989.

[95] 12 ILM, p. 1085.

[96] 19 ILM, p. 15.

[97] Cf. A. TIMOSHENKO, 'International Environmental Law in the Post-UNCED Era', paper presented at the International Law Association's 66th Conference, Buenos Aires, 14-20 August 1993, p. 5.

7. CONCLUSION

Chapter 39 of *Agenda 21* introduced the concept of "international law of sustainable development". Even if no definition is given for this concept, the content of Chapter 39 implies that this concept overlaps with international environmental law. One corollary of such an overlap or equation is that environmental law today should be viewed in the wider context of sustainable development.[98] This in itself requires due consideration in law-making of integration of environment and development. Given the impressive results of UNEP's activities in the last two decades, particularly its continuous efforts for integration of environment and development and its role in attracting the confidence and active participation of many developing countries in international environmental arrangements, it was only natural that *Agenda 21* entrusted it with an expanded mandate for the development of international law of sustainable development and for effective implementation of adopted measures.

As a subsidiary organ of the General Assembly with a tiny budget never enough for its ambitious programmes, UNEP has suffered from the traditional administrative constraints of such organs. However, the dynamism of its mandate, the increasing interest and involvement of the public in environmental issues, energetic leadership, and a rather small but professional staff have together resulted in achievements not normally possible even for larger organisations with larger budgets. Hardly any other UN subsidiary organ can be compared with UNEP in this respect. UNEP has been a big soul in a little body.[99]

UNEP has emerged from its teething troubles and now has the necessary experience to act with more authority and independence without risking entanglement in the bureaucratic routines of specialised agencies. Promotion from subsidiary organ to specialised agency would afford it the necessary power to fulfil its expanded task, particularly with respect to the development of international law, and supervision of the implementation of international legal agreements. One important corollary of such elevated status would be the ability to request advisory opinions from the International

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[98] Ibid., p. 3.

[99] One established view is that the term 'subsidiary organ' is essentially a formal one, and does not necessarily imply any measure of the autonomy such an organ enjoys *vis-à-vis* the principal organ. SIMMA, p. 196. However, a careful study of the situation in UNEP and even in UNDP shows that this 'formal' relation has implied a range of limitations particularly with respect to financing. Specialised agencies normally do not experience the limitations in the same way.

Court of Justice. Many important questions in environmental law still need legal clarification by an international legal authority such as the ICJ. One such question is the right to a decent environment as a human right. Another corollary would be increased activity by UNEP in preparing more international binding instruments, particularly in areas not specifically within the competence of other UN bodies. International trade in chemicals and land-based marine pollution have been named as two such areas.

Notwithstanding the resistance of some countries, the nature of environmental issues and the global relevance of related problems dictate that the United Nations give proper priority to the environmental item on its agenda. Such a priority requires a status for UNEP at least equal to that of UNESCO, ILO or IMO. One possible occasion for this elevation will arise at the turn of the century, when the results of the national implementation of *Agenda 21* are to be assessed by the UN.

NOTES

WHEN IS A TREATY A TREATY IN LAW? AN ANALYSIS OF THE VIEWS OF THE SUPREME COURT OF NEPAL ON A BILATERAL AGREEMENT BETWEEN NEPAL AND INDIA

Surya P. Subedi*

1. INTRODUCTION

> "For a small country, Nepal has produced more than its share of political oddities. It has a constitutional monarch, worshipped by many as an incarnate deity. It is also one of the few countries to have freely voted communists into power . . . On August 28th Nepal discovered it also had a Supreme Court prepared to overrule both king and party. The Court decided that King Birendra's decision in June to dissolve parliament and call an election was unconstitutional."[1]

These lines were written recently in *the Economist*, after the Supreme Court of Nepal had delivered an extraordinary decision stating that the decision of the King of Nepal of June 1995 to dissolve parliament and call an election on the recommendation of the Prime Minister was unconstitutional. In 1992 this Court also delivered a very interesting decision, touching upon the law of treaties and affecting Nepal's relations with India. The latter judgment is the subject of analysis in this paper.

A number of rivers originate in the Nepal Himalayas and flow through the valleys and plains of Nepal to India and ultimately to the Bay of Bengal. They can provide a great deal of hydro-electric power, a cheap and durable form of energy, much needed by the countries of South Asia. It is estimated that Nepalese rivers could generate up to 83,000 megawatts of hydro-electric

* Senior Lecturer in International Law, University of Hull.

[1] 'The Monarch and the Marxists', *The Economist*, 2 Sept. 1995, p. 53.

Asian Yearbook of International Law, Volume 5 (Ko Swan Sik *et al.*, eds.; 90-411-0375-9
, pp. 201-210

power,[2] which is more than the combined total hydro-electric power produced by USA, Canada, and Mexico. For instance, a single hydro-electric power project, the Karnali Project, would have an installed capacity of 10,800 MW, the second largest in the world.[3] These rivers have also been very useful to irrigate the low-laying parts of Nepal as well as the fertile Indo-Gangetic plains in India. That is one reason why India became interested from as early as the 1950s to utilise the Nepalese rivers in the interests of both India and Nepal.

However, many Nepalese took the view that India was keen to exploit Nepal's hydropower potential to its advantage. Their opinion was based on Nepal's experience with the Kosi and Gandak projects in the early 1960s under which India secured disproportionate benefits to Nepal's detriment. It was this hang-up of the past that led to the insertion of a clause in the new 1990 Constitution of Nepal, at the insistence of all nationalist forces in the country, to ensure that no government in Nepal concludes a treaty to exploit water resources of Nepal without securing a two-thirds majority in parliament.[4] Such a majority is very difficult to secure without taking all major parties in confidence. Nevertheless, a newly elected government of the Nepali Congress Party, which critics characterised as government supported and favoured by India, in 1991 concluded an agreement with immediate effect with India (hereafter the 'Tanakpur Agreement'), allowing it to build a 577-metre long afflux bund[5] on Nepalese territory to ensure the success of an Indian hydro-electric power project being built at Tanakpur, located on the Indian side of the Indo-Nepal border river, Mahakali, using the water of this river. The agreement was to enter into force without awaiting or requiring the approval of the parliament of Nepal. A case was brought before the Supreme Court of Nepal challenging the validity of the agreement.[6] The Prime Minister, who endorsed the 'Agreed Minutes' through a Joint Communique, contested the case stating

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[2] "Only 0.64% of that potential is now harnessed. Foreign consultants say 25,000 MW are easily exploitable if and when India and Nepal reach some agreement on pricing." *Far Eastern Economic Review*, 8 March 1990, p. 26.

[3] XXXVII *The Foreign Affairs Record* No. 3 (March 1991), p. 35 (Ministry of Foreign Affairs, Government of India).

[4] See infra.

[5] Anglo-Indian for: quay.

[6] The case was brought before the Supreme Court under writ jurisdiction as a public interest litigation by Mr. B.K. NEUPANE, an Advocate of the Supreme Court of Nepal, asking the Court to review the decisions of the Government to go ahead with the Tanakpur Project without seeking parliamentary approval. The reason for bringing the case directly to the Supreme Court was to seek under certiorari jurisdiction judicial review of the agreement with India, in accordance with the rights granted to the citizens of Nepal to go directly to the Supreme Court to have any decision of the Government quashed if the decision is unconstitutional or if the fundamental rights of individuals have been violated.

that the Agreed Minutes did not constitute an agreement in law but were a mere understanding reached between the two countries to allow India to build the afflux bund on Nepalese territory for the Indian Tanakpur project in return for certain concessions. Hence, in his opinion, it was not necessary to table this understanding before parliament since the Constitution of Nepal and the Nepal Treaty Act required the Government to table only treaties and agreements and not understandings.

It is interesting that the Government of the day did not try to argue that the deal was an executive agreement and therefore not subject to the requirement of being tabled before parliament. What the Prime Minister in fact was saying was that the documents exchanged between Nepal and India were of a technical and administrative nature and related to matters for the regulation of which the executive was competent. The Government of Nepal focused all its efforts on denying that the instruments concluded between the two countries constituted a treaty.

In a very interesting judgment of far-reaching implications, the Supreme Court of Nepal held that the understanding reached between India and Nepal was a treaty for all purposes and that the Government of Nepal was under an obligation to table it before parliament for its approval for ratification.

2. PROVISIONS OF THE CONSTITUTION OF NEPAL AND THE TREATY ACT

The 1990 Constitution of Nepal provides in Article 126 that:

> (1) The ratification, accession, acceptance and approval of treaties or agreements to which the Kingdom of Nepal or His Majesty's Government is to become a party shall be done in the manner prescribed by law.
>
> (2) The law to be made pursuant to clause (1) shall, *inter alia*, require that the ratification, accession, acceptance or approval of treaties or agreements on the following matters be approved by a majority of two-thirds of the Members present in the joint session of both Houses of Parliament:
> (a) Peace and Friendship;
> (d) Defence and strategic alliance;
> (c) Boundaries of the Kingdom of Nepal;
> (d) Natural resources and distribution in the utilisation thereof.
> Provided that out of the treaties and agreements referred to in sub-clauses (a) and (d), if any treaty or agreement is of an ordinary nature and does not affect the country in a pervasively grave manner or on a long-term basis, such treaty or agreement may be approved for ratification, accession, acceptance or

> approval by the House of Representatives by a simple majority of the Members present and voting.
>
> (3) A treaty or agreement not ratified, acceded to, accepted or approved as the case may be pursuant to this Article shall not bind the Kingdom of Nepal or His Majesty's Government after the commencement of this Constitution.
>
> (4) Notwithstanding anything mentioned in clause (1) or (2), no treaty or agreement shall be concluded which compromises the territorial integrity of the Kingdom of Nepal.[7]

Pursuant to clause (1) of this Article, the 1990 Nepal Treaty Act was enacted.[8] Article 4 of the Act requires the Government of Nepal to table before the House of Representatives all treaties and agreements (other than those referred to in Article 126 paragraph 2 of the Constitution) that need to be ratified, acceded, accepted or approved by Nepal. Such treaties may be ratified, acceded, accepted or approved with the consent of the House of Representatives by a simple majority of the Members present and voting. The Treaty Act also provides that once ratified, acceded, accepted or approved, the provisions of such treaties and agreements will be applicable as the law of Nepal and will prevail over other laws in the event of inconsistency with those laws.

Given these provisions of the Constitution and the Treaty Act, the issues before the Supreme Court were whether the Indo-Nepal agreement on Tanakpur constituted an Agreement for the purposes of the Constitution and the Nepal Treaty Act and, if so, whether it affected Nepal "in a pervasively grave manner or on a long-term basis" and was not "of an ordinary nature". The definition of a treaty provided in the Nepal Treaty Act is identical to that of the 1969 Vienna Convention on the Law of Treaties: "'Treaty' means an agreement concluded between two or more States or between a State and an international organization in written form and this word encompasses any document of this nature whatever its particular designation".

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[7] Translated by the author from the Nepali text of the 1990 *Constitution of the Kingdom of Nepal*, (Ministry of Law and Justice, Kathmandu), 2047 KARTIK 23 [October 1990], p. 73.

[8] *Nepal Gazette*, 8 Poush 2047 (Dec. 1990), pp. 77-79.

3. THE NATURE OF THE DOCUMENT CONCLUDED BETWEEN NEPAL AND INDIA

An Indo-Nepal Joint Commission had been established in order to help identify areas for mutual economic co-operation between the two Governments and advise them on the feasibility and modalities of such cooperation. This Joint Commission had been asked, *inter alia*, to examine the possibilities of co-operation in harnessing Nepal's water resources in the interests of both India and Nepal and to make appropriate recommendations to the Governments. In order to facilitate its work on co-operation in matters relating to water resources, the Commission had set up a Sub-Commission on Water Resources. Upon the recommendation of the Sub-Commission the Joint Commission took certain decisions in the form of Agreed Minutes on 5 December 1991 which included the following provisions on the Tanakpur barrage project:

> "(i) The site at Mahendranagar municipal area in the Jimuwa village will be made available for tying up of the Left Afflux Bund, about 577 meters [in] length (with an area of about 2.9 hectares) to the high ground on the Nepalese side . . .. The availability of land for construction of [the] Bund will be effected in such a way by HMG/N [Nepal] that the work could start by [the] 15th of December 1991.
>
> (ii) India will construct a head regulator of 1,000 cusecs capacity near the left under-sluice of the Tanakpur Barrage, as also the portion of [the] canal up to [the] Nepal-India border for supply of up to 150 cusecs of water to irrigate between 4,000 to 5,000 hectares of land on [the] Nepalese side . . ..
>
> (iii) In response to a request from [the] Nepalese side, as a goodwill gesture the Indian side agreed to provide initially 10 MW of energy annually free of cost to Nepal in spite of the fact that this will add to further loss in the availability of power to India from [the] Tanakpur Power Station . . .".[9]

The decision of the Joint Commission was endorsed by the Prime Ministers of India and Nepal in a joint press communique issued during the Nepalese Prime Minister's visit to India between 5-10 December 1991. The Supreme Court of Nepal had to decide whether the two instruments formed a treaty for the purposes of the Constitution of Nepal and the Nepal Treaty Act.

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[9] See *Nepal Gazette*, 8 Poush of B.S. 2049 (Dec. 1991), Part VI, Section 41, No. 36, pp. 9-10.

4. THE FACTUAL BACKGROUND TO THE TANAKPUR BARRAGE PROJECT

The site on which the main project is located is the land ceded to British India by Nepal after the two-year (1813-1815) war between the two countries.[10] The land on which Nepal permitted India under the Tanakpur Agreement to build the 577-metre long afflux bund is the land returned to Nepal by British India in 1860 in return for Nepal's assistance in crushing the Indian Sepoy Mutiny against the British Raj.[11] It appears that as early as 1983 India had already started construction work of the Tanakpur barrage project on its soil to harness the water of the Mahakali River, without consulting Nepal.[12] It seems that only when the Indian side realized that without constructing an afflux bund on the Nepalese side of the border the project could not deliver the desired amount of electricity or water for India, the Government of India approached the Government of Nepal with a view to securing Nepal's prompt approval for the construction of an afflux bund. The political party that was in power in Nepal at the time was often characterised by critics as a party supported and favoured by India. It was against this background that the Prime Ministers of India and Nepal decided to conclude an agreement (without calling it an agreement) with immediate effect through an informal document entitled 'Agreed Minutes' in order to avoid the parliamentary procedure of ratification of treaties and agreements.

Many observers believed that the agreement itself was not after all a bad deal for Nepal, but the manner in which the agreement was concluded aroused nationalist sentiments in Nepal. If the Prime Minster of Nepal had come clean and tabled the agreement before parliament for approval as a normal bilateral transaction, the agreement could perhaps have been easily endorsed since the Government had a majority in parliament. Trying to avoid parliamentary scrutiny, however, he was forced to submit to the scrutiny of the judiciary.

5. THE DECISION OF THE SUPREME COURT

Delivering its judgment on the case on 15 December 1992, the Supreme Court stated, *inter alia*:

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[10] D.B. BARAL, *Tanakpur: From the Beginning to the End* (Pairavi Publications, Kathmandu, 1993) p. 4.

[11] Ibid.

[12] As mentioned in the written pleadings (Memorial) submitted to the Supreme Court on behalf of the Government. See ibid., pp. 39-57.

"[that the documents in question concluded between Nepal and India] do not appear to have been concluded in any formal and traditional form. However, the joint press statement and the Joint Press Communique issued at the end of bilateral talks between the two Prime Ministers as well as the notice published to this effect in the Nepal Gazette on behalf of the Ministry of Water Resources and Energy of His Majesty's Government demonstrate that the recommendations of the Joint Commission were endorsed by the two Prime Ministers and the Governments of the two countries. Thus, there is no logical reason to believe that the decisions included in the Agreed Minutes concerning water resources and endorsed by the two Prime Ministers and the Governments of the two countries did not amount to an agreement or a treaty and were mere recommendations or understandings.

The argument of the Attorney General that since there was no treaty or agreement of any formal or customary form concluded between the two countries the Agreed Minutes or understandings cannot be regarded as a treaty or an agreement is not consistent with the definition of a treaty or an agreement provided in section (a) of Article 2 of the Nepal Treaty Act, 1990. According to this definition, whatever its particular designation may be, if there has been concluded an agreement between two countries in written form that agreement has to be regarded as a treaty. After all, a treaty is a mutual agreement between two parties to create legal rights and obligations.

Neither the Vienna Convention on the Law of Treaties of 1969 nor the opinion of publicists or the decisions of international courts and tribunals require that a treaty be concluded in any particular form. In international practice, in addition to formal treaties, all other instruments known as memorandum, protocol, exchange of notes, declaration, convention, charter, covenant, final act, statute, modus vivendi, agreed minutes etc., have been regarded as treaties and agreements. Depending on the situation even a joint press statement or a joint press communique can constitute a treaty.

It happens every now and then that States enter into transactions akin to treaties but having no legally binding force because they create moral or political obligations rather than legal obligations and rights between States and are often known as political or moral understandings. But the decisions in question in this case were made through Agreed Minutes between Nepal and India which include provisions designed to create mutual rights and obligations between the two countries. For instance, the Agreed Minutes provide that Nepal will make its land available to India for the project but will not give up its right to exercise its continuous control and sovereign rights over such land and the natural resources therein. In return, Nepal will receive electricity and water for irrigation from India.

> The Agreed Minutes also provide that India will be allowed to build a canal up to the Nepalese border and to carry out a survey with a view to constructing a road, etc. These decisions were included in the joint press statement and press communique issued after bilateral talks between the Prime Ministers of the two countries and published by the Ministry of Water Resources and Energy of His Majesty's Government in the Nepal Gazette. Thus, these decisions cannot be regarded as mere non-binding instruments of political and moral character; they appear to be the type of treaties which create mutual rights and obligations."[13]

Thus, the Supreme Court of Nepal seems to have subscribed to the view that the Agreed Minutes and the Joint Communique do not merely give an account of discussions and summarise points of agreement. They enumerate the commitments to which both India and Nepal have consented and thus create rights and obligations in international law for these two countries. That is how the public and the official and semi-official media understood the texts when they described the deal between India and Nepal as "a breakthrough on the vexed issue of water resources development" between the two countries.[14] Consequently, the agreement written in the form of Agreed Minutes and included in the Joint Press Communique should be submitted to parliament for approval in accordance with the Constitution of Nepal before the agreement could legally enter into force.

5. CONCLUDING OBSERVATIONS

Although it is rare to find a municipal law court in a developing country that challenges the power of the executive branch of the State with regard to its conduct of foreign policy affairs, the above-mentioned views of the Supreme Court of Nepal are consistent with the views of international courts and tribunals. For instance, the International Court of Justice stated in 1978 in the *Aegean Sea Continental Shelf* case that the Court "knows of no rule of international law which might preclude a joint communique from constituting an international agreement".[15] Similarly, in 1994 the ICJ in the case between Qatar and Bahrain concerning a maritime delimitation and a territorial dispute

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[13] Author's own translation from the Nepali text of the Judgment as published in D.B. DARVAL, op. cit. n. 10, p. 91.

[14] See, for instance the front page coverage of the deal in *The Times of India*, 12 Dec. 1991, p. 1, under the heading: 'Indo-Nepal talks: water resources issue resolved'.

[15] ICJ Rep. (1978) p. 39, para. 96.

held that the Agreed Minutes of 1990 between these two countries constituted an international agreement since they created rights and obligations in international law for the Parties by enumerating the commitments to which the Parties had consented.[16]

Indeed, in its commentary to the definition of 'treaty' which was incorporated without change in the final text of the 1969 Vienna Convention on the Law of Treaties, the International Law Commission of the United Nations stated that "[t]he term 'treaty' is used throughout the draft articles as a generic term covering all forms of international agreement in writing concluded between States". The ILC went on to remark that "very many single instruments in daily use, such as an 'agreed minute' or a 'memorandum of understanding', could not appropriately be called *formal instruments*, but they are undoubtedly international agreements subject to the law of treaties".[17]

There are a number of instruments concluded between two or more states and termed 'agreed minutes' which have been recognized by the international community as legally binding international agreements. For instance, the 1963 boundary agreement between Iraq and Kuwait was concluded in the form of 'agreed minutes'. During and after the Gulf War in the wake of the Iraqi invasion of Kuwait the UN and the international community treated this instrument as a legally binding international agreement. In its resolution 687 (1991) the Security Council of the UN demanded that

> "Iraq and Kuwait respect the inviolability of the international boundary and the allocation of islands set out in the 'Agreed Minutes between the State of Kuwait and the Republic of Iraq regarding the restoration of friendly relations, recognition, and related matters', signed by them in the exercise of their sovereignty at Baghdad on 4th October 1963 and registered with the United Nations . . .".[18]

The decision of the Supreme Court of Nepal can be regarded as a bold decision which acts as a check against any excesses by the executive in foreign policy matters. Such decisions of municipal courts are quite helpful in ensuring that relations between States are based on transparency and democracy and that the Government of the day does not conclude an agreement with a foreign Power under a different and an informal instrument in order to avoid parliamentary and constitutional scrutiny. This is particularly so in a country such

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[16] ICJ Judgment of 1 July 1994, General List No. 87, p. 13, para. 25.

[17] II Yearbook of the International Law Commission (1966) p. 188.

[18] See, generally, M.H. MENDELSON and S.C. HULTON, 'The Iraq-Kuwait boundary', 64 BYIL (1993) p. 135 et seq.

as Nepal whose leaders have in the past concluded certain lopsided treaties with India without properly weighing the long term pros and cons of the treaty for the future of the country. Therefore, the present decision is likely to strengthen not only the constitutional system of parliamentary scrutiny of executive acts on foreign policy matters but also the democratic process that is under way in the country since 1990.

REMARKS ON CHINA'S RATIFICATION OF THE 1982 UN CONVENTION ON THE LAW OF THE SEA

Yu Hui*

1. INTRODUCTION

Eighteen months after the entry into force of the 1982 United Nations Convention on the Law of the Sea,[1] China ratified that Convention on 15 May 1996.[2] On 7 June 1996, it deposited the instrument of ratification with the Secretary-General of the United Nations.[3] Upon ratification, China made a declaration consisting of four statements,[4] and on the same day it announced the long due baselines for measurement of the territorial sea.[5]

While China had participated actively in the Third United Nations Conference on the Law of the Sea (UNCLOS III) and had signed the Convention on the day it was opened for signature, on 10 December 1982, a variety of factors delayed its ratification. Among them were the difficulty of reconciling China's position on innocent passage by warships through the territorial sea with the Convention's provisions, overlapping maritime claims with opposite and adjacent neighbouring States, territorial disputes over some

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* Ph.D. Candidate, University of Amsterdam; LL.M., Dalhousie Law School; LL.M., Peking University; Corresponding research fellow, Institute of International Law, Peking University; former Legal Officer, State Oceanic Administration of China. When this comment was written, the author was a guest research fellow at the Max Planck Institute for Comparative Public Law and International Law, to which the author owes gratitude for both intellectual and financial support. The author would also like to thank Dr. Peter Macalister-Smith for his helpful contribution during the preparation of these Remarks.

[1] The Convention entered into force on November 16, 1994.

[2] In accordance with the decision of the 19th meeting of the Standing Committee of the 8th National People's Congress.

[3] The Convention entered into force for China on the 30th day following the deposit of the instrument of ratification, and China became the 93rd State party to the Convention.

[4] See *People's Daily* (overseas ed.), May 16, 1996, p. 4. The English text in this article is the author's translation.

[5] The geographical coordinates of some territorial sea baselines of the continent, and the territorial sea baselines of the Xisha Islands. For the English text, see *China Daily*, May 16, 1996.

Asian Yearbook of International Law, Volume 5 (Ko Swan Sik *et al.*, eds.; 90-411-0375-9
 pp. 211-230

groups of islands, and uncertainty as to the financial obligations arising under the Convention.

The ratification of the Convention with the Declaration accompanying it demonstrates China's willingness to defend its maritime rights and address its maritime problems by reference to international law. It is also of importance for the promotion of peace in East and Southeast Asia where significant conflicts exist between China's maritime claims and those of others.

This note will briefly review the historical development of the law of the sea in China, China's position during the UNCLOS III and the possible reasons for final ratification of the Convention, then comment on the four statements contained in the Declaration made upon ratification of the Convention, and conclude with a review of the underlying policy.

2. CHINA AND THE LAW OF THE SEA

2.1. Historical note

China has a 18,000 km continental coastline, and another 14,000 km coastline around some 6,500 islands scattered in the Bohai (an internal sea), the Yellow Sea (400,000 km^2), the East China Sea (700,000 km^2), and the South China Sea (3,400,000 km^2). These are all enclosed or semi-enclosed seas between China and neighbouring States, and the resulting maritime boundary problems remain to be settled.

Although China for centuries led the world in the development of nautical technology, with its ships sailing to the farthest reaches of the Indian Ocean before the time of the Roman Empire, its ancient emperors did not feel the need for expansion of their power overseas. Its nautical activity waned by the 16th century of the present era, and this was followed by the arrival of the European colonial powers. While under the Qing Dynasty, China divided the oceans into "Nei Yang" (inner ocean) and "Wai Yang" (outer ocean), it was in 1864, with the introduction of HENRY WHEATON's *Elements of International Law* to China, that China formulated a clearer conception of territorial sea jurisdiction. In that year, during the Prussian-Danish War, a Prussian warship captured three Danish merchant ships in the Gulf of Bohai. China's Qing government protested on the ground that the capture was made within the Chinese "inner ocean", basing its position on the principles of international law contained in the Chinese translation of WHEATON's work. Acknowledging

the illegality of its act, Prussia released two of the Danish ships, and paid compensation for the third.[6]

The first delimitation of China's territorial sea can be traced back to the 1930s. At the Hague Codification Conference in 1930, the Chinese delegation declared itself in favour of limiting the territorial sea to a breadth of 3 nautical miles (nm) from the low water mark along the coast.[7] In 1931, the State Council of the Republic of China adopted a decree, which provided that the limit of the territorial sea was to be 3 nm, and the limit of an anti-smuggling zone was 12 nm.[8] This decree was the first legislative act in Chinese history formally establishing the territorial sea.

When the Taiwan crisis developed in 1958 China (the People's Republic of China), finding it necessary to warn other countries not to send warships to the aid of the Taiwan "Nationalists", made a Declaration on the Territorial Sea, which stated that: (1) the breadth of China's territorial sea was 12 nm; (2) straight baselines would be applied as appropriate for the delimitation of China's territorial sea; (3) no foreign military vessels or aircraft could enter China's territorial sea or the air space above it without permission; and (4) the foregoing principles would apply to Taiwan and its surrounding islands and to all islands belonging to China.[9] Since then, the 1958 Declaration has served as the basis for China's policy on the law of the sea.

A comprehensive legal regime for the oceans was gradually taking shape at the international level at UNCLOS III, with China beginning to participate in the Conference in 1973. In the early 1980s, a series of basic maritime laws and regulations were enacted, including the 1982 Marine Environmental Protection Law, the 1983 Maritime Traffic Safety Law, the 1986 Fisheries Law, the 1986 Mineral Resources Law, the 1987 Customs Law, the 1992 Maritime Code, and most importantly, the 1992 Law on the Territorial Sea and the Contiguous Zone.[10]

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[6] See WANG TIEYA, 'International Law in China: Historical and Contemporary Perspectives', 221 RdC (1990-II) 232-233; see also CHIU HUNGDAH, 'China and the Question of Territorial Sea', 1 *International Trade Law Journal* (1975) 33.

[7] For conference documents concerning the width of the territorial sea and the position of the Chinese delegation, see 24 AJIL (Supp. 1930), 25, 27, 234-235, and 254.

[8] For the text of the Order, see *Collection of Laws and Decrees of the Republic of China* (1934), Part IV, 715.

[9] For English text of the Declaration, see *Peking Review*, No. 28, September 9, 1958, 21.

[10] This list is not exhaustive. For the English text of these laws and regulations, see Office of Laws and Regulations, Department of Ocean Management and Monitoring, State Oceanic Administration (ed.), *Collection of the Sea Laws and Regulations of the People's Republic of China* (Beijing: China Ocean Press, 1991).

Essentially identical to the 1958 Declaration, the 1992 Law on the Territorial Sea and the Contiguous Zone defines the geographic scope of China's territorial sea as 12 nm measured from straight baselines, establishes a 12 nm contiguous zone adjacent to and beyond the territorial sea, prescribes basic rights and duties in these two sea belts, reaffirms China's sovereignty over its coastal islands and all the other islands belonging to China, and provides that ships for non-military purposes have a right of innocent passage whereas foreign warships shall be subject to authorization before entering China's territorial sea. China's 1992 Law on the Territorial Sea and the Contiguous Zone, and its other maritime laws and regulations are intended to establish a comprehensive marine legal system.[11]

2.2. China and UNCLOS III

China was not a party to the 1958 Geneva Conventions, which it criticized as serving only the interests of a few big maritime powers.[12] After its return to the United Nations in 1971, China participated fully throughout the nine years of UNCLOS III. The Working Papers submitted by the Chinese delegation to the Seabed Committee in 1973 clarified China's position on major law of the sea issues.[13]

In general, China viewed UNCLOS III as an arena for the continuing struggle of the Third World, including China, against the hegemony of the superpowers. As to the conduct of the Conference, China supported the adoption of a 'one state, one seat' principle for the distribution of seats in the committees of the Conference.[14] On substantive issues, China joined the majority of developing countries in demanding extension of coastal State rights up to 200 nm,[15] and the establishment of an international seabed regime with

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[11] See ZHAO ENBO, 'China's Marine Legal System', in *Marine Law and Policy* (ed. China Institute for Marine Development Strategy) 1 (1990), 118-125.

[12] See SHEN WEILIANG, *Peking Review*, April 15, 1973, 14-15; QIAO GUANHUA, *Peking Review*, October 5, 1973, 15-16; UN Doc. A/AC 138/SC II/SR 57, 1973, 103-105.

[13] See 'Working Paper on Sea Area within the Limits of National Jurisdiction', UN Doc. A/AC 138/SC II/L.34 (July 16, 1973); 'Working Paper on Marine Scientific Research', UN Doc. A/AC 138/SC III/L.42 (July 19, 1973); and 'Working Paper on General Principles for the International Sea Area', UN Doc. A/AC 138/SC II/L.45 (August 8, 1973).

[14] For details, see J. GREENFIELD, *China's Practice in the Law of the Sea* (Clarendon Press, 1992), 193-197.

[15] See UN Doc. A/CONF 62/WP 10/Add I (1977).

appropriate machinery based on the concept of "common heritage of mankind".[16]

Convinced that its position on the right of innocent passage was of vital national concern, China reiterated its position that a coastal State has the right to require prior authorization or notification for the passage of foreign military ships through its territorial sea. As to boundary delimitation, China favoured application of the 'natural prolongation' principle for the definition of the continental shelf, and opposed the median line or equidistance criterion, maintaining that delimitation of the exclusive economic zone (EEZ) and the continental shelf between States with opposite or adjacent coasts should be determined through negotiations on an equal footing by the parties concerned, in accordance with the principle of equity.[17]

Though not totally satisfied with the Convention,[18] China considers it the basic legal document governing international maritime activity that meets the needs of most developing countries for safeguarding their maritime rights and interests. China signed the Convention on 10 December 1982 and ratification of the Convention was considered to be in accordance with China's general interests. Adherence to the Convention also enables China to enjoy broad maritime rights and jurisdiction, such as transit passage through international straits, resource development, environmental protection and scientific research in the EEZ.

The 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, adjusting and revising the deep seabed mining regime to meet the objections of the industrialized States, also meets China's specific interests in international sea-bed activities. China registered as a pioneer investor in 1991 and enjoys the exclusive rights of exploration for and exploitation of the mineral resources over 150,000 km^2 in the northeastern Pacific. Becoming a State party to the Convention ensures the recognition and protection of such rights and interests and allows China to participate in the activities of international institutions like the International Sea-Bed Authority, the International Tribunal for the Law of the Sea, and the Commission on the Limits of the Continental Shelf, thus giving China influence on international marine affairs.[19]

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[16] See UN Doc. A/AC 138/SC II/L.45 (1973).

[17] See Third UN Conference on the Law of the Sea, Official Records, Vol. XIV, 23-24.

[18] For details, see SHEN WEILIANG and XU GUANGJIAN, 'The Third UN Conference on the Law of the Sea and the Convention on the Law of the Sea', Chin. YIL (1983), 433-434.

[19] See the statement by the Chinese vice foreign minister, in *People's Daily* (overseas ed.), May 13, 1996, 5.

However, ratification of the Convention left China with some problems too. In order to clarify its position on some unresolved vital issues and to avoid a potentially disadvantageous impact of the Convention, China made a declaration upon ratification, based on Article 310 of the Convention. The Declaration contains four statements, and is of direct relevance in determining China's actual position on law of the sea issues.

3. CHINA'S DECLARATION

3.1. Statement on the EEZ and Continental Shelf

During UNCLOS III, China gave its active support to the establishment of a 200 nm EEZ regime, although China would not be able to extend its jurisdiction up to the permitted limits because the coasts of countries opposite and adjacent to it lay within 400 nm. While China recognized that the 'natural prolongation' principle for the definition of the continental shelf would work in its favour were it to negotiate a division of the continental shelf with Japan, that same principle could work against China when negotiating a maritime boundary with Vietnam. Aware of the complex geomorphology and geology of its maritime areas, committed to its economic reforms, and maintaining a 'soft' border policy and a low-risk foreign policy, China preferred not to embark upon demarcation of its EEZ and continental shelf boundaries.[20] However, unilateral claims of 200 nm EEZs, continental shelves and fishery zones made by China's adjacent or opposite coastal States[21] called for a response from China.

The first statement of the Declaration made upon ratification of the Convention makes specific reference to China's EEZ and the continental shelf for the first time, but does so in a rather ambiguous way. It reads:

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[20] Some Chinese laws imply jurisdiction over maritime areas wider than the territorial sea. For example, Art. 2 of China's Marine Environmental Protection Law provides that "this law is applicable to the inland waters and territorial seas of the People's Republic of China and all other sea areas under the jurisdiction of the People's Republic of China". "All other sea areas" under Chinese jurisdiction here implicitly refers to the EEZ and the continental shelf of China.

[21] In 1977, Vietnam made a statement on its territorial sea, contiguous zone, continental shelf and exclusive zone; North Korea declared a 200 nm EEZ; South Korea promulgated a law for the development of submarine mineral resources; Japan proclaimed a 200 nm fishery zone. In 1978, a Philippine presidential decree proclaimed Kalayaan part of Palawan Province. In 1980, Indonesia and Malaysia proclaimed their rights to 200 nm EEZ respectively.

> "In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China has sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf."

The language used is significant. Geographically China cannot claim an EEZ of up to 200 nm because of the presence of opposite coastal States within 400 nm. But China explicitly asserts sovereign rights over a 200 nm EEZ, or an area of 3,000,000 km^2, "in accordance with the Convention", thereby insisting on the rights to which it is entitled under the Convention even though it might not be able to exercise them fully. On the other hand, China does not explicitly proclaim the establishment of a 200 nm EEZ, and the specific limits of China's EEZ and continental shelf are not made clear, thereby avoiding direct confrontation with the adjacent and opposite States which have claimed overlapping rights in the same areas.

Having thus reaffirmed its rights under the Convention, China also acknowledges the responsibilities which it is required to assume under the Convention. This was emphasized by the Director-General of the State Oceanic Administration of China, who referred to the following main obligations in respect of maritime areas, apart from other obligations under the Convention: (1) taking appropriate measures and enacting laws and regulations for the management of maritime activity in those areas; (2) protection and preservation of the marine environment and marine resources; (3) paying due regard to the rights of other States while exercising its own rights; (4) drawing charts for due publicity, and depositing copies of these charts with the Secretary-General of the UN; (5) settlement of maritime disputes through peaceful negotiations.[22]

3.2. Statement on maritime boundary limitation

Being one of several States bordering a semi-closed sea raises questions concerning the delimitation of EEZs and the continental shelf. During UNCLOS III, the Chinese delegation repeatedly declared its position in the following terms:

> "Delimitation of the exclusive economic zone and the continental shelf between States with opposite or adjacent coasts should be determined through negotiations on an equal footing between the parties concerned, in accordance

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[22] *People's Daily*, May 18, 1996, 3.

> with the principle of equity and taking into account all relevant factors and circumstances. This is the only way to attain a result which is fair and just to all parties concerned."[23]

In the second statement of the Declaration made upon ratification of the Convention China re-affirmed the same principle:

> "The People's Republic of China will effect, through consultations, the delimitation of the boundary of maritime jurisdiction with the states with opposite or adjacent coasts on the basis of international law and in accordance with the principle of equity."

The Chinese position is essentially consistent with Articles 74(1) and 83(1) of the Convention, which provide that the delimitation of the EEZ and the continental shelf between States with opposite or adjacent coasts "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". What is significant, however, is that China declares that boundary disputes are to be settled through *consultations* in accordance with the principle of equity, rather than by reference to international tribunals. China views territorial issues as bilateral questions and prefers to resolve them through bilateral and subregional negotiations rather than submit to binding determination by an international arbitration or judicial body. Such a policy is the basis for such statements as: "China is willing to hold bilateral talks with the countries concerned to settle the dispute over the Nansha (Spratly) issue, but opposes the internationalization of the issue."[24] On the other hand, China does not explicitly refuse third party dispute settlement procedures. In accordance with Article 287 and Annex VII of the Convention, China can be deemed to have accepted the principle of recourse to arbitration.

After years of discussing the concept of 'equity' in international law at UNCLOS III, the participating States could find no universally agreed meaning of the term. Accordingly, they settled for the broader reference to delimitation "on the basis of international law", and a specific indication of the objective, viz., "to achieve an equitable solution" in Articles 74 and 83 of the Convention. However, this provision is so general that only by further interpretation

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[23] See *supra* n. 17.

[24] Statement by the spokesman of the Chinese Foreign Ministry at a press conference; see *People's Daily* (overseas ed.), July 17, 1992, 1.

can it be made practically applicable.[25] China's position on the application of the principle of equity is also indeterminate, and subject to different interpretations, and cannot by itself be used as a practical method for boundary delimitation. However, China's clear acceptance of the rule that boundary delimitation questions will be resolved on the "basis of international law" demonstrates its commitment to seeking a peaceful settlement of the issues involved, and is in conformity with Article 279 of the Convention that calls for settlement of disputes by peaceful means in accordance with the Charter of the United Nations.

3.3. Statement on disputed islands

The third statement of the Declaration reads:

> "The People's Republic of China reaffirms its sovereignty over all archipelagos and islands listed in Article 2 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone promulgated on February 25, 1992."

Article 2 (2) of the 1992 Law on the Territorial Sea and the Contiguous Zone provides that:

> "The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha islands; the Zhongsha Islands; and the Nansha Islands; as well as all the other islands belonging to the People's Republic of China."

This statement has been a source of protests and disputes, because it touches upon difficult territorial issues, including the Diaoyu Islands (Senkaku,

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[25] Several methods could be adopted to bring about the desired equitable result in ocean boundary delimitation. The following considerations have been identified: (1) geographical considerations: natural prolongation, non-encroachment, distance, proportionality, configuration of coasts, baselines of coastal States, off-shore islands - locations and nature, harbour works, light house and low-tide elevations, equal division of the area of overlap, equal exchange of areas; (2) geological considerations - major constructional variations; (3) geomorphologic considerations; (4) historic interests; (5) environmental-ecological considerations; (6) socio-economic considerations; (7) conduct of State and estoppel; (8) prevention of potential disputes; (9) simplification of the boundary lines. For details, see FU KUEN-CHEN, *Equitable Ocean Boundary Delimitation* (Taipei: 123 Information Company, 1989).

in Japanese) dispute with Japan in the East China Sea and the multilateral and overlapping claims over the Xisha Islands (Paracel) and Nansha Islands (Spratly) in the South China Sea.

The Diaoyu Islands comprise eight uninhabited islands situated 102 nm northeast of Taiwan and 240 nm southwest of Okinawa. Both China (including Taiwan) and Japan claim sovereignty over the Diaoyu Islands, and neither party seems willing to compromise its claims due to the oil resources underlying the sea-bed areas of the islands. Currently the islands are not within the full control of either State, but activities involving these islands frequently raise tension between the two countries.[26]

The South China Sea has two important groups of islands, the Xisha Islands and the Nansha Islands. The Xisha Islands are situated southeast of China's Hainan Island and east of Vietnam. China claims full sovereignty and jurisdiction over the Xisha Islands, over which Vietnam also claims territorial rights. The Nansha Islands comprise a group of hundreds of islands, islets, rocks and reefs, spread over a wide area in an important strategic location which is also rich in fisheries as well as hydrocarbons and other mineral resources. China has from time immemorial claimed sovereignty over all of the Nansha Islands and "their surrounding waters". Attracted by its oil resources, other neighbouring States including Vietnam, Malaysia, Philippines, and Brunei also claim and even occupy some of the islands since the 1970s. From the late 1980s, determined to assert its jurisdiction over the Nansha Islands, China took a series of actions, including promulgating official standard names of the islands in the South China Sea, establishing Hainan Province to strengthen the administrative control over the Xisha and Nansha Islands as well as their surrounding waters, setting up marine scientific survey stations in the area, and taking back some islets of the Nansha Islands, which once resulted in a naval clash with Vietnam in March 1988.[27]

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[26] For more, see e.g., MA YING-JEOU, *Legal Problems of Seabed Boundary Delimitation in the East China Sea*, Occasional Papers, 1984; PARK CHOON-HO & PARK JAE KYU (eds.), *The Law of the Sea: Problems from the East Asian Perspective* (Honolulu: The Law of the Sea Institute, University of Hawaii, 1987); PARK CHOON-HO, *East Asia and the Law of the Sea* (Seoul: Seoul National University Press, 1988); 'Lost at Sea; the Demons of Diaoyu', editorial, FEER, October 17, 1996, 7.

[27] For more, see e.g. J.R.V. PRESCOTT, *The Maritime Political Boundaries of the World* (London: Methuen, 1985) Chapter 8: The South China Sea; J.R.V. PRESCOTT, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map* (Honolulu: East-West Center, East-West Environment and Policy Institute, 1981); J.M. VAN DYKE & D.L. BENNETT, 'Islands and the Delimitation of Ocean Space in the South China Sea', 10 *Ocean Yearbook* (1993) 54-89; CHEN HURNG-YU, 'A Comparison between Taipei and Peking in their Policies and Concepts regarding the South China Sea', 29 *Issues & Studies* (1993) 22-58; L.G. CORDNER, 'The Spratly Islands Dispute and the

The third statement affirms China's sovereignty over the islands and, together with China's 1958 Declaration on the Territorial Sea and the 1992 Law on the Territorial Sea and the Contiguous Zone, will serve as a tool for future negotiations. As PRESCOTT comments: "In the South China Sea, China's insistence that all the Nansha or Spratly Islands and associated submerged banks have belonged to China from time immemorial, will make it very difficult for any country to negotiate with China".[28] Maritime boundary delimitation there would be exceptionally complicated due to overlapping claims involving six parties without a common basis for negotiation.

Sovereignty disputes over islands cannot be resolved solely by reference to the Convention. According to the latter's unstated premise sovereignty over land territory must be established prior to consideration of maritime issues. The application of relevant articles of the Convention can only be considered after that sovereignty issue is resolved. Furthermore, the extent of the maritime areas that might legitimately be claimed after the issue of sovereignty over the islands is resolved remains unsettled. Article 121 of the Convention provides that an island is entitled to a 12 nm territorial sea and a 200 nm EEZ, but "rocks which cannot sustain human habitation or economic life of their own" are excluded from having EEZs or continental shelves. Among the Nansha Islands, only 20 islands protrude above sea level at high tide, and the largest, the Taiping Island (Itu Aba Island), is only 0.43 km^2 in area. Almost all of the Nansha Islands are uninhabited and cannot sustain an economic life of their own. It is likely that the maritime delimitation 'effect' with respect to each island will have to be negotiated by reference to all relevant circumstances in order to ensure that the solution achieved is 'equitable'.

While the Convention offers no direct solution for 'island delimitation' issues, its provisions do provide legal guidance towards their peaceful settlement. Thus, Article 279 of the Convention urges States Parties to settle disputes by peaceful means, and Article 197 calls for global and regional co-operation. Articles 74 and 83, reference to which has been made earlier, direct the States concerned to effect delimitation of EEZ's and continental shelfs "by agreement on the basis of international law . . . in order to achieve an equitable solution", and further require that "[p]ending agreement . . . the States concerned, in a spirit of understanding and co-operation, shall make every effort to *enter into provisional arrangements of a practical nature* . . ." (emphasis added). The latter provision encourages States to adopt a pragmatic

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Law of the Sea', 25 ODIL (1994) 61-74; J.I. CHARNEY, 'Central East Asian Maritime Boundaries and the Law of the Sea', 89 AJIL (1995) 724-749.

[28] J.R.V. PRESCOTT, *The Maritime Political Boundaries of the World*, 92.

approach designed to reduce and eliminate friction generated by sovereignty issues through "provisional arrangements". Among such arrangements are agreements on "joint development" of concurrently claimed maritime areas that would produce mutual benefits for disputing parties immediately.

'Joint development' refers to joint exploration and exploitation of transboundary or straddling deposits of living or mineral resources under bilateral (or possibly regional) agreements. A device under active consideration by many coastal States since the 1960s,[29] it has been endorsed by the ICJ. In the *North Sea Continental Shelf Cases*, the ICJ held that joint exploitation agreements were "particularly appropriate when it is a question of preserving the unity of a deposit".[30] Joint development was also envisaged by Judge EVENSEN in his separate opinion in the 1982 *Tunisia and Libya Continental Shelf Case*.[31] It was pointed out in the *Gulf of Maine Case* that the delimitation of a maritime boundary is not necessarily a panacea for disputes over offshore resources, because even successful delimitation may still require a degree of close cooperation if opposite or adjacent States are rationally to exploit transboundary resources.[32] The case brought to the ICJ by Guinea-Bissau in 1991 relating to its maritime delimitation with Senegal was discontinued in 1995 due to the conclusion of an agreement on management and cooperation, which contains provisions on joint development of a specific maritime zone.[33] Joint development arrangements have also been negotiated in Southeast Asia. In 1979, Malaysia and Thailand signed a Memorandum of Understanding on the establishment of a joint authority for the exploitation of hydrocarbons in the Gulf of Thailand. The two countries agreed to implement

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[29] For more, see e.g. M.J. VALENCIA et al., 'Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Area?' 16 ODIL (1986) 211-254; E.L. RICHARDSON, 'Jan Mayen in Perspective', 82 AJIL (1988) 443-458; International Law Association's Committee on the Exclusive Economic Zone, *Report on Joint Development of Non-Living Resources in the Exclusive Economic Zone*, 1988; H. FOX et al., *Joint Development of Offshore Oil and Gas* (London: British Institute of International and Comparative Law, 1989); W.T. ONORATO & M.J. VALENCIA, 'International Cooperation for Petroleum Development: the Timor Gap Treaty', 5 *ICSID - Foreign Investment Law Journal* (1990) 1-29; YU HUI, 'Joint Development of Mineral Resources - An Asian Solution?' 2 AsYIL (1992) 87-112; G.H. BLAKE et al., *The Peaceful Management of Transboundary Resources*, Graham & Trotman/Martinus Nijhoff, 1995.

[30] ICJ Rep. (1969) p. 52, para. 99.

[31] ICJ Rep. (1982) p. 18.

[32] ICJ Rep. (1984) p. 246.

[33] See S.C. MCCAFFREY, 'Development in Public International Law', 30 *International Lawyer* (1995) 290.

the arrangement in 1990.[34] The signing in 1989 of a Treaty on the Zone of Cooperation in the Timor Sea between Indonesia and Australia opened a long disputed area for joint exploitation and highlighted the current interest in such arrangements.[35] In 1992 Vietnam and Malaysia agreed to explore jointly for hydrocarbons in their overlapping claimed areas in the Gulf of Thailand.[36]

Since the March 1988 clash between China and Vietnam, South China Sea disputes have attracted increasing attention. Proposals for a joint development zone or a 'Spratly Authority' have been put forward.[37] Indonesia took the initiative in 1990 to launch a quasi-governmental negotiation process, titled "Managing Potential Conflicts in the South China Sea", aimed at getting the claimants and other neighbouring countries to discuss a solution for the disputes. Joint development arrangements were favoured by the States concerned.[38] The programme has continued to develop avenues for cooperative activities and to foster dialogue among the littoral States of the South China Sea region.[39]

Joint development has also been under active consideration by China, but lack of a clear Chinese proclamation on an EEZ and of delimitation provisions on the Chinese continental shelf, together with doubt about the potential effect of a joint development zone on final boundary delimitation in the South China

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[34] Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Establishment of a Joint Authority for the Exploitation of the Resources of the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, done at Chiang Mai, February 21, 1979, see 6 *Energy* (1981) 1356-1358; Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority, which is designed to implement the Memorandum, May 30, 1990, see D. ONG, 'Thailand/Malaysia: the Joint Development Agreement 1990', Appendix II, 6 *International Journal of Estuarine and Coastal Law* (1990) 64-72.

[35] Treaty on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and North Australia, December 11, 1989, 29 ILM (1990) 469-537. The Treaty was referred to in the *East Timor (Portugal v. Australia) Case*, see ICJ Rep. (1995).

[36] 'Vietnam, Malaysia Agree to Joint Search for Oil', FEER, June 18, 1992, p. 83, as quoted in T.L. MCDORMAN, 'The South China Sea Islands Dispute in the 1990s - A New Multilateral Process and Continuing Friction', 8 *International Journal of Marine and Coastal Law* (1993), 274; see also G.H. BLAKE et al., *supra* n. 29, p. 90.

[37] For example, during the Pacem in Maribus XXI held in Takaoka, Japan, 6-9 September 1993, the South China Sea problem was discussed. See E.M. BORGHESE, 'Pacem in Maribus XXI', 24 *Environmental Policy and Law* (1994) 21.

[38] See ASEAN Declaration on the South China Sea, Manila, 22 July 1992, in 3 AsYIL (1993) 8. For details, see T.L. MCDORMAN, *supra* n. 36, pp. 263-285.

[39] For 1994 and 1995 activities, see G.S. HEARNS & W.G. STORMONT, 'Managing Potential Conflicts in the South China Sea - Report', 20 *Marine Policy* (1996) 177-181.

Sea, has so far prevented China from taking a final position on proposals for joint development.

3.4. Statement on innocent passage

The difficulty of reconciling China's position on innocent passage through the territorial sea with the Convention was one of the main reasons for the delay of China's ratification, and the possible need to amend the relevant Chinese legislation had been the subject of international comment.[40] The fourth statement of the Declaration does not really resolve the problem. This statement reads:

> "The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea relating to innocent passage through the territorial sea do not prejudice the right of the coastal State to require prior authorization or notification in accordance with its laws and regulations for the passage of foreign warships through its territorial sea."

China's position on innocent passage has been consistent. Its 1958 Declaration provides that no foreign military vessels or aircraft may enter China's territorial sea or the airspace above it without permission. During UNCLOS III, under the defense policy aimed at countering the maritime security threat from the two superpowers, China repeatedly proposed inclusion in the Convention of the requirement of prior notification or authorization for foreign worships passing through the territorial sea.[41] Nevertheless, the Convention's provisions basically serve the interests of the superpowers in

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[40] See e.g. W.T. BURKE, 'Chinese Perception of the Law of the Sea', in: *The Law of the Sea: What Lies Ahead* (Honolulu: The Law of the Sea Institute, 1988) 160; KIM HYUN-SOO, 'The 1992 Chinese Territorial Sea Law in the Light of the UN Convention', 43 ICLQ (1994) 896-901.

[41] As early as 16 July 1973, the Chinese delegation submitted a working paper to the Seabed Committee, in which it suggested that "the foreign non-military ships enjoy the right of innocent passage". "A coastal State may, in accordance with its laws and regulations, require foreign military ships to render prior notification to, or to seek prior approval from, its competent authorities before passing through its territorial sea." UN Doc. A/AC 138/SC II/L.34 (1973). At the 7th session of 1978, since the Informal Composite Negotiating Text had failed to reflect China's suggestion on passage of military ships through the territorial sea, the Chinese delegation pointed out again: "everyone knows that military ships and general commercial ships are two kinds of ships of a different nature. Whether foreign military ships enjoy the right of innocent passage in the territorial sea, is up to the coastal State to decide in accordance with its laws and regulations". See WEI MIN, *Law of the Sea [Hai Yang Fa]* (Beijing: Law Press, 1987) 80.

protecting naval mobility by including Article 17,[42] to the effect that "ships of all States" enjoy the right of innocent passage. Unwilling to agree, China reiterated its position on the occasion of the adoption of the Convention at the 11th session of the Conference on 30 April 1982,[43] as well as when signing the Convention at the final session on 9 December 1982.[44] Further re-affirmation of its position took place by the adoption of the 1992 Law on the Territorial Sea and the Contiguous Zone, which finally transformed the policy into a clearly stated legal rule, as follows:

> "Foreign ships for non-military purposes shall enjoy the right of innocent passage through the territorial sea of the People's Republic of China in accordance with the law.
>
> Foreign ships for military purposes shall be subject to approval by the Government of the People's Republic of China for entering the territorial sea of the People's Republic of China."

In China's opinion, the view according to which the right of innocent passage extends to ships of all States without distinguishing between warships and merchant ships does not represent general State practice and is not a rule acceptable to all States.[45]

> "According to the generally recognized principles of international law, only foreign vessels used for non-military purposes enjoy the right of innocent passage through the territorial sea. The passage of foreign warships through the territorial sea is a matter which bears upon the sovereignty and national security of the coastal State. Naturally, the coastal State has the right to make necessary regulations in respect of such passage."[46]

In other words, since there are no clear provisions regarding the regime of passage of foreign warships through the territorial sea, a coastal State may, according to its laws, require prior notification or approval for the passage of military vessels.

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[42] Virtually identical with Article 14(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which reads: "Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea". 516 UNTS (1964) 214.

[43] Third UN Conference on the Law of the Sea, Official Records, Vol. XVI, 161-162.

[44] Ibid., Vol. XVII, 102.

[45] ZHOU GENGSHENG, *Guo Ji Fa,* [International Law] Vol. 1 (Beijing: Commercial Press, 1959) 23.

[46] See *supra* n. 17.

Whether foreign military ships enjoy the right of innocent passage in the territorial sea thus remains a controversial issue. Customary international law on the topic is unclear, since State practice and national legislation are not consistent, and the Convention's provisions are ambiguous. Although according to one interpretation "ships of all States" may include warships, when read together with the provisions on the meaning of innocent passage and the rights of protection of the coastal States, the Convention may be understood as implicitly allowing coastal States to enact legislation covering their security interests in the territorial sea. It is also important to note that during the negotiation process the article formed part of a 'package deal' and was adopted without vote. On its adoption, the Conference President made a statement that he "would like to confirm that their decision is without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, in accordance with Article 19 (dealing with the meaning of innocent passage) and Article 25 (dealing with rights of protection of the coastal State) as provided for in the Convention".[47]

At the signing ceremony on 9 December 1982, the Chairman of the Chinese delegation made a statement and clarified the Chinese position:

> "At the previous sessions of the Conference, we repeatedly pointed out that in the articles of the Convention relating to the innocent passage through the territorial sea there were no clear provisions regarding the regime of the passage of foreign warships through the territorial sea. A considerable number of States including China time and again submitted their amendment in this regard. To respond to the call of the President of the Conference, the above-mentioned co-sponsors of the amendment did not insist on a vote at the session held last April, so that the draft Convention on the Law of the Sea could be adopted by consensus. The statement made by the President of the Conference at that session showed clearly this would not affect the principled position of the co-sponsors demanding that their security be ensured."[48]

What is the legal effect of this statement in the context of the Convention? While Article 309 of the Convention expressly prohibits reservations, Article 310 "does not preclude a State, when signing, ratifying, or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the

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[47] Third UN Conference on the Law of the Sea, Official Records, Vol. XVI, 132.
[48] See *supra* n. 43.

provisions of this Convention in their application to that State". The statement on the innocent passage of warships in territorial waters seems consistent with Article 310. It harmonized China's laws with the Convention, without touching upon the legal effect of Article 17. No true consensus was ever achieved on this Article, which covers an area that is still subject to different interpretations and applications in national practice.[49]

4. AREAS OF EMPHASIS IN MARITIME POLICY: NATIONAL SECURITY AND JOINT DEVELOPMENT

China's ratification of the Convention and the accompanying Declaration reflect China's current approach to international law. In the past China generally regarded international law as a tool of western capitalism to subjugate developing countries. With the adoption in the 1980s of a more liberal policy of an open door to the outside world, China's approach to international law changed. It now evaluates existing international rules and customs on the basis of national interests rather than communist ideology, and regards international law as a useful instrument for implementing its policies.[50]

4.1. National security

Ratification of the Convention signals that China will treat the Convention as the basis for establishing confidence and good relations with neighbouring coastal States under commonly accepted international legal rules. On the other hand, China believes that its maritime rights and national security must be protected and secured, as evidenced by its insistence on the position that foreign military ships shall be subject to prior authorization for entering

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[49] In current State practice, there exists a strong preference that the passage of foreign warships shall be subject to prior notification or authorization of the coastal States. E.g. Denmark, Brazil, Sudan, Egypt and India in their national laws require prior permission or notification for passage of foreign warships in their territorial waters. For details, see FRANCIS NGANTCHA, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (London: Pinter Publishers, 1990) 147-150.

[50] For more, see e.g. P.C. YUAN, 'China's Challenge to Traditional International Law: An Exposition and Analysis of Chinese Views and Behaviour in International Law and Politics', 10 *Dalhousie Law Journal* (1987) 9-42; WANG TIEYA, *supra* n. 6, 199-367; M. BENNETT, 'The People's Republic of China and the Use of International Law in the Spratly Islands Dispute', 28 *Stanford Journal of International Law* (1992) 425-450.

China's territorial sea. In one view, the latter objective could have been achieved in some other way: by refraining from ratifying the Convention, or by amending the relevant Chinese law.[51] It should be pointed out that in the general practice of China the provisions of international treaties to which China is a party are applied in the municipal sphere, even if they deviate from national law.[52] This is clearly spelt out in Article 142 of China's Civil Law 1986,[53] Article 238 of China's Civil Procedure Law 1991,[54] Article 27 of the Regulations of the People's Republic of China on Consular Privileges and Immunity 1990,[55] Article 268 of the Maritime Code of the People's Republic of China 1992,[56] and Article 14 of the Regulations on Management of Foreign Marine Scientific Research 1996.[57] However, neither remaining outside the Convention in order to safeguard its position on the issue of innocent passage, nor giving the provision of the Convention on innocent passage precedence over China's law, was an option that appealed to China. China found a way out by simply stating that the Convention's provision on innocent passage does not prejudice China's rights, believing its position could thus be justified.

Over a long history, China has not only made constant and intensive use of the sea, but also has tended to regard the sea as a natural feature that operates to deter foreign invaders. In 1523, in order to suppress Japanese pirates, the adjacent sea along the Chinese coasts was declared closed. In the 18th century, the Chinese emperor of the Qing Dynasty adopted an isolationist "closed-door and self-defense" policy. The closed door was forced open by the Western gunboats in 1840. During the Sino-Japanese War, the sea and Chinese internal waters were used as the main route by the Japanese for the invasion of China. During the Taiwan Straits crisis in 1958, navy ships of the United States continuously entered China's territorial sea up to 3 nm from China's coast, which was considered a serious affront to Chinese national dignity. As PRESCOTT observes: "The country which was the victim most frequently was

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[51] See WANG LIYU and P.H. PEARSE, 'The New Legal Regime for China's Territorial Sea', 25 ODIL (1994) 439.

[52] See WANG TIEYA, *supra* n. 6, p. 333; LI HAOPEI, *Tiao Yue Fa Gai Lun* [The Law of Treaties] (Beijing: Law Press, 1987) 393; LI ZHAOJIE, 'Effect of Treaties in Domestic Law: Practice of the People's Republic of China', 16 *Dalhousie Law Journal* (1993) 93.

[53] For the English text of this Law, see *The Laws of the People's Republic of China (1983-1986)*, (Beijing: Foreign Language Press, 1987) 225-249.

[54] For the English text of this Law, see *The Laws of the People's Republic of China (1990-1992)*, (Beijing: Science Press, 1993) 185-240.

[55] For the English text of the Regulations, see ibid. pp. 115-122.

[56] For English text of this Law, see ibid., pp. 411-467.

[57] See *People's Daily*, June 29, 1996, 3.

China, which had gunboat diplomacy applied against it on twenty-three occasions".[58] These historical events gave the Chinese people a strong sense of being threatened by foreign navy ships which, therefore, should in no way enjoy innocent passage in China's territorial sea.

4.2. Joint development

A feature of China's flexibility on maritime issues is its willingness to consider joint development of marine resources. This can be seen specifically in its adoption of a policy of "putting aside the question of disputes and instead jointly developing resources in the disputed area". As the Chinese leader DENG XIAOPING once remarked:

> "International disputes that have not been handled right can reach the flash point. I asked them (foreign guests) whether the policy of 'one country, two systems' could be adopted in some cases and the policy of 'joint development' in others . . . We Chinese stand for peace and hope to solve disputes by peaceful means. What kind of peaceful means? 'One country, two systems', and 'joint development'."[59]

The concept of joint development is not of Chinese origin. In Asia, in 1974 Japan and South Korea concluded an agreement for joint development of a part of the continental shelf of the two countries in the northeast of the East China Sea,[60] to which China responded sharply. Nevertheless, the idea of joint development of overlapping claims areas is under careful study by China. Following the adoption of a more liberal political policy, and motivated by the prospect of financial gains that could be used for China's modernization, and that of attracting Japanese capital and technology, China proposed to Japan that the disputes over the Diaoyu Islands should be put aside and that consideration should be given to jointly developing oil resources in the area. However, due

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[58] J.R.V. PRESCOTT, *The Maritime Political Boundaries of the World*, *supra* n. 27, p. 122.

[59] Speech by DENG XIAOPING at the Third Plenary Session of the Central Advisory Committee of the Communist Party of China in October 1984. See DENG XIAOPING, *Jianshe Juyou Zhongguo Tese De Shehuizhuyi* [Build Socialism with Chinese Characteristics] (Beijing: Foreign Language Press, 1985) 24.

[60] Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf adjacent to the Two Countries, dated February 5, 1974; see R. CHURCHILL et al., *New Directions in the Law of the Sea*, Vol. 4 (Oceana Publications, 1975) 117-133.

to the strategic importance and the potential oil resources of the Diaoyu Islands, both parties have been reluctant to compromise.

Joint development of marine resources around the Nansha Islands in the South China Sea has also been considered by China. In August 1990 during a visit to Singapore, the Chinese premier announced that "China is ready for joint efforts with Southeast Asian countries to develop the [Nansha] islands, while putting aside for the time being the question of sovereignty".[61] At the 1992 ASEAN Foreign Ministers' Conference, China's foreign minister said: "China is in favour of shelving the matter of territorial sovereignty and concentrating on cooperative activities in the area . . .".[62] At the ASEAN Regional Forum held in July 1995, he re-affirmed China's policy of putting aside disputes and negotiating joint development before the disputes are settled. He observed that China's ratification of the UN Convention on the Law of the Sea in May 1996 and the notification of territorial sea baselines had created better conditions for territorial negotiations and consultations with the neighbouring States concerned.[63] China's endeavour to settle disputes in the South China Sea by reference to accepted norms of international law, and through practical arrangements like joint development, has been welcomed in the region. However, as indicated above, the disputes relating to the Nansha Islands raise a range of complex issues among six parties, and it seems unlikely that agreement among them can be reached quickly.

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[61] See as quoted in T.L. MCDORMAN, *supra* n. 36, p. 274.

[62] See as quoted in M. BOCIURKIW, 'China Suspends Claim on Spratlys', *South China Morning Post*, July 22, 1992, 11.

[63] See *People's Daily*, July 24, 1996, 6.

LEGAL MATERIALS

STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

INDIA

JUDICIAL DECISIONS**

Sovereign immunity; Shipping line as department of the Government of the German Democratic Republic "exercising the rights of a legal entity"; Absence of consent of Government of India to sue pursuant to section 86(2)(b) of the Indian Civil Procedure Code of 1908; *Held,* consent of the Central Government a mandatory condition precedent.

Supreme Court, 25 November 1993
AIR 1994 S.C. 516

M.M. PUNCHHI and N.P. SINGH, JJ.

VEB. DEUTFRACHT SEEREEDEREI ROSTOCK (D.S.R. LINES) - Appellant *v.* NEW CENTRAL JUTE MILLS CO.LTD. & ANOTHER - Respondents

The case came before the Supreme Court of India, in the form of Civil Appeal No. 4208 of 1983 on a decision by the Calcutta High Court.

The plaintiff-respondent filed a suit for a decree for Rs. 240,000 claiming that the defendant-appellant (D.S.R. Lines) sold them damaged goods. D.S.R. Lines was a company "incorporated under the appropriate laws of . . . West [*sic*] Germany" and was "carrying on its business in West [*sic*] Germany as also at Calcutta".

The defendant took objection and argued that it was a department and/or agent and/or instrumentality of the Government of the German Democratic

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* Edited by Ko Swan Sik, General Editor.

** Contributed by V.S. MANI, LUTHER RANGREJI and GOVINDRAJ G. HEGDE, Jawaharlal Nehru University, New Delhi.

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, pp. 233-291

Republic which was recognized as a sovereign foreign state so that the suit could not be entertained against the defendant without prior consent of the central government of India as required by S. 86 of the 1908 Code of Civil Procedure.

A single Judge of the Calcutta High Court by order of 3 February 1982 dismissed the case for want of written consent of the central government. On appeal to the Division Bench, the High Court reversed the order of the trial judge, and ordered that the question whether the consent of the Central Government was required be dealt with at the trial of the case. It was this order of the High Court that came in for appeal before the Supreme Court.

There was evidence, in the case, of the Consul General of the German Democratic Republic certifying that DSR Lines constituted a department of the Government of the GDR, "exercising the rights of a legal entity". Besides, Article 12 of the GDR Constitution prohibited private ownership in, *inter alia*, 'ocean shipping' and 'larger industrial enterprises' which were 'nationally-owned property'.

SINGH, J.:

. . .

"5. One of the principles of International Law is that every sovereign State respects the independence of every other foreign State. This absolute independence and the international comity underlines the relationship between sovereign States. The object of S. 86 of the Code is to give effect to the principles of International Law. But, in India it is only a qualified privilege because a suit can be brought with the consent of the Central Government in certain circumstances. Just as an independent Sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide rights and liabilities of foreign States to sue and be sued in its Courts. It can be said that the effect of S. 86 thus is to modify the extent of the doctrine of immunity recognised by the International Law. If a suit is filed in Indian Courts with the consent of the Central Government as required by S. 86, it shall not be open to any foreign State tot rely on the doctrine of immunity. Sub-Sec. (1) of S. 86 says in clear and unambiguous terms that no foreign State may be sued in any Court, except with the consent of the Central Government certified in writing by the Secretary to that Government.

. . .

"[T]he Central Government has to accede to the said request [to sue] or refuse the same after taking into consideration all the facts and circumstances of the case. . . .

"[W]henever a relief is sought against a foreign State, the Court before which such claim is lodged has to examine whether the person concerned had got the consent of the Central Government in terms of S. 86 of the Code.

. . .

"11. . . . While considering the question of grant or refusal of such consent, the Central Government is expected to examine that question objectively. Once the Central Government is satisfied that a cause of action has accrued to the applicant against any foreign company or corporation, which shall be deemed to be a foreign State, such consent should be given. The immunity and protection extended to the foreign State on the basis of International Law should not be stretched to a limit, so that a foreign company and corporation, trading within the local limits of the jurisdiction of the Court concerned, may take a plea of S. 86, although *prima facie* it appears that such company or corporation is liable to be sued for any act or omission on their part or for any breach of the terms of the contract entered on their behalf. It is neither the purpose nor the scope of S. 86 to protect such foreign traders, who have committed breach of the terms of the contract, causing loss and injury to the plaintiff. But, if it appears to the Central Government that any attempt on the part of the plaintiff to sue a foreign State, including any company or corporation, is just to harass or to drag them in a frivolous litigation, then certainly the Central Government shall be justified in rejecting any such application for consent, because such motivated action on the part of the plaintiff may strain the relations of this country with the foreign State".

Accordingly the appeal was allowed and the suit dismissed.

Comment[*]

The sovereign immunity law of India has remained as archaic as the Indian Civil Procedure Code itself, enacted as it was by the British Parliament in 1908.[1] Section 86 of the Code in fact deals with two aspects of the sovereign immunity law of India: One, the substantive question of sovereign immunity of foreign governments, and two, the mandatory procedural condition precedent of the Central Government's consent for initiation of a suit against a foreign sovereign. The Indian courts have been taking an absolutist view of sovereign immunity of foreign governments, both substantively as well as procedurally. In fact much can be said in favour of the view adopted by the Division Bench of the Calcutta High Court which held that the question whether the pre-requisite of the Central Government's consent was applicable in relation to this case, should be examined by the trial court

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[*] By V.S. *Mani*, Professor of International Space Law, Jawaharlal Nehru University, New Delhi.

[1] Cf. K.I. VIBHUTE, 'Transnational trade transactions of a foreign state and sovereign immunity in India: an appraisal', 3 AsYIL 47.

itself. Apparently, this view must have been inspired by the fact that the DSR Lines had a place of business in India, at Calcutta itself.

The Supreme Court in this case relied on/endorsed its own earlier judgment in *Mirza Ali Akbar Kashami* v. *VAR* (AIR 1966 SC 230), another Indian case. *Royal Nepal Airline Corporation* v. *Monorama Meher Singh Legha* (AIR 1966 Calcutta 319), and two English cases *(Baccus S.R.L.* v. *Servicio Nacional Del Trigo* [1957] 1 QB 438 and *Krajina* v. *The Tass Agency* [1949] 2 AllER 274). These English cases are not only 'ancient' in view of the subsequent developments in the law on sovereign immunity law,[2] but also out of place in respect of the special procedural requirement of the Central Government's consent in Indian law.

The Supreme Court decision in this case is remarkable in other respects, too. First, the appellant-defendants had a place of business in Calcutta. The Supreme Court did not consider to what extent this factor obviated the need for compliance with the prerequisite of the Central Government's consent. Second, at the time of preferring the appeal, i.e. in 1983, the GDR still existed. But by the time the Supreme Court delivered its judgement, the GDR had ceased to exist. Would Article 12 of the GDR constitution still be relevant? Would the 1981 certificate by the Consul-General still remain conclusive proof of the 'sovereign' status of the appellant?

Finally, there is the basic question of the contemporary relevance of the absolute immunity doctrine. This has ramifications both for international law and Indian law. As for international law, the trend is clearly towards a restrictive theory and a distinction between commercial and sovereign acts, to be determined in terms of the nature of the acts. The role of the courts is crucial in this exercise, if the experience of the British, American, Canadian, Australian and European legislation and judicial practice on the matter is any indication.

As for the Indian law, it was high time for the Supreme Court to say, and it did not say, that Section 86 of the 1908 Act is archaic, stood in the way of equality before the law (Article 14 of the Constitution), unreasonably restricted the freedom of trade and profession under Article 19 and violated the universally shared basic principles of the law of contracts. If the state has entered the 'non-sovereign' field of commerce, it must not be placed in a privileged position vis-à-vis the individual and the law should not close the avenues of enforcement of the individual's rights, should the state be the defaulting party in commercial transactions. Also, it is difficult to understand why the Central Government be given a deciding role in preventing a court in exercising its powers of dispensation of justice.

Evidently, it is high time that the Indian Parliament thinks in terms of an Indian Foreign States Immunities Act, on the basis of an Indian perception of the role of the state in the economic development of the country.

Enforcement of foreign arbitral awards; Enforceability under the Convention on the Recognition and the Enforcement of Foreign Arbitral Awards, Nw York 1958 and the Foreign Awards (Recognition and Enforce-

[2] See, for instance, *The Philippine Admiral* [1977] A.C. 373; Trendtex Trading *v.* Central Bank of Nigeria [1977] QB 529 (CA); *I Congreso de Partido* [1983] 1 A.C. 244 (House of Lords).

ment) Act 1961; Not enforceable on grounds that the award was against public policy; Concept of public policy.

RENUSAGAR POWER COMPANY LTD. - Appellant *v.* GENERAL ELECTRIC COMPANY – Respondent

Supreme Court
AIR 1994 S.C. 860

M.N. VENKATACHALIAH, C.J.I., S.C. AGRAWAL and Dr. A.S. ANAND, JJ.

The case came up before the Supreme Court of India through Civil Appeals Nos. 71 and 71-A of 1990 with 379 of 1992, D/-7-10-1993, from a decision of the Bombay High Court.

Renusagar Power Co. Ltd., a company incorporated under the India Companies Act, 1956 (Appellant) and General Electric Company, a company incorporated under the laws of the State of New York in the USA (Respondent) were parties to a contract, dated 24 August 1964, for the supply by General Electric to Renusagar of the equipment and power services for setting up a thermal power plant.

The contract contained an arbitration clause which provided that any disagreement arising out of or related to the contract which the parties are unable to resolve by sincere negotiation shall be finally settled in accordance with the Arbitration Rules of the International Chamber of Commerce.

Arbitration took place at the request of Respondent and an award was made on 16 September 1986, upholding the claim of Respondent. On 15 October 1986 Respondent instituted proceedings for enforcement of the award before the Bombay High Court.

In his judgment of 21 October 1988 the single Judge held that the award was enforceable under the provisions of the Foreign Awards (Recognition and Enforcement) Act and on that basis passed a decree in terms of the award. On appeal the Division Bench of the High Court upheld the order by judgment of 12 October 1989 (1990 (1) Bom CR 561), rejecting the argument according to which the award was unenforceable because, *inter alia,* its enforcement would be contrary to public policy under sec.7(1)(b)(ii) of the Foreign Awards Act. Renusagar went on appeal before the Supreme Court.

The Court, with Judge AGRAWAL delivering the judgment, referred to the background against which the Foreign Awards Act, 1961 was enacted. The principal issue in the case was defined as follows:

"22. Arbitration is a well recognised mode for resolving disputes arising out of commercial transactions. This is equally true for international commercial transactions. With the growth of international commerce there was an increase in disputes arising out of such transactions being adjudicated through arbitration. One of the problems faced in such arbitrations related to recognition and enforcement of an arbitral award made in one country by the Courts of other countries . . .."

The Court proceeded by outlining the purposes of the Geneva Protocol of 1923 and the subsequent Geneva Convention of 1927, and those of the New York Convention of 1958. The Foreign Awards Act was outlined as follows:

"23. . . . The Foreign Awards Act has been enacted to give effect to the New York Convention and for purposes connected therewith. In the Statement of Objects and Reasons, reference has been made to the defects in the Geneva Convention of 1927 which "hampered the speedy settlement of disputes through arbitration and hence no longer met the requirements of international trade" and which led to the adoption of the New York Convention. Section 2 of the Act defines the expression 'foreign award'. S. 3 makes provision for stay of proceedings in respect of matters to be referred to arbitration. Section 4 deals with effect of foreign awards. Sub-sec.(1) of S. 4 provides that a foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. Sub-sec.(2) prescribes that any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made and may be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India. Section 5 makes provision for filing of foreign awards in Court. In sub-sec.(1) it is laid down that any person interested in a foreign award may apply to any court having jurisdiction over the subject matter of the award that the award be filed in Court. Sub-sec.(2) requires that such an application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. Sub-sec.(3) requires the court to give notice to the parties to the arbitration other than the applicant requiring them to show cause, within a time specified, why the award should not be filed. Section 6 deals with enforcement of foreign awards. Sub-sec.(1) lays down that where the Court is satisfied that the foreign award is enforceable under the Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Sub-sec.(2) provides that upon the judgment so pronounced a decree shall follow, no appeal shall lie from such decree except insofar as the decree is in excess of or not in accordance with the

award. Section 7 contains the conditions for enforcement of foreign awards and prescribes the circumstances under which foreign awards will not be enforced. Section 8 requires the production of the original award or a duly authenticated copy thereof as well as [the] original agreement for arbitration or a duly certified copy thereof and the production of evidence to prove that the award is a foreign award. Section 9 is a saving clause which excludes the applicability of the Act to matters specified therein. S. 10 provides for repeal of the Arbitration (Protocol and Convention) Act, 1937, in relation to foreign awards to which the Act applies. Section 11 provides for rule making power of the High Court. . ."

The judgment continued:

"24. In the present case, we are concerned with conditions of enforcement laid down in S. 7, which provides as follows -

"7. Conditions for Enforcement of Foreign Awards. - (1) A foreign award may not be enforced under this Act -

(a) if the party against whom it is sought to enforce the award proves to the Court dealing with the case that -

(i) the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereof, under the law of the country where the award was made; or

(ii) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement:

Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) 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; or

(b) if the Country dealing with the case is satisfied that –

(i) the subject-matter of the difference is not capable of settlement by arbitration under the law in India; or

(ii) the enforcement of the award will be contrary to the public policy;

(2) If the Court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-section (1), the Court may, if it deems proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement if the award, order the other party to furnish suitable security."

After hearing the contentions of both the parties, the Court framed, *inter alia*, the following issues:

"30. . . .

(i) What is the scope of enquiry in proceedings for enforcement of a foreign award under S. 5 read with S. 7 of the Foreign Awards Act?

(ii) Were Renusagar unable to present their case before the Arbitral Tribunal and consequently can the award not be enforced in view of Section 7(1)(a)(ii) of the Foreign Awards Act?

(iii) Does Section 7(1)(b)(ii) of the Foreign Awards Act preclude the enforcement of the award of the Arbitral Tribunal for the reason that the said award is contrary to the public policy of the State of New York?

(iv) What is meant by 'public policy' in Section 7(1)(b) (ii) of the Foreign Awards Act?

(v) Is the award of the Arbitral Tribunal enforceable as contrary to public policy of India on the ground that:

(a) it involves contravention of the provisions of the Foreign Exchange Regulation Act [FERA], 1973;

. . .

(d) it would lead to unjust enrichment for General Electric."

As regards issue (i) the Court raised the question whether in enforcement proceedings it is permissible to impeach the award on merits. After having surveyed the answers under the common law, under the 1927 Convention and under the 1958 New York Convention, the Court held:

"37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the Court in which award is sought to be enforced is limited to grounds mentioned in S. 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits."

As regards issue (ii), the Court held:

"40. We are, therefore, of the opinion that the enforcement of the arbitral award is not barred by S. 7(1)(a)(ii) of the Foreign Awards Act on the ground that Renusagar was unable to present its case before the Arbitral Tribunal.

As regards, issue (iii), the Court observed:

"41. . . . We find it difficult to accept this contention. It cannot be held that by not using the words 'Public policy of India' and only using the words 'public policy' in S. 7 (1)(b)(ii) of the Foreign Awards Act, Parliament intended to deviate from the provisions of the New York Convention contained in Art. V(2)(b) which uses the words 'public policy of that country' implying public policy of the country where recognition and enforcement is sought. That Parliament did not intend to deviate from the terms of the New York Convention is borne out by the amendment which was introduced in the Act by Act 47 of 1973 after the decision of this Court in the Tractor-export case (supra) whereby S. 3 was substituted to bring it in accord with the provisions of the New York Convention. The Foreign Awards Act has been enacted to give effect to the New York Convention which seeks to remedy the defects in the Geneva Convention of 1927 that hampered the speedy settlement of disputes through arbitration. The Foreign Awards Act is, therefore, intended to reduce the time taken in recognition and enforcement of foreign arbitral awards. The New York Convention seeks to achieve this objective by dispensing with the requirement of the leave to enforce the award by the courts where the award is made and thereby avoid the problem of 'double exequatur'. It also restricts the scope of enquiry before the court enforcing the award by eliminating the requirement that the award should not be contrary to the principles of the law of the country in which it is sought to be relied upon. Enlarging the field of enquiry to include public policy of the courts whose law

governs the contract or of the country of place of arbitration, would run counter to the expressed intent of the legislation."

The Court further held,

"45. We are, therefore, of the view that the words 'public policy' used in S. 7(1)(b)(ii) of the Foreign Awards Act refer to the public policy of India and the recognition and enforcement of the award of the Arbitral Tribunal cannot be questioned on the ground that it is contrary to the public policy of the State of New York."

With regard to 'public policy' (issue iv) the Court said:

"46. . . . this Court has laid down -

"Public policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time." (See Central Inland Water Transport Corporation Ltd. *v.* Brojo Nath Ganguly (1986) 2 SCR 278 at p. 372 (AIR 1986 SC 1571 at p. 1612).

. . .

48. . . . There are two conflicting positions which are referred to as the 'narrow view' and the 'broad view'. According to the narrow view courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this area. (See CHITTY on Contracts, 26th Ed.Vol. I, para 1133, pp. 685-686). Similar is the trend of the decision in India. In Gherulai Parakh *v.* Mahadeodas Maiya, 1959 Suppl(2) SCR 392 (AIR 1959 SC781) this Court favoured the narrow view when it said:

> ". . . though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days" (p. 440) (of SCR): (at p. 795 of AIR).

49. In later decisions this Court has, however, leaned towards the broad view. (See Murlidhar Agarwal *v.* State of U.P. (1975) 1 SCR 575 at p. 584 (AIR 1974 SC 1924 at p. 1930); Central Inland Water Transport Corporation *v.* Brojo Nath Ganguly (supra) (1986)2 SCR 278 at p. 373 (AIR 1986 SC 1571

at p. 1612); Rattanchand Hira Chand *v.* Askar Nawaz Jung (1991)2 SCC 67 at pp. 76-77 (1991 AIR SCW 496 at p. 502-03).

. . .

61. In France, a distinction is made between international public policy ('ordre public international') and the national public policy. Under the new French Code of Civil Procedure, an international arbitral award can be set aside if the recognition or execution is contrary to international public policy. In doing so it recognises the existence of two levels of public policy - the national level, which may be concerned with purely domestic considerations, and the international level, which is less restrictive in its approach. . . .

. . .

63. In view of the absence of a workable definition of 'international public policy' we find it difficult to construe the expression 'public policy' in Article V(2)(b) of the New York Convention to mean international public policy. In our opinion the said expression must be construed to mean the doctrine of public policy as applied by the Court in which the foreign award is sought to be enforced. Consequently, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act means the doctrine of public policy as applied by the Courts in India. This raises the question whether the narrower concept of public policy as applicable in the field of public (*sic*) international law should be applied or the wider concept of public policy as applicable in the field of municipal law."

The Court further observed:

"65. This would imply that the defence of public policy which is permissible under S. 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in S. 7(1) of the Protocol and Convention Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression 'public policy' covers the field not covered by the words 'and the law of India' which follow the said expression,

contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. . . . Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

With regard to issue (*v*)(a), the Court held,

"84. . . . We are, therefore, unable to hold that the enforcement of the award would involve violation of any of the provisions of FERA and for that reason it would be contrary to public policy of India so as to render the award unenforceable in view of section 7(1)(b)(ii) of the Act."

With regard to issue (*v*)(d) the Court observed:

"99. In Indian law the principle of unjust enrichment finds recognition in the Indian Contract Act, 1872 (Ss.70 and 72).

100. We do not consider it necessary to go into the question whether the principle of unjust enrichment is a part of the public policy of India since we are of the opinion that even if it be assumed that unjust enrichment is contrary to public policy of India, Renusagar cannot succeed because the unjust enrichment must relate to the enforcement of the award and not to its merits in view of the limited scope of enquiry in proceedings for the enforcement of a foreign award under the Foreign Awards Act. The objections raised by Renusagar based on unjust enrichment do not relate to the enforcement of the award . . ."

The appeal was dismissed and the decree passed by the Division Bench of the Bombay High Court was affirmed.

Comments*

India is a party to both the 1927 and 1958 Conventions and has enacted enabling legislation, namely the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

One of the principal grounds for setting aside a foreign arbitral award is 'public policy'. There is no uniform guideline to decide what constitutes public policy. The New York Convention provides that state parties and courts are free to determine and interpret the meaning of their own public policy. Courts of state parties have refused to recognize an existing principle of 'international public policy', though France has enacted legislation incorporating the above, *vide* the French Commercial Code, 1980 and 1981.

As regards the scope of Section 7 of the Foreign Awards Act, the view of the Supreme Court is supported by writings of scholars and the *travaux préparatoires* of the New York Convention. The Court held that an award can be set aside on grounds of public policy if such award is contrary to (a) the fundamental principles of law, (b) the interests of India, and (c) justice and morality. In an earlier case, *C.O.S.I.D.* v. *Steel Authority of India Ltd.* (AIR 1986 Delhi High Court 8-23) the SAIL, a government company, could not discharge its contractual obligations towards COSID, a foreign company, due to an order issued by the Ministry of Iron and Steel. The Delhi Court held that the Ministry order was in the economic interest of India and the application of COSID to enforce the award was, therefore, set aside.

The new Indian Arbitration and Conciliation Act, 1995, that has come into effect on 25 January 1996, has explicitly stipulated in section 48(2)(b) that the words 'public policy' in the Foreign Awards Act, 1961, will now be read 'public policy of India'. One can say with a certain amount of conviction that the *Renusagar* case has influenced this change.

JAPAN

JUDICIAL DECISIONS**

Compensation for Japanese prisoners of war detained in the USSR after World War II; Non-retroactivity of Articles 66 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949; The non-customary character of the rule of "Compensation by the Power on which the prisoner depends"; Municipal applicability of international law; No

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* By LUTHER RANGREJI and GOVINDRAJ HEGDE, doctoral scholars at the International Legal Studies Division, School of International Studies, Jawaharlal Nehru University, New Delhi.

** Contributed by OKADA IZUMI, Nanzan University, Nagoya, member of the Study Group on Decisions of Japanese Courts Relating to International Law.

legal obligation for the State of Japan to settle credit balances due to the repatriated prisoners of war

Tokyo High Court, 5 March 1993
Hanrei Jiho [Judicial Reports] No. 1446, 1993, p. 40[3]

X ET AL. *v.* STATE OF JAPAN

At the closing stage of World War II, the Soviet Union declared war against Japan on 8 August 1945 and invaded and occupied Manchuria, Kwantung Province, the northern part of Korea, South Sakhalin and the Kuril Islands. As a result, about 700,000 officers and men of the Japanese Army surrendered to the Soviet Army. They were detained as prisoners of war and transferred to some two thousand Soviet camps in, *inter alia*, Siberia, Central Asia, European Russia, the Far North and Outer Mongolia.

These Japanese POWs were compelled to forced labour, mostly outdoors, such as building of concentration camps, deforestation for railways, construction of houses, factories, bridges, dams, power plants and canals, coal mining, cargo handling in harbours, farm work, etc. About 60,000 POWs died of starvation because of the bad food situation, heavy labour conditions, infectious diseases, or severe weather conditions. Among those who survived and were repatriated (not until 1958 was their repatriation practically completed) many suffered from mental and physical injuries and disabilities.

In April 1981, sixty-one ex-POWs and a widow of one of the ex-POWs brought a case before the Tokyo District Court. They sued the State of Japan for settlement of the credit balances resulting from the forced labour during the detention in the USSR, and for compensation for the injuries and disabilities caused by the forced labour as well as for all other damage suffered during the detention and imputable to the Detaining Power.

The Tokyo District Court in its judgment of 18 April 1989[4] dismissed all claims of the plaintiffs. The judgment was based on, *inter alia*, two considerations of international law:

First, the claims were filed under Articles 66 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (hereinafter:

[3] Cf. English translation in 37 JAIL (1994) 129.
[4] *Hanrei Jiho* No. 1329, 1990, p. 36.

Third Geneva Convention)[5] and were directed against the State of Japan as "the Power on which the prisoner of war depends". The Court held the Convention to be inapplicable because most of the plaintiffs had lost their POW-status by repatriation before the Convention had entered into force between Japan and the USSR[6] and because the provisions of the Convention could not be applied retroactively to the results of Word War II.

Secondly, the claims were based, *inter alia*, on the so-called "Rule of compensation by the state on which the POW depends". This rule, which is contained

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[5] The relevant provisions read as follows, in part:
Art. 58: ". . . [T]he Detaining Power may determine the maximum amount of money . . . that prisoners may have in their possession. Any amount in excess . . . shall be placed to their account . . . "
Art. 64: "The Detaining Power shall hold an account for each prisoner of war, showing at least the following: (1) The amounts due to the prisoner or received by him as advances of pay, as working pay or derived from any other source; . . . (2) The payments made to the prisoner in cash, or in any other similar form; the payments made on his behalf and at his request; . . ."
Art. 66: "On the termination of captivity, through the release of a prisoner of war or his repatriation, the Detaining Power shall give him a statement . . . showing the credit balance then due to him. The Detaining Power shall also send . . . to the Government upon which the prisoner of war depends, lists giving all appropriate particulars of all prisoners of war whose captivity has been terminated . . . and showing the amount of their credit balances.
. . .
Any of the above provisions of this Article may be varied by mutual agreement between any two Parties to the conflict.
The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity".
Art. 68: "Any claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends . . .. In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability, . . .
Any claim by a prisoner of war for compensation in respect of personal effects, monies or valuables impounded by the Detaining Power . . . shall likewise be referred to the Power on which he depends . . .. The Detaining Power will, in all cases, provide the prisoner of war with a statement . . . showing all available information . . .. A copy of this statement will be forwarded to the Power on which he depends . . .."

[6] Japan acceded to the Convention on 21 April 1953 and the USSR ratified it on 10 May 1954 (the judgment erroneously mentions 10 November 1954, the date of entry into force of the Convention, as the date of "accession by the USSR"). Two of the 62 plaintiffs returned home in 1956, after the entry into force of the Convention between the two states. One of these two had been handed over as a suspected war criminal to the People's Republic of China in 1950 and was imprisoned there until repatriation and the other had been convicted of espionage in the USSR in 1949 and had served in Soviet prison before being returned home. The Court held that the Convention was not applicable to this person because of the Soviet reservation to Art. 85 of the Convention ("Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention").

in Articles 66 and 68 of the Convention, was allegedly already established as a rule of international customary law at a time not later than the termination of hostilities of World War II. However, the Court denied the rule to be so established in the absence of evidence of general practice and *opinio juris* among the belligerents in World War II, these being the requisites for the existence of international customary law.

The Court also examined, and dismissed, the claims under Article 29, paragraph 3 of the Constitution of Japan (which contains the principle of just compensation in case of taking of private property for public purposes), Article 1 of the State Tort Liability Act and the tort law of the Civil Code. The plaintiffs had alleged that under these provisions the State of Japan was liable for damage caused by its unlawful exercise of public authority, such as its waiver of the plaintiffs' rights to claim from the USSR, under paragraph 6 of the Japan-USSR Joint Declaration of 1956.

The Tokyo High Court found, basically on the same grounds as the Court below, that all the original claims of the appellants as well as a new claim submitted before the High Court were groundless, and, consequently, dismissed the appeal. The grounds for the judgment, so far as relevant to international law, were as follows:

(1) *On the applicability of Articles 66 and 68 of the Third Geneva Convention*

Unlike the appellants' contention the Convention was not included for the purpose of (post-war) management of matters stemming from the past war but was adopted by states which recognized the defects and inadequacies of the existing law relating to prisoners of war and which strived for its improvement. Besides there is insufficient evidence in the drafting history of the Convention for the view that the Convention was intended to apply retroactively to the facts of World War II. Neither can this applicability be achieved by appellants' reference to Article 141[7] of the Convention.

It was contended by the appellants that the termination of the status of POW by release or repatriation does not imply the lapse of either the person's rights resulting from his detention as a POW or the rights and obligations of

[7] "The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation . . .."

the Powers concerned, i.e. the Detaining Power and the Power on which he depends, relating to his detention. The Court held:

"But the question as to what rights and obligations the POWs actually acquired during their detention which commenced before the Convention of 1949 entered into force between Japan and the USSR, how their acquired rights and obligations must be settled, or how their legal status is affected by their release or repatriation, shall, in principle, be determined solely according to the provisions of the treaties or other laws that were in force at the time of their detention and the termination of the status of POWs. Therefore, unless explicitly otherwise provided, the above questions cannot be settled by provisions of treaties or other laws that came into existence later."

One of the appellants was released from a Soviet prison and returned to Japan in November 1956, that is after the 1949 Geneva Convention had entered into force between Japan and the USSR. The appellants argued that, consequently, the Convention in any case applied to this one person. However, the Court held that, while it was established that the person concerned served as a prisoner convicted of espionage[8] under Article 58 of the Russian Penal Code, at least from 1950 until his return home in 1956,

"the Convention is, by its nature, applicable only to those who have the status of POW and only in respect of their detention as POWs. Consequently, with a view to securing an unequivocal administration of the provisions of the Convention there is no reason, unless explicitly otherwise provided, to apply the Convention retroactively to a person who had, at one time, been excluded from the application of the Convention because of his conviction for war crimes or other crimes mentioned in the [Soviet] reservation to Article 85 of the Convention, despite the fact that [according to the appellants] the conviction was later reviewed and quashed [in the USSR in 1991]."

(2) *On the question of whether Articles 66 and 68 of the Third Geneva Convention are in fact codified rules of customary international law*

As to the so-called "Rule of compensation by the State on which the POW depends", the Court held, taking the drafting process into account:

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[8] *See supra*, n. 4.

"It is difficult to establish, as the appellants allege, that the rule of compensation by the state on which the POW depends had already become a general practice among those states which participated in the conference of experts, the diplomatic conference and other conferences[9] or, had already been effected by these states with *opinio juris sive necessitatis* when the conferences were convened."

The Court described the outcome of the development of international law relating to the protection of POWs, especially since the 19th century and under the impact of the idea of human rights, as follows:

"Of course the concrete contents of proper treatment, rights and interests to which POWs are entitled have been gradually expanded and reinforced in keeping with historical developments, and it is generally recognized today that at least certain principles bearing on the fundamental human rights of POWs have become rules of international customary law which detaining Powers are obliged to observe, such as, for example, the principles that POWs are not in the power of the individuals or military units who have captured them, but of the enemy Power; that reprisals against POWs are prohibited; that during the detention POWs must be protected and respected as human beings; that detaining Powers must provide POWs with clothings, food, etc.; that no POWs may be employed for labour of an improper nature, such as unhealthy and dangerous labour; and that the hygiene at POW camps is to be ensured. However, in view of a general survey of the municipal law systems of major countries including Japan on the matter of compensation to POWs of their own nationality, it can hardly be acknowledged that the alleged rule of compensation by the state on which the POW depends satisfied the requirements of general practice and *opinio juris* and had been established as a rule of international customary law at the time when the appellants were detained in Siberia."

(3) *On the question of the domestic applicability of the relevant rules of international law*

"The domestic applicability of the relevant rules of international law, that is to say, the question of whether such rules are directly applicable to the

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[9] Respectively, the Preliminary Conference in 1946, the Conference of Government Experts in 1947, the 17th International Red Cross Conference in 1948, and the Diplomatic Conference in 1949.

appellants without any national legislation, must be examined. It is well-accepted in Japan that duly promulgated treaties and international customary law are recognized to have domestic effect without any special legislative acts. But when the content of a rule established by a treaty is not clear and precise, or when a rule of international customary law which deals with rights and interests of individual nationals does not specify in detail the substantive conditions for the coming into existence, duration, extinction, etc. of these rights, the procedural conditions for their exercise, and their coordination with the existing municipal law, we cannot but deny the domestic applicability of the rule in question.

Therefore, even if it could be acknowledged that Articles 66 en 68 of the Third Geneva Convention of 1949 were applicable to the appellants, or that international customary law to the same effect had been established, yet the appellants may not be admitted to claim for compensation directly on the basis of these Articles or the international customary law to the same effect, as these Articles are not clear nor precise in respect of the scope of entitled persons, nor in respect of the content, method, duration, etc. of the compensation, and, moreover, do not define the interconnection with the domestic systems of pensions, allowances, accident compensation, and so on, which were introduced in many countries since before World War II on behalf of soldiers of their own nationality."

(4) *On the new claim of the alleged illegality of the delay in the payment of credit balances*

According to the appellants, several memoranda of the General Headquarters of the Supreme Commander of the Allied Powers (GHQ-SCAP) of 8 February, 16 March and 7 May 1946, which the Japanese government was obliged to implement, permitted the Japanese government, as part of the occupation policy and by way of exception to the general prohibitions, to pay the total amounts of earnings of repatriated Japanese POWs during their detention. Referring to these memoranda and the practice of the Japanese government in liquidating credit balances on the basis of these memoranda, the appellants contended that the appellee was under an obligation to settle the credit balances even with those repatriated POWs who possessed no sufficient documents to prove these balances. With regard to this contention the Court found as follows:

"For several years after the War, the Allied Powers restricted the import of currency and other valuables into Japan . . . for the purpose of reconstruction of the Japanese economy which was in disorder because of the long war.

However, the liquidation of the credit balances of ex-POWs was permitted under certain restrictions, *i.c.* on condition that they possessed certificates of their earnings as POWs. Japan, which was under occupation and in a position of faithfully implementing the occupation policy of the Allied Powers, took the necessary measures and made the payments instead of the detaining Powers, provided that the relevant documents were presented. Therefore, it is difficult to acknowledge the appellants' contention to the effect that Japan settled the credit balances due to Japanese POWs during their detention by way of fulfilling an obligation under international law.

. . .

[I]t is evident that the Soviet authorities neither issued nor presented any documents to prove the earnings of the POWs detained in Siberia, despite the request of the Japanese government to the GHQ-SCAP . . .. [T]here is no sufficient proof that Japan has recognized a legal responsibility for settling the credit balances of the Japanese POWs in World War II, or has enacted a law accepting such responsibility. Therefore, at all events, the claim of the appellants which is premised on the assumption that the appellee was under a legal obligation to settle credit balances with the ex-POWs detained in Siberia, including the appellants, cannot be admitted."

The appellants appealed to the Supreme Court.

MALAYSIA

LEGISLATION*

Shipping

Merchant Shipping (Amendment) Act 1994 (Act A 895)

The Merchant Shipping (Amendment) Act 1994 (Act A 895) amends the Merchant Shipping Ordinance 1952. Act A 895 has three main objectives:

(i) to provide for the registration of small merchant ships;
(ii) to streamline the provisions of the 1952 Ordinance relating to licensing of shipping within Malaysia; and

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* Contributed by WAN ARFAH HAMZAH, University of Malaya, Kuala Lumpur.

(iii) to provide for more effective control of shipping activities within Malaysian waters.

To provide for more effective control of shipping activities within Malaysian waters, section 16 of Act A 895 introduces a new Part XIIIA, headed 'Control of Shipping', which shall apply also to Sabah and Sarawak. *Inter alia,* the amendment requires any ship involved in the activities listed to notify the Director of Marine. These activities are:

(a) dredging;
(b) mining, including exploration and exploitation;
(c) cable and pipe laying;
(d) marine construction, including the construction of jetties and wharves;
(e) dumping of any material;
(f) sports, leisure or recreational activity;
(g) survey;
(h) cleaning, including cleaning of cargo tanks;
(i) transportation, discharging or loading of wastes; or
(j) pilotage (new section 491 B(1).

The Director of Marine, upon receiving the notification, may impose such terms and conditions as he thinks fit (new section 491 B(3)). Further, the Director of Marine is empowered, where he has reason to believe that an offence has been committed under this Part, to:

(a) stop and board any ship to make any enquiry and examination;
(b) inspect any permit or any other document required under the 1952 Ordinance or any international rules;
(c) detain any ship including any equipment on board; and
(d) arrest any person who has committed an offence under this Part (new section 491C(1).

Apart from the above, other amendments which are significant are sections 2(b), 17 and 18 of Act A 895. Section 2(b) replaces the definition of the Load Line Convention (viz. International Load Line Convention 1930) in the 1952 Ordinance with a new one. The new definition refers to the International Convention on Load Lines of 1966 and to any amendment thereof applicable to Malaysia. Section 17 amends section 504 of the 1952 Ordinance by increasing fifty-fold each of the fines imposed thereunder.[10] Section 18

[10] The maximum fine of 1000 dollars imposable under subsection (2) of section 504 on the master of a ship and owner or any other person liable, if the ship after detention or ordered to be detained proceeds to sea before being released by the competent authority, is increased to 50,000 ringgit; the maximum fine of 100 dollars per day imposable under subsection (4) of section 504 on the master and owner of a ship that proceeds to sea taking on board any officer authorized to detain the ship has been increased to 5,000 ringgit per day; and the maximum fine of 500 dollars

introduces a new section 512A which empowers the Director of Marine to compound any offence committed under the 1952 Ordinance.

Act A 895 received the Royal Assent on 24 June 1994 and was published in the Gazette on 7 July 1994.

Marine pollution

Merchant Shipping (Oil Pollution) Act 1994 (Act 515)

The Merchant Shipping (Oil Pollution) Act 1994 (Act 515) was promulgated to enable Malaysia to accede to, and implement, two International Maritime Organization (IMO) conventions governing compensation for damage, caused by oil spills from ships,[11] viz. the International Convention on Civil Liability for Oil Pollution Damage, 1969 (Civil Liability Convention)[12] and its supplementary convention, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention).[13]

Act 515 comprises 6 parts, 29 sections and 2 schedules. The 6 parts cover:

(i) Preliminary provisions (section 1 - 2);
(ii) Civil Liability for Oil Pollution (section 3 - 14);
(iii) The International Oil Pollution Compensation Fund (sections 15 - 22);
(iv) Jurisdiction and effect of judgments (sections 23 - 24);
(v) Enforcement (sections 25 - 27); and
(vi) Miscellaneous (sections 28 - 29).

Part II implements the Civil Liability Convention. *Section 3* imposes strict liability on the owner of a ship for pollution damage in any area of Malaysia or any other Liability Convention country caused by oil which has been discharged or has escaped from his ship. No liability shall attach to the shipowner if he can bring himself within one of the three defences provided in *section 4*:

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imposable under subsection (6) of section 504 on any person who opposes or obstructs any officer authorized to detain the ship has been increased to 25,000 ringgit.

[11] Malaysia acceded to both conventions on 6 January 1995.

[12] Governs the liability of shipowners for oil pollution damage and establishes a comprehensive compensation scheme for pollution damage caused by oil spills from ships.

[13] Provides payment of additional compensation to victims of oil pollution when the compensation provided under the Civil Liability Convention is inadequate.

(a) the discharge or escape resulted from an act of war, hostilities or a natural phenomenon of an exceptional character;
(b) the discharge or escape was wholly caused by an act or omission of a third party; or
(c) the discharge or escape was wholly caused by the negligence or wrongful act of a government or other authority responsible for the maintenance of lights or other navigational aids.

According to *section 5* liability is imposed only on the shipowner and no claim may be made against his servant or agent. The shipowner may limit that liability provided the incident leading to the pollution damage is not due to his actual fault or privity.

Under *section 6*, if he limits his liability the aggregate of his liabilities shall not exceed one hundred and thirty-three special drawing rights for each ton of the ship's damage, provided that this aggregate amount shall not in any event exceed fourteen million special drawing rights.[14]

The shipowner may, under *section 7*, apply to the Court for the limitation of the liability to an amount determined in accordance with section 6. The Court shall, after determining such limit and directing payment or deposit of a bank guarantee or security into Court of that amount, determine also the amounts due to the persons making claims in the proceedings and direct the distribution of the amount paid into Court among such persons in proportion to their established claims. Section 7 also enables the right of subrogation to be exercised with regard to the amount paid into Court by the shipowner or any other person who has paid compensation in any claim for pollution damage. The right of subrogation may also be exercised by a shipowner who has voluntarily made any reasonable sacrifices or incurred any reasonable expenses to prevent or minimize the pollution damage.

Section 8 empowers the Court to order the release from arrest of any ship or other property which may have been given as security for any claim arising from a liability under section 3, provided the shipowner or any other person liable has paid the limitation amount into Court.

Limitation of time for compensation claims is prescribed by *section 10*. No claim shall be considered unless the action is commenced within 3 years from the date of the pollution damage or 6 years from the date of the incident causing the pollution damage, and where the incident consists of a series of occurrences, the 6 year period shall run from the date of the first occurrence.

Section 11 imposes on the owner of a ship carrying more than 2000 tons

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[14] The power to convert the special drawing rights into Ringgit Malaysia is given to the Minister of Transport: section 29(2)(e).

of oil compulsory insurance which shall be evidenced by a certificate issued by the Director of Marine in the case of a ship registered in Malaysia or a non-Liability Convention country or in the case of a ship registered in a Liability Convention country, by the government of that country.

Under *section 13*, an action may be instituted against the insurer. In such proceedings, the insurer may invoke the defences available to the shipowner and also limit his liability to the same extent as the shipowner.

Section 14 provides that the Act shall not apply to warships and government ships used for non-commercial purposes.

Part III implements the Fund Convention. *Section 16* confers on the International Oil Pollution Compensation Fund (the Fund) legal personality and capacity to be a party in legal proceedings before a Court in Malaysia.

Under *section 17* a person or importer who in any year receives more than 150,000 tons of oil has an obligation to contribute to the Fund. Such contribution shall be as determined by the Assembly of the Fund under Articles 11 and 12 of the Fund Convention.

Section 18 empowers the Director of Marine to obtain information from persons engaged in producing, treating, distributing or transporting oil for the purpose of transmitting to the Fund the names and addresses of persons liable to contribute.

The key provision in this Part is *section 19*. It stipulates that save as provided under subsection (4) the Fund shall pay additional compensation for pollution damage in Malaysia to any person suffering such damage who has been unable to obtain adequate compensation under the Civil Liability Convention. Subsection (4) exempts the Fund from liability if:

(a) it can prove that the pollution damage resulted from war, hostilities or insurrection or was caused by oil which was discharged or which escaped from a warship or other government ship used for non-commercial service; or

(b) the claimant cannot prove that the pollution damage resulted from an incident involving one or more ships.

Section 20 provides for the indemnification of the shipowner and his guarantor by the Fund where the pollution damage is caused by a ship registered in or flying the flag of a Fund Convention country. The section also sets out the extent of such indemnification as well as the circumstances in which the Fund is relieved from its obligation to indemnify the shipowner.

The limitation period for compensation claims against the Fund is spelt out in *section 21*. Claims are extinguished unless an action is commenced or a third party notice of an action is commenced or a third party notice of an

action to enforce a claim against the shipowner or his guarantor is given to the Fund within 3 years from the date of the pollution damage or unless an action is commenced within 6 years from the date of the incident which caused the pollution damage.

Section 22 deals with subrogation and the rights of recourse of the Fund against the shipowner or his guarantor as well as of a public authority in Malaysia against the Fund.

Part IV which covers jurisdiction and effect of judgments contains two sections. *Section 23* extends the admiralty jurisdiction of the High Court under paragraph 24(b)(*sic*)[15] of the Courts of Judicature Act 1964 to any claims arising under Act 515. Subsection (2) of section 23 makes it clear, however, that the jurisdiction of the Court covers only claims in relation to pollution damage occurring in any area of Malaysia.

Section 24 deals with enforcement of judgements by a Court in a Liability Convention country. It essentially extends Part II of the Reciprocal Enforcement of Judgements Act 1958 to any such judgement.

THE PHILIPPINES

JUDICIAL DECISIONS*

Foreign Corporations

HB Zachary Company International v. *Court of Appeal*
G.R. No. 106989, 10 May 1994, 232 SCRA 328

The Supreme Court ruled that the enforcement of the writ of preliminary attachment against a foreign corporation although simultaneous with the service of the summons and a copy of the complaint, did not bind the company because the service of the summons was not validly made.

The Supreme Court stated that when a foreign corporation has designated a person to receive service of summons pursuant to the Corporation Code, that

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[15] This should have been phrased paragraph (b) of section 24.

* Contributed by R.P.M. LOTILLA, University of the Philippines, Institute of International Legal Studies.

designation is exclusive and service of summons on any other person is inefficacious. However, the writ of preliminary attachment may be validly served anew.

George Grotjahn GmbH & Co. v. *Isnani*
G.R. No. 109272, 10 August 1994, 235 SCRA 216

The Supreme Court held that a multinational company organized and existing under the laws of the Federal Republic of Germany has capacity to sue in the Philippines if that foreign corporation is doing business in the Philippines. 'Doing business' including appointing representatives or distribu

tors who are domiciled in the Philippines, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization.

The Supreme Court stated that there is no general rule or governing principle as to what constitutes 'doing' or 'engaging in' or 'transacting' business in the Philippines. Each case must be judged in the light of its peculiar circumstances.

In this case, the multinational company does not engage in commercial dealings or activities in the country because it is precluded from doing so by Philippine law. Nonetheless, it has been continuously acting as a supervision, communications and coordination center for its home office's affiliates in Singapore, and in the process has named its local agent and has employed Philippine nationals. From this uninterrupted performance of acts pursuant to its primary purposes and functions as a regional/area headquarters for its home office, it is clear that the multinational company is doing business in the country.

The domestic corporation is estopped from assailing the personality of the multinational company because the doctrine of estoppel to deny corporate existence applies to foreign as well as to domestic corporations. Thus, one who has dealt with a corporation of foreign origin as a corporate entity is estopped to deny its corporate existence and capacity.

Application of Philippine Labour Law on Overseas Contracts

Klaveness Maritime Agency Inc. v. *PALMOS*
G.R. No. 102310-12, 20 May 1994, 232 SCRA 448

The Supreme Court held that the Labor Code does not require a formal trial-type proceeding before an erring employee may be dismissed especially in the case of a vessel on the ocean or in a foreign port. The minimum requirement of due process in termination proceedings - which must be complied with even in respect of seamen on board a vessel - consists of notice to the employees intended to be dismissed and the grant to them of an opportunity to present their own side of the alleged offence or misconduct which led to the management decision to terminate.

Inter-Orient Maritime Enterprises Inc. v. *NLRC*
G.R. No. 115286, 11 August 1994, 235 SCRA 268

The Supreme Court ruled that a company's management prerogative cannot be exercised at the cost of loss of the captain's right under his contract and under Philippine law.

Succession

VDA. de Perez v. *Tolete*
G.R. No. 76714, 2 June 1994, 232 SCRA 722

The Supreme Court ruled that the respective wills of the spouses, both foreign citizens, admitted to probate in a foreign country, will only be effective in this country upon compliance with the following provision of the Civil Code of the Philippines:

> "Art. 816. The will of an alien who is abroad produces effect in the Philippines if made with the formalities prescribed by the law of the place in which he resides, or according to the formalities observed in this country, or in conformity with those which this Code prescribes."

Thus, the proof that both wills conform with the formalities prescribed by New York laws or by Philippine laws is imperative.

The evidence necessary for the reprobate or allowance of wills which have been probated outside of the Philippines are as follows: (1) The due execution of the will in accordance with the foreign law; (2) The testator has his domicile in the foreign country and not in the Philippines; (3) The will has been admitted to probate in such country; (4) The fact that the foreign tribunal is a probate court, and (5) The laws of a foreign country on procedure and allowance of wills. Except for the first and the last requirements, the petitioner submitted all the needed evidence.

The necessity of presenting evidence on the foreign laws upon which the probate in the foreign country is based is impelled by the fact that the courts cannot take judicial notice of them.

Citizenship

Republic v. *De La Rosa*
G.R. No. 104654, 6 June 1994, 232 SCRA 785

The Supreme Court held that FRIVALDO, having opted to reacquire Philippine citizenship through naturalization under the Revised Naturalization Law, is bound to follow the procedure prescribed by the said law. It is not for an applicant to decide for himself and to select the requirements which he believes, even sincerely, are applicable to his case and discard those which he believes are inconvenient or merely of nuisance value. The law does not distinguish between an applicant who was formerly a Filipino citizen and one who was never such a citizen. It does not provide a special procedure for the reacquisition of Philippine citizenship by former Filipino citizens.

Adoption by Aliens

Republic v. *Toledano*
G.R. No. 94147, 8 June 1994, 233 SCRA 9

The Supreme Court, applying Art. 184 and 185 of the Family Code, held that both foreign spouses are disqualified to adopt under Philippine law even if one of the spouses was formerly a Filipino citizen.

There can be no questions that the alien spouse is not qualified to adopt under any of the exceptional cases in the provision. In the first place, he is not

a former Filipino citizen but a natural born citizen of the United States of America. In the second place, the adopted is neither his relative by consanguinity nor the legitimate child of his spouse. In the third place, when the spouses jointly filed the petition to adopt, his spouse was no longer a Filipini citizen but naturalized American.

The other spouse may appear to qualify because she was a former Filipino citizen seeking to adopt her younger brother. But the petition cannot be granted in her favour alone without violating the Family Code which mandates a joint adoption by the husband and wife. This is in consonance with the concept of joint parental authority over the child which is the ideal situation.

Human Rights

Brigido Simon v. *Commission on Human Rights*
G.R. No. 100150, 5 January 1994, 229 SCRA 117

The Supreme Court held that although the Universal Declaration of Human Rights, or more specifically, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, suggest that the scope of human rights can be understood to include those that relate to an individual's social, economic, cultural, political and civil relations, which seems to closely identify the term with the universally accepted traits and attributes of an individual, along with what is generally considered to be his inherent and inalienable rights encompassing almost all aspects of life, the 1987 Constitutional Convention delegates envisioned a Commission on Human Rights that would focus its attention to the more severe cases of human right violations such as political and civil rights violations.

The Supreme Court further held that the demolition of stalls, sari-sari stores and carinderias does not fall within the compartment of 'human rights' violations involving civil and political rights as intended by the present Constitution. As the Commission can only exercise the power of investigation on matters within said definition of human rights, the 'order to desist' and the consequent order of contempt is not investigational in character but prescinds from an adjudicative power that the Commission does not have.

Ordonez v. *Director of Prisons*
G.R. No. 115576, 4 August 1994, 235 SCRA 152

The Supreme Court declared that there is absolutely no question that the prisoners' plea for immediate release should be heeded.

In this case, the prisoners were among the civilians tried under military commissions during Martial Law and were sentenced to death but the sentence was commuted to reclusion perpetual under the 1987 Constitution. Their convictions were nullified when the Supreme Court ruled in *Olaguer* v. *Military Commission No. 34* that the military tribunals had no jurisdiction over civilians. But they still remained under detention, in spite of the Supreme Court directive in *Cruz* v. *Ponce Enrile* that the Department of Justice should file information in civil courts within 180 days, because no information was filed against them for lack of records.

The prisoners wrote to the UN Human Rights Committee (UNHRC), complaining that their continued detention violated their rights under Articles 6,7,9,10,14 & 26 of the International Covenant on Civil and Political Rights. The UNHRC declared the communication as admissible and requested the Philippine Government to submit written explanation of the complaint within six months from the date of transmittal. The Philippine Commission on Human Rights wrote to the Secretary of Justice for the release of the complainants unless criminal charges had already been filed against them.

The Supreme Court found that the government failed to show that the complainants' continued detention is supported by a valid conviction or by the pendency of charges against them or by any legitimate cause whatsoever. If no information can be filed against them because the records were lost, it is not the prisoners who should be made to suffer. In the eyes of the law, the prisoners are not guilty nor appear to be guilty of any crime for which they may be validly held. Hence, they are entitled to be set free.

Contracts

Lufthansa German Airlines v. *Court of Appeal*
G.R. No. 83612, 24 November 1994, 238 SCRA 290

The Supreme Court ruled that the airline company which issued a confirmed ticket to a passenger covering a five-leg trip aboard different airlines is liable for damages occasioned by the bumping-off of said passenger by one of the airlines contracted to carry him to a particular destination of the five-leg trip.

In the very nature of their contract, the airline company is clearly the principal in the contract of carriage with the passenger and remains to be so, regardless of those instances when actual carriage was to be performed by various carriers. The issuance of a confirmed ticket in favour of the passenger covering his entire five-leg trip aboard successive carriers attests to this. It is also proof that the airline company, in effect, guaranteed that the successive carriers, such as Air Kenya, would honour his ticket, assure him of a space therein and transport him to a particular segment of his trip.

The Court also ruled that Section 2 of Article 30 of the Warsaw Convention does not apply because that article presupposes the occurrence of either an accident or a delay, neither of which took place. Nor can the Court take heed of jurisprudence in the US where the term 'delay' was interpreted to include 'bumping-off' or failure to carry a passenger with a confirmed reservation.

These decisions in the US are not controlling in this jurisdiction. It is not prepared, absent reasons of a compelling nature, to entertain an extended meaning of the term 'delay', which in the *KLM* v. *CA* case was given its ordinary meaning.

Contracts; Applicability of Foreign Law

Cadalin v. *Poea*
G.R. No. 104776, 5 December 1994, 238 SCRA 721

A foreign law provides that a claim arising out of a contract of employment shall not be actionable after the lapse of one year from the date of the expiry of the contract.

The Supreme Court stated that as a general rule, a foreign procedural law will not be applied in the forum. Procedural matters, such as service of process, joinder of actions, period and requisites for appeal and so forth, are governed by the laws of the forum. This is true even if the action is based upon a foreign substantive law.

A law on prescription of actions is *sui generis* in Conflict of Laws in the sense that it may be viewed either as procedural or substantive, depending on the characterization given by such a law.

However, the characterization of a statute into a substantive law becomes irrelevant when the country of the forum has a 'Borrowing Statute'. Said statute has the practical effect of treating the foreign statute of limitation as one of substance. A borrowing statute directs the state of the forum to apply the foreign statute of limitations to the pending claims based on a foreign law.

While there are several kinds of borrowing statutes, one form provides that an action barred by the laws of the place where it accrued will not be enforced in the forum even though the local statute has not run against it. Section 48 of our Code of Civil Procedure is of this kind. It has not been repealed or amended by the Civil Code. There is no inconsistency or contradiction between the provisions of both laws.

In the light of the 1987 Constitution, however, Section 48 cannot be enforced *ex proprio vigore* insofar as it ordains the application in this jurisdiction of a foreign law. The courts of the forum will not enforce any foreign claim obnoxious to the forum's public policy. To enforce the one-year prescriptive period of the foreign law would contravene the public policy on the protection of labor.

As to the question on whether the employees are entitled to the benefits provided for by foreign law or not, the provisions on their contracts of employment are instructive. The contracts, prepared by the employers themselves, provided that the laws of the host country became applicable to said contracts if they offer terms and conditions more favourable than those stipulated therein.

Any ambiguity in the contracts should be interpreted against the employers as Art. 1377 of the Civil Code provides that the interpretation of obscure words or stipulations in a contract shall not favour the party who caused such obscurity. Thus, the Supreme Court read the contracts as adopting the provisions of the foreign law as part and parcel thereof.

The parties to a contract may select the law by which it is governed. In such a case, the foreign law is adopted as a system to regulate the relations of the parties, including questions of their capacity to enter into the contract, the formalities to be observed by them, matters of performance, and so forth.

Instead of adopting the entire mass of the foreign law, the parties may just agree that specific provisions of a foreign statute shall be deemed incorporated into their contract "as a set of terms". By such reference to the provisions of

the foreign law, the contract does not become a foreign contract to be governed by the foreign law. The said law does not operate as a statute but as a set of contractual terms deemed written in the contract.

A basic policy of contract is to protect the expectation of the parties. It is protected by giving effect to the parties' own choice of the applicable law. The choice of law must, however, bear some relationship to the parties or their transaction. There is no question that the contracts to be enforced by claimants have a direct connection with the Bahrain law because the services were rendered in that country.

Extradition

Wright v. *CA*
G.R. No. 113213, 15 August 1994, 235 SCRA 341

In this case, the Supreme Court denied the petition of an Australian citizen sought by his government for indictable crimes in his country. The Australian citizen contends that the Philippine-Australian treaty is a violation of Section 21, Article VII of the 1987 Constitution, for being an *ex post facto* law and that there was no proof of his being prosecuted in Australia.

The Supreme Court characterized extradition as an intrusion into the territorial integrity of the host State and a delimitation of the sovereign power within its territory. As such, it does not impose an obligation to extradite on the requested State until the latter has made its own determination of the validity of the requesting State's demand in accordance with the requested State's own interest.

Since the principles of international law recognize no right of extradition apart from that arising from a treaty, States enter into such treaties for the purpose of bringing fugitives of justice within the ambit of their laws, under conventions recognizing the right of nations to mutually agree to surrender individuals within their jurisdiction and control, and for the purpose of enforcing their respective municipal laws.

The phrase "wanted for prosecution" in the treaty merely requires "a warrant for the arrest or a copy of the warrant for the arrest of the person sought to be extradited" which was complied with.

As to the treaty being an *ex post facto* law, the Supreme Court held that as conceived under the Constitution, *ex post facto* laws are:

(1) statutes that make an act punishable as a crime when such act was not an offense when committed;
(2) laws which, while not creating new offenses, aggravate the seriousness of a crime;
(3) statutes which prescribe greater punishment for a crime already committed; or
(4) laws which alter rules of evidence so as to make it substantially easier to convict a defendant.

Applying the constitutional principle, the Court held that the prohibition applies only to criminal legislation which affects the substantial rights of the accused. The extradition treaty is neither a piece of criminal legislation nor a criminal procedural statute. It merely provides for the extradition of persons wanted for prosecution of an offense or a crime which was already committed or consummated at the time the treaty was ratified.

Land Acquisition

Republic v. *CA*
G.R. No. 108998, 24 August 1994, 235 SCRA 567

The law provides that a natural-born citizen of the Philippines who has lost his Philippine citizenship may be a transferee of a private land up to a maximum area of 1,000 sq.m., if urban, or one hectare in case of rural land, to be used by him as his residence. For the purpose of transfer and/or acquisition of a parcel of residential land, it is not significant whether such persons are no longer Filipino citizens at the time they purchased or registered the parcels of land in question. What is important is that they were formerly natural-born citizens of the Philippines, and as transferees of a private land, they could apply for registration in accordance with the mandate of Section 8, Article XII of the Constitution.

The Supreme Court held that there could be no legal impediment for the registration of the land in view of what the Constitution ordains, because even if the persons concerned were already foreign citizens at the time they applied for registration of the properties in question, said properties were already private lands. The land was already private in character since the foreign

citizen's predecessor in interest had been in open, continuous and exclusive possession and occupation thereof under claim of ownership.

SINGAPORE

LEGISLATION*

International commercial arbitration

International Arbitration Act, No.23 of 1994

This Act implements the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration on an 'opt-out' basis so that its provisions will apply to international arbitrations unless parties expressly exclude it. The UNCITRAL Model Law set out in the First Schedule of the Act establishes a procedural framework for the conduct of international commercial arbitrations. It regulates such matters as the composition and jurisdiction of the arbitral tribunal, conduct of the arbitral proceedings, the making of the award and setting aside the award.

Apart from implementing the Model Law, the Act also introduces additional provisions which will facilitate the conduct of international arbitration proceedings.

The Act also provides for certain matters relating to the conduct of conciliation proceedings and consolidates all provisions on international commercial arbitrations by replacing and re-enacting the Arbitration (Foreign Awards) Act in Part III of the Act. That Act gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (set out in the Second Schedule).

International sale of goods

The Sale of Goods (United Nations Convention) Act, No. 14 of 1995

Singapore ratified the United Nations Convention on Contracts for the International Sale of Goods, 1980, also known as the Vienna Sales Convention,

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* Contributed by SOH TZE BIAN, Attorney General's Chambers, Singapore.

on 16 February 1995. The Convention, which came into force on 1 January 1988, will take effect in Singapore on 1 March 1996.

The Convention is a significant international instrument which provides uniform rules to govern contracts for the international commercial sale of goods. It provides a common law for sales contracts among countries with very different legal systems, and in many respects reflects existing Singapore law.

The Act gives effect in Singapore to the above Convention and provides that the Convention, except for Article 1(1)(b), shall have the force of law in Singapore and is therefore part of the laws of Singapore. If the reservation made under Article 95 of the Convention which excludes the application of Article 1(1)(b) is subsequently withdrawn, clause 3(3) provides that the Minister may by orders delete clause 3(2) so that Article 1(1)(b) will apply. However, Article 1(1)(b) will not apply to any proposal for concluding the contract made or any contract concluded before the date on which the withdrawal of the reservation takes effect under Article 97(4) of the Convention.

The Act provides that the Convention shall prevail over any other law in Singapore to the extent of any inconsistency and allows the Minister by Gazette notification to declare the countries which are bound by the Convention and the reservations and declarations, if any, made by such countries. The Minister may also declare any denunciation made by a specified country. The Minister may in relation to a specified country issue a certificate in relation to the above matters which will be evidence of the facts contained in the certificate.

SRI LANKA

LEGISLATION*

Torture

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22, 1994

The Act gives effect to the Convention against Torture and other cruel, inhuman or degrading treatment or punishment of 1984. Under the Act any

* Contributed by CHARIKA MARASINGHE, University of Colombo.

person who tortures any other person shall be guilty of an offence. Further, any person who attempts to commit, aids and abets in committing, or conspires to commit torture shall also be guilty of an offence under the Act.

Torture has been interpreted in the Act to mean "any act which causes severe pain, whether physical or mental, to any other person, being an act which is-

(a) done for any of the following purpose, that is to say-
    (i) obtaining from such other person or a third person, any information or confession; or
    (ii) punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or
    (iii) intimidating or co-ercing such other person or a third person;
(b) done for a reason based on discrimination, and being in every case, an act which is done by or at the instigation of, or with the consent or acquiesce of, a public officer or other person acting in an official capacity".

A person guilty of an offence under this Act shall, on conviction after trial by the High Court, be punishable with imprisonment of either description for a term not less than seven years and not exceeding ten years and a fine not less than ten thousand rupees and not exceeding fifty thousand rupees. Acts done during state of war, internal political instability or any public emergency or on an order of a superior officer or a public authority shall not be a defence to an offence under the Act.

The High Court of Sri Lanka shall have the jurisdiction to hear and try an offence under this Act committed in any place outside the territory of Sri Lanka by any person, in any case where-

(a) the offender, whether he is a citizen of Sri Lanka or not, is in Sri Lanka or on board a ship or aircraft registered in Sri Lanka;
(b) the person alleged to have committed the offence is a citizen of Sri Lanka; or
(c) the person in relation to whom the offence is alleged to have been committed is a citizen of Sri Lanka.

Where a person who is not a citizen of Sri Lanka is arrested for an offence under this Act, he shall be entitled to communicate, without delay with the nearest appropriate representative of the State of which he is a national or, if he is a stateless person, the nearest appropriate representative of the State where he usually resides.

Where a person is arrested for an offence under the Act, the Minister in charge of foreign affairs shall inform the relevant authorities in any other state having jurisdiction over that offence, of the measures which the Government of Sri Lanka has taken, or proposes to take, for the prosecution or extradition of that person for that offence.

The Act also provides for the extradition of any person accused or convicted of the offence of torture. Under the Act the Government of Sri Lanka has an obligation to afford such assistance (including the supply of any relevant evidence at its disposal) to the relevant authorities of any State as may be necessary in connection with criminal proceedings instituted in that State against any person, in respect of the offence of torture.

THAILAND

JUDICIAL DECISIONS*

Extradition of nationals; 1983 Thai-US Extradition Treaty

The US Government had requested the extradition of Mr. THANONG SIRIPRECHAPONG, then an elected Member of Parliament, to stand trial in San Francisco, on the offence of narcotic drug trafficking, which involved the importation into the USA of multiple container-loads of marijuana over a ten-year period between 1977-1987.

On 10 January 1995, the Thai Cabinet resolved to extradite Mr. SIRIPRECHAPONG and to request the Criminal Court to determine whether a Thai national is extraditable under the Thailand - US Extradition Treaty of 1983 and the Extradition Act, Buddhist Era 2472 (1929).

Article 8(1) of the 1983 Treaty provides:
"Neither Contracting Party shall be bound to extradite its own nationals.
In a case in which the United States of America is the Requested State, the Executive Authority shall have the power to extradite its nationals if, in its discretion, it is deemed proper to do so.
In a case in which Thailand is the Requested State, the competent authority may extradite its nationals if not prevented from doing so."

The relevant provisions of the 1929 Extradition Act are as follows:
"*Section 3.* This Act shall be applicable to all extradition proceedings in Siam [as Thailand was then called] so far as it is not inconsistent with the terms of any Treaty, Convention or Agreement with a foreign State, or any Royal Proclamation issued in connection therewith."

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* Contributed by KRIANGSAK KITTICHAISAREE, Royal Thai Embassy, Washington D.C.

"*Section 13.* The court may not hear evidence or defence raised by the defendant, except in case of the following:

. . .

(4) the defendant's nationality."

"*Section 16.* Whenever the court has determined that the defendant is a Siamese subject . . . the court shall report to and consult the Minister of Justice before making an order to acquit the defendant."

Mr. SIRIPRECHAPONG argued, *inter alia,* that, as a Thai national, he could not be extradited to the USA without violating the relevant provisions of the Extradition Act, and/or the Extradition Treaty.

The position of the US Government is that the Extradition Treaty does not bar the extradition of nationals, and there is no Thai constitutional or statutory bar to such extradition.

It has been noted that in concluding 27 extradition treaties with 7 foreign countries, Thailand had consistently denied extradition of Thai nationals (as, for example, Article 1 of the Thai-Belgian Extradition Treaty). Nevertheless, the extradition treaty between Thailand and the United Kingdom and that between Thailand and the USA are exceptions in that they leave some room for interpretation that a Thai national may be extradited provided that there is nothing to prevent it. The above-cited proviso of Article 8(1) of the Thai-US Treaty has its identical counterpart in the Thai-UK Treaty, and is borne out by the practice in the UK and the USA which permit extradition of their own nationals. It has also been argued that the common law countries, such as the USA and the UK, strictly adhere to the territorial principle of jurisdiction, whereas countries like Thailand also consider the principle of personal jurisdiction as a crucial factor in exercising jurisdiction.

The crux of the question in Mr. SIRIPRECHAPONG's case was whether anything in Thai law would prevent extradition of Thai nationals. The Criminal Court (President MANITYA JITTJANTARAKLUB, Judges SAMAKKI MANEERATANA and JAMRAS SRITHAWACHPONGSE) on 17 July 1995 ruled:

"Pursuant to Article 8(1) of the Extradition Treaty, the Executive Authority of the USA has the power to extradite US nationals if, in its discretion, it is deemed proper to do so. Therefore, the discretion of the US Executive Authority is the sole condition on the US side regarding extradition of US nationals. On the Thai side, the competent authority may extradite Thai nationals if not prevented from doing so. Applying this provision to the present case, the Court has two findings. First, since the Thai Cabinet has resolved to extradite the defendant, there is nothing to prevent his extradition. Secondly, there

should be equality of treatment and reciprocity. If the USA considers its nationals extraditable, Thailand should also treat its nationals as extraditable, so that reciprocity can be ensured."

The defendant lodged an appeal on 31 July 1995. The Appeal is now pending in the Court of Appeal, which, by virtue of Section 17 of the Extradition Act, is the court of final judgment in extradition cases.

VIETNAM

DECLARATIONS

Sovereignty and jurisdiction over sea and seabed areas; territorial disputes

Declaration made upon ratification of the United Nations Convention of the Law of the Sea[20]

The National Assembly reaffirms the sovereignty of the Socialist Republic of Vietnam over its internal waters and territorial sea, the sovereign rights and jurisdiction in the contiguous zone, the exclusive economic zone and the continental shelf of Vietnam, based on the provisions of the Convention and principles of international law, and calls on other countries to respect the above-mentioned rights of Vietnam.

The National Assembly reiterates Vietnam's sovereignty over the Hoang Sa and Truong Sa archipelagoes and its positions to settle those disputes relating to territorial claims as well as other disputes in the Eastern Sea through peaceful negotiations in the spirit of equality, mutual respect and understanding, and with due respect for international law, particularly the 1982 United Nations Convention on the Law of the Sea, and for the sovereignty rights and jurisdiction of the coastal States over their respective continental shelves and exclusive economic zones; the concerned parties should, while exerting active efforts to promote negotiations for a fundamental and long-term solution, maintain stability on the basis of the status quo and refrain from any act that may further complicate the situation and from the use of force or threat of force.

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[20] Law of the Sea Bulletin No. 28 (1995) p. 5.

The National Assembly emphasizes that it is necessary to [differentiate] between the settlement of the dispute over the Hoang Sa and Truong Sa archipelagoes and the defence of the continental shelf and maritime zones falling under Vietnam's sovereignty, rights and jurisdiction, based on the principles and standards specified in the 1982 United Nations Convention on the Law of the Sea.

The National Assembly [authorizes] the National Assembly's Standing Committee and the Government to review all relevant national legislation to consider necessary amendments in conformity with the 1982 United Nations Convention on the Law of the Sea, and to safeguard the interests of Vietnam.

The National Assembly authorizes the Government to undertake effective measures for the management and defence of the continental shelf and maritime zones of Vietnam.

PRACTICE OF ASIAN STATES AT THE TIME OF ENTRY INTO FORCE OF THE UN CONVENTION ON THE LAW OF THE SEA*

Territorial sea

Breadth of the territorial sea

All the coastal States in the subregion, except Singapore and the Philippines, have established the breadth of their territorial seas at 12 miles. Singapore, being surrounded by a narrow band of waters, had claimed only three miles. The Philippines never clearly defined its territorial sea.[21]

Drawing of baselines

Most of the States in the subregion use straight baselines, generally in conformity with Article 7 of the 1982 Convention. However, a straight base-

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* From: *The Law of the Sea, Practice of States at the time of entry into force of the United Nations Convention on the Law of the Sea* (UN, New York 1994), with permission from the UN.

[21] See *The Law of the Sea: National Claims to Maritime Jurisdiction* (United Nations publication, Sales No. E.91.V.15).

line adopted by Myanmar is 222 miles in length and has the effect of closing the Gulf of Martaban (approximately 49,000 square kilometres) as internal waters, against which the United States protested in 1982.[22] Some of the baselines established by Vietnam in the Statement of the Government on 12 November 1982 on the territorial sea baseline,[23] have also been protested by France, Singapore and Thailand as not in conformity with the well-established rules of international law as reflected in Article 7 of the Convention.[24] Vietnam reportedly justified the baselines by referring to paragraph 5 of Article 7, which allows the coastal State to take account of "economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage".[25]

Although the Democratic People's Republic of Korea has not proclaimed any straight baseline, the presumed straight line which forms the basis for measuring its 'military' or 'security' zone of 50 miles and the economic zone in the Sea of Japan (East Sea) does not follow the general direction of the coast, except in a most gross fashion.[26] In a communication dated 4 January 1990 addressed to the United Nations, the United States stated that "as recognized in customary international law and as reflected in the 1982 United Nations Convention on the Law of the Sea", straight baselines might only be employed in localities where the coastline was deeply indented and cut into, or where there was a fringe of islands along the immediate vicinity of the coast, and that the coastline of the Democratic People's Republic of Korea in question was neither deeply cut into, nor fringed with many islands.[27]

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[22] United States Department of State, *Limits in the Seas No. 112* (United States Responses to Excessive National Maritime Claims) (1992) 20-22.

[23] *The Law of the Sea. Baselines: National Legislation with illustrative maps* (United Nations publication, Sales No. E.89.V.10) 384.

[24] See Note dated 5 December 1983 from the Permanent Mission of France addressed to the Secretary-General of the United Nations, *Law of the Sea Bulletin*, No. 3 (1984) 16; Statement by Thailand dated 22 November 1985, *The Law of the Sea: Current Developments in State Practice* (United Nations publication, Sales No. E.87.V.3) 147; and Note dated 5 December 1986 from the Permanent Mission of Singapore addressed to the Secretary-General of the United Nations, *The Law of the Sea: Current Developments in State Practice No II* (United Nations publication, Sales No. E.89.V.7) 84.

[25] M. VALENCIA, 'Vietnam: Fisheries and navigational policies and issues', 21 ODIL (1990) 432.

[26] C. PARK, 'The 50-mile military boundary zone of North Korea', 72 AJIL (1978) 866. See also J.G. KIM, 'Reflections on the attitude of North Korea toward the law of the sea treaty (UNCLOS III)', in C. PARK and J.K. PARK, eds., *The Law of the Sea: Problems from the East Asian Perspective* (1987) 217.

[27] *The Law of the Sea: Current Developments in State Practice No. III* (United Nations publication, Sales No. 92.V.13) 145.

Right of innocent passage

With regard to the regime of innocent passage through the territorial sea, several States require prior authorization by, or notification to, their authorities for the passage of foreign warships. These are Bangladesh, China, Democratic People's Republic of Korea, India, Maldives, Myanmar, Pakistan, Republic of Korea, Sri Lanka and Vietnam.[28] The laws of Bangladesh, China, Myanmar and Pakistan[29] specifically require foreign warships to obtain prior 'permission' or 'authorization', and the laws of Maldives and Sri Lanka[30] require the 'consent' of the Government. The laws of India and the Republic of Korea[31] refer only to prior 'notice' to be given to the authorities.

In a statement circulated in February 1993, the Ministry of Foreign Affairs of Thailand confirmed its position that all foreign ships, including warships and fishing vessels, could exercise the right of innocent passage in the territorial sea "without having to give prior notification to, or obtain prior permission, approval or consent from the coastal State concerned", and that any laws and regulations which tended to restrict such right were contrary to the rules of customary international law and were "incompatible with the obligations assumed by the States concerned when they signed the 1982 Convention".[32]

With respect to the passage of certain other types of vessels, the 1976 Pakistani law requires "foreign super-tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or

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[28] 59 BYIL (1988) 519-521.

[29] Territorial Waters and Maritime Zones Act, 1974 of Bangladesh, sect. 3(7), *National Legislation and Treaties Relating to the Law of the Sea* (ST/LEG/SER.B/19) (United Nations publication, Sales No. E/F.80.V.3) 4; Law on the Territorial Sea and the Contiguous Zone of 25 February 1992 of China, Art. 6, *Law of the Sea Bulletin*, No. 21 (1992) 24; Territorial Sea and Maritime Zones Law, 1977 of Myanmar, sect. 9 (a), *National Legislation and Treaties Relating to the Law of the Sea*, op. cit. p. 8; Territorial Waters and Maritime Zones Act, 1976 of Pakistan, sect. 3 (2), ibid., p. 86.

[30] Maritime Zones Law No. 22 of 1976 of Sri Lanka. sect. 3(1), ibid., p. 120; Law No. 32/76 of 5 December 1976 Relating to the Navigation and Passage by Foreign Ships and Aircrafts through the Airspace, Territorial Waters and the Economic Zone of the Republic of Maldives, sect. 1, R.W. SMITH, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (1986) 278.

[31] Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 of India, sect. 4(2), ibid., p. 47; Territorial Sea Law, 1977 of the Republic of Korea, art. 5(1), ibid., p. 95.

[32] Document A/48/90.

materials" to give prior notice to the Government before entering and passing through its territorial sea.[33]

In 1986, in an effort to interdict maritime activities of armed anti-government groups, Sri Lanka issued a Notice to Mariners which purported to require that with certain exceptions all vessels must obtain permission before entering its territorial sea. The United States protested the Sri Lanka measure by stating that, although the United States recognized the right of Sri Lanka, "under customary international law as reflected in Article 25 of the 1982 Convention on the Law of the Sea", to prevent passage which was not innocent and to suspend temporarily innocent passage of foreign ships if such suspension was "essential to its security", the Notice was not in accordance with that right because the suspension was overly broad and the duration of the suspension was not indicated as being temporary.[34]

Contiguous zone and special zones

Several States, including Cambodia, China, India, Myanmar, Pakistan, Sri Lanka and Vietnam, have established contiguous zones with the outer limit of 24 miles from the baseline, in conformity with the Convention. Bangladesh's contiguous zone extends to a line of six miles from the territorial sea, i.e., 18 miles from the baseline.

Although the Convention allows the coastal State to exercise in the contiguous zone the control necessary for "customs, fiscal, immigration or sanitary" matters, the legislation of all the States mentioned above includes the protection or safeguarding of their security as an additional element.[35]

In a decree of 17 March 1980, Vietnam claimed that military vessels must have its permission and must give notice before entering its contiguous zone, and the United States protested the claim as "contrary to international law".[36] In addition to the contiguous zone, China proclaimed in 1950 three

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[33] Territorial Waters and Maritime Zones Act, 1976, loc. cit., sect. 3(3).

[34] Loc. cit. n. 2, p. 50.

[35] Bangladesh: Territorial Waters and Maritime Zones Act, 1974, loc. cit., sect. 4(2)(a); China: Law on the Territorial Sea and the Contiguous Zone, 1992, loc. cit., Art. 13; India: Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, loc. cit., sect. 5(4)(a); Myanmar: Territorial Sea and Maritime Zones Law, 1977, loc. cit., sect. 11; Pakistan: Territorial Waters and Maritime Zones Act, 1976, loc. cit., sect. 4(2)(a); Sri Lanka: Maritime Zones Law, 1976, loc. cit., sect. 4(2)(a); Vietnam: Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone, and the Continental Shelf, 1977, para. 2, SMITH, op. cit., p. 481.

[36] Loc. cit. n. 2, p. 35.

maritime security zones off parts of its coast including the high seas portions: (1) a "military warning (alert) zone" lying west of a line from the Yalu River estuary to a point off the eastern end of the Shandong Peninsula; (2) a "military navigation zone" off Shanghai; and (3) the "military operation zone" north of the Taiwan Province. Among the three, the claim to the second zone appears to have been superseded in 1958, when the territorial sea was extended to 12 miles. China however, reconfirmed the two remaining zones when it was negotiating with Japan a fisheries agreement which was signed in 1975. In the exchange of letters concerning the scope of the agreement, Japan reserved its position of not recognizing the Chinese claims to those special zones, though it agreed to refrain from fishing in those areas.[37]

The Democratic People's Republic of Korea also proclaimed in 1977 a military zone within its exclusive economic zone up to 50 miles from the baseline. The purpose of the zone was to "reliably safeguard the exclusive economic zone" and to defend militarily the national interests and sovereignty of the country. In this zone, including the air space, acts of foreigners, foreign military vessels and planes are prohibited, and civilian ships and planes are allowed only with prior agreement of the authorities.[38] On 4 January 1990, the United States protested this proclamation, recalling that:

> "customary international law, as reflected in the 1982 United Nations Convention on the Law of the Sea, does not recognize the right of coastal States to assert powers or rights for security purposes in peacetime which would restrict the exercise of the high seas freedoms of navigation and overflight beyond the territorial sea."[39]

Straits used for international navigation

The most important straits used for international navigation in the subregion are the Malaca/Singapore Straits between Indonesia, Malaysia and Singapore. In 1976, these States established a Council on Safety of Navigation and Control of Marine Pollution, which adopted an Agreement on Safety of

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[37] C. PARK, 'People's Republic of China and the law of the sea', in C. PARK and J.K. PARK, eds., op. cit. n. 26, pp. 256-257. See also B.D. LARKIN, 'East Asian ocean security zone', 2 *Ocean Yearbook* (1980) 288; ZHINGUO GAO, 'China and the Law of the Sea Convention', 15 *Marine Policy* (1991) 203. For the text of the China-Japan Agreement, see 1103 UNTS 3.

[38] J.G. KIM, 'North Korea and the law of the sea', in C. PARK and J.K. PARK, eds., op. cit. n. 26, p. 218.

[39] *The Law of the Sea: Current Developments in State Practice No. III*, op. cit., p. 145.

Navigation in the Malacca/Singapore Straits and submitted it to the International Maritime Organization (IMO) for consideration. In 1977, IMO adopted the traffic separation scheme and other navigational requirements proposed by the Agreement. Malaysia has subsequently enacted special legislation incorporating the relevant IMO decisions.[40] Two such traffic separation schemes are currently in operation in the Straits.

During the Third United Nations Conference on the Law of the Sea, the three States bordering the Malacca/Singapore Straits came to an understanding with major users of those Straits regarding the purpose and meaning of Article 233 of the Convention, which deals with safeguards with respect to coastal States' measures to protect the marine environment in straits used for international navigation. In the statement recording such 'common understanding' presented to the President of the Conference by the representative of Malaysia on 29 April 1982, these States and major users confirmed that the enforcement measures which strait States might take "shall not constitute denying, hampering, impairing or suspending the right of transit passage".[41]

With respect to the Straits of Sunda and Lombok of Indonesia, upon learning that Indonesia might have ordered its Navy to close them for exercises, the United States expressed its concern to Government officials because interference with the right of transit passage would "violate international law as reflected in the 1982 Law of the Sea Convention".[42] Similar protests were also made by Australia, Japan and the 12 Member States of the European Community, which considered those straits as qualifying for transit passage.[43]

The above-mentioned statement by Thailand also referred to the "right of transit passage in the straits used for international navigation", declaring that any laws and regulations which tended to restrict such right were contrary to the rules of customary international law and were incompatible with the obligations assumed by the States concerned when they signed the Convention.[44]

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[40] H. YUSOF, *The UN Convention on the Law of the Sea in Southeast Asia: Problems of Implementation,* SEAPOL Studies No. 3 (1986), p. 24.

[41] *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. 16 (United Nations publication, Sales No. E.84.V.2) 250, document A/CONF.62/L.145. The contents of the statement were formally confirmed by Australia, France, the Federal Republic of Germany, Indonesia, Japan, Singapore, United Kingdom and the United States. See ibid., documents A/CONF.62/L.145/Add.1-8.

[42] 83 AJIL (1989) 359-360.

[43] T. TREVES, 'Codification du droit international et pratique des Etats dans le droit de la mer', 223 RdC (1990-IV) 134.

[44] See n. 32 *supra*.

Archipelagic waters

Two States in the subregion, i.e., Indonesia and the Philippines, have proclaimed the status of archipelagic States, with accompanying claims to archipelagic waters and other elements provided for in Part IV of the Convention. The Maldives has claimed a special form of 'archipelagic enclosure'.

Indonesia proclaimed its status as an archipelagic State by the Djuanda Declaration of 13 December 1957. The archipelagic State concept was then elaborated by Act No. 4 of 18 February 1960 concerning Indonesian Waters.[45] The baselines consist of straight lines with 195 turning points, including five segments longer than 100 miles and two of these measure 124 miles. The ratio of land to water within the archipelago is 1:1.2. These elements are in conformity with the requirements stipulated in Article 47(1) to (3) of the Convention, which were actually heavily influenced by the Indonesian system adopted some two decades earlier.[46]

Article 47(6) of the Convention deals with the situation where a part of the archipelagic waters lies between two parts of an immediately adjacent neighbouring State. This is the case of the maritime area between West and East Malaysia, which has become part of the Indonesian archipelagic waters.[47] Indonesia and Malaysia agreed on the original text of that paragraph in 1976 and, as an elaboration of that agreement, the two States concluded on 25 February 1982 a Treaty relating to the legal regime of the archipelagic state and the rights of Malaysia in the territorial sea and archipelagic waters as well as in the airspace above the territorial sea, archipelagic waters and the territory of the Republic of Indonesia lying between East and West Malaysia.[48] This Treaty confirms in Article 2(2) the continued respect by Indonesia of existing rights and other legitimate interests which Malaysia had traditionally exercised in the archipelagic waters and in the airspace lying between East and West Malaysia.

In an exchange of notes with Indonesia in 1988, the United States said that it:

> "recognizes the archipelagic States principles as applied by Indonesia on the understanding that they are applied in accordance with the

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[45] Text in *The Law of the Sea: Practice of Archipelagic States* (United Nations publication, Sales No. E.92.V.3) 45.

[46] J.R.V. PRESCOTT, *The Maritime Political Boundaries of the World* (1985) 211.

[47] N. WISNOMOERTI, 'Indonesia and the law of the sea', in C. PARK and J.K. PARK, eds., op. cit. n. 26, p. 398.

[48] Text in *The Law of the Sea: Practice of Archipelagic States*, op. cit. n. 45, p. 144.

provisions of Part IV of the 1982 United Nations Convention on the Law of the Sea and that Indonesia respects international rights and obligations pertaining to transit of the Indonesian archipelagic waters in accordance with international law as reflected in that Part."[49]

The Philippines confirmed, in a note of 12 December 1955 to the Secretary-General,[50] its claims to all waters surrounded by the islands belonging to the country as "necessary appurtenances of its land territory" subject to its exclusive sovereignty. Subsequently, Republic Act No. 3046 of 17 June 1961,[51] as amended by Republic Act No. 5446 of 18 September 1968,[52] defined the baselines, stating that all waters within the baselines were considered "inland or internal waters" of the Philippines. According to the Declaration made by the Philippines at the time of both its signature and ratification of the Convention, its Constitution considers the concept of archipelagic waters under the Convention as similar to that of internal waters and "removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation". The Philippine Declaration further states that the Convention shall not be construed as amending any of its pertinent laws and decrees.[53] This Declaration was objected to by several States as incompatible with Article 310, and as containing reservations prohibited under Article 309 of the Convention.[54] In its declaration concerning one of such objections, received by the Secretary-General on 26 October 1988, the Philippines clarified that the Declaration concerned was made in conformity with Article 310 and that it intended to harmonize its domestic legislation with the provisions of the Convention, adding that the necessary steps were being taken to enact legislation dealing with sea lanes passage and the exercise of its sovereign rights over archipelagic waters, in accordance with the Convention.[55]

Maldives had promulgated an 'archipelagic enclosure' which, although following the general configuration of the island chain, does not relate directly

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[49] 83 AJIL (1989) 561.

[50] United Nations Legislative Series, *Laws and Regulations on the Regime of the Territorial Sea* (United Nations publication, Sales No. 1957.V.2), p. 39.

[51] Text in *The Law of the Sea: Practice of Archipelagic States*, op. cit. n. 25, p. 75.

[52] Ibid., p. 76.

[53] Declaration of the Philippines upon signature and ratification of the Convention, paras. 5 and 7, *The Law of the Sea: Status of the United Nations Convention on the Law of the Sea* (United Nations publication, Sales No. E.85.V.5), 22 and 37; 4 AsYIL 286.

[54] One of such protests, that of the United States, is reproduced in United States Department of State, op. cit. n. 22, p. 76.

[55] *The Law of the Sea: Current Developments in State Practice No. II*, op. cit., p. 96.

to land points. The exact status of the waters within the rectangular enclosure is not clear, but it appears that some form of integration of these waters on the broad lines of the archipelagic concept is intended.[56]

Exclusive economic zone and exclusive fishery zone

All the coastal States in the subregion, except China, the Republic of Korea and Singapore, have proclaimed either an exclusive economic zone or exclusive fishery zone extending up to 200 miles from the baseline. Only Japan has proclaimed an exclusive fishery zone. The outer limit of the exclusive economic zone of Maldives is defined by reference to coordinates.

Relevant national legislation in the subregion generally follows the provisions of the Convention. Some discrepancies, however, are found with respect to coastal States' jurisdiction regarding artificial islands and installations, fisheries conducted by foreign vessels, and the possible designation of special areas.

While the Convention confers on the coastal State the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures within its exclusive economic zone, the "installations and structures" in question are limited to only those constructed "for the purposes provided for in Article 56 and other economic purposes" and those which "may interfere with the exercise of the rights of the coastal State in the zone" (Article 60(1)). The laws of India,[57] Indonesia,[58] Myanmar,[59] Pakistan,[60] Philippines,[61] and Sri Lanka,[62] most of which were adopted in the latter half of the 1970s, do not make distinction among artificial islands, installations and structures according to their use, treating all of them (and 'devices' in some of those laws) used for any purpose as subject to their exclusive jurisdiction.

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[56] H.W. JAYEWARDENE, *The Regime of Islands in International Law* (1990), p. 172.

[57] Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act. 1976, sect. 7(4)(b), loc. cit.

[58] Act No. 5 of 18 October 1983 on the Indonesian Exclusive Economic Zone, Art. 6, *The Law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone* (United Nations publication, Sales No. E.85.V.10) 152.

[59] Territorial Sea and Maritime Zones Law of Myanmar, 1977, sect. 18 (b), loc. cit., p. 10.

[60] Territorial Waters and Maritime Zones Act, 1976, sect. 6(2)(b), loc. cit., p. 89.

[61] Presidential Decree No. 1599 of 11 June 1978 Establishing An Exclusive Economic Zone and for Other Purposes, sec. 2(b), *The law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone, op. cit., p. 245.*

[62] Maritime Zones Law No. 22 of 1 September 1976, sect. 5(3)(c), loc. cit., p. 121.

With respect to fisheries, a unique arrangement is made in the 1977 Japanese law to exempt nationals of China and the Republic of Korea from the application of the regulatory measures on fishing by foreigners within its fishing zone.[63] The law also excluded from the application of the fishing zone "the East China Sea, a part of the Pacific adjacent to the East China Sea, the Yellow Sea and the western part of the Japan Sea", as the areas of interest for China and the Republic of Korea.[64]

National legislation of the States in the subregion does not generally provide for the determination of the allowable catch, the promotion of the optimum utilization of the living resources and the access by other States to the surplus of the allowable catch, as set out in Articles 61 and 62 of the Convention. One exception may be the Indonesian Law, which permits fishing by foreign fishermen provided that the catch in question is in excess of Indonesia's capacity to harvest the allowable catch.[65]

Despite the prohibition of imprisonment or other form of corporal punishment for violations of fisheries laws and regulations by the Convention (Article 73(3), the Philippines' 1978 Decree provides for the possibility of ordering imprisonment ranging from six months to ten years.[66]

Although no imprisonment is envisaged in the laws of some other States, it has been pointed out that the fines they impose are so high as compared with the income of arrested fishermen that such fishermen are often imprisoned in default of payment.[67]

Another problem regarding fisheries is the recent requirement of Malaysia for Thai fishing vessels passing the Malaysian exclusive economic zone to the high seas to notify its authorities, which Thailand has refused to accept because of its non-conformity with the regime of exclusive economic zone.[68] The 1993 statement by the Thai Foreign Ministry mentioned above also refers to the freedom of navigation in the exclusive economic zone of another State as part of customary international law codified by the 1982 Convention, and

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[63] Enforcement Order of 17 June 1977 of Law No. 31 of 2 May 1977 on Provisional Measures relating to the Fishing Zone, as amended in 1977, Art. 6, *The Law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone*, op. cit., p. 169.

[64] Ibid. See also 28 JAIL (1985) 109-110.

[65] Act No. 5 of 18 October 1983 on the Indonesian Exclusive Economic Zone, Art. 5(3), loc. cit.

[66] Presidential Decree No. 1599 of 11 June 1978 Establishing an Exclusive Economic Zone and for Other Purposes, sect. 5(b), loc. cit., p. 246.

[67] R.S.K. LIM, 'EEZ legislation of ASEAN States', 40 ICLQ (1991) 182.

[68] P. TANGSUBKUL, "A review of disputed maritime areas in Southeast Asia", in P. FABBRI, ed., *Ocean Management in Global Change* (1992) 268.

declares that Thailand does not consider herself bound by the laws and regulations which tend to restrict such freedom.[69]

With respect to the designation of special areas, the laws of India and Pakistan have similar provisions, enabling the Government to declare any area of the exclusive economic zone to be a 'designated area', where it may make such provisions as it deems necessary with respect to resource exploitation, the protection of artificial islands and installations, the protection of the environment, customs and fiscal matters and the regulation of navigation.[70] Indeed, both countries go even further in applying their legislation to the exclusive economic zone: in almost identical provisions, the above-mentioned laws enable the Government to extend any law in force to the exclusive economic zone or any part thereof and to "make such provisions as it may consider necessary for facilitating the enforcement" of such law, and any law so extended is considered to have effect as if the exclusive economic zone or the part thereof to which it has been extended formed "part of the territory of" the State.[71]

Continental shelf

While some States, such as Cambodia, Indonesia, Malaysia, the Philippines and Thailand, have proclaimed their rights over the continental shelf on the basis of the rules codified in the 1958 Geneva Convention on the Continental Shelf, some others, e.g., Bangladesh, India, Myanmar, Pakistan, Sri Lanka and Vietnam, have followed the 1982 Convention in defining the limit of their continental shelf as the outer limit of the continental margin.[72]

The 1958 Convention (Article 5(1)) and the 1982 Convention (Article 78(2)) provide that the exercise of the coastal States' rights over the continental shelf must not result in any unjustifiable interference with navigation. The 1976 Act of India empowers the Government to declare any area of the continental shelf and its superjacent waters to be a 'designated area' for various

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[69] See n. 32 *supra*.

[70] The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, of India, sect. 7(6), loc. cit., p. 51; Territorial Waters and Maritime Zones Act of 1976, of Pakistan, sect. 6(4), loc. cit., p. 89.

[71] Section 7 of the Indian law, loc. cit., pp. 51-52; and section 6(5) of the Pakistani law, loc. cit., p. 90.

[72] See *The Law of the Sea: National Claims to Maritime Jurisdiction*, op. cit. For the text of the relevant legislation of most of these States, see *The Law of the Sea: National Legislation on the Continental Shelf* (United Nations publication, Sales No. E.89.V.5).

regulatory purposes. According to the 'Explanation' attached to that provision, such regulation may include those on the "entry into and passage through the designated area of foreign ships by the establishment of fairways, sea lanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India".[73]

In an Act adopted several months later, Pakistan incorporated almost identical wording as the Indian 'Explanation' into the text of the law itself.[74]

The United States protested both of these laws as contrary to international law.[75]

Delimitation of maritime boundaries

A number of agreements have been concluded between neighbouring States in the subregion, particularly in Southeast Asia and the Andaman Sea on the delimitation of their maritime boundaries. Most of the agreements deal only with the continental shelf. Only a few establish single boundary lines for both the continental shelf and the exclusive economic zone.

Many boundaries are not agreed upon presumably owing, to a great extent, to the existence of disputes regarding sovereignty over one or a group of islands or reefs claimed by more than one State, or to the political relationship between the States involved. Such cases are found particularly in the Sea of Okhotsk, Sea of Japan, Yellow Sea, East China Sea, South China Sea, Gulf of Tonkin, and Gulf of Thailand.

Particular mention should be made of three agreements creating joint development areas for oil and gas without defining boundaries in certain bordering areas with overlapping claims. These are: the 1974 agreement between Japan and the Republic of Korea on the continental shelf in the East China Sea,[76] the 1979 and 1990 agreements between Malaysia and Thailand concerning the Joint Authority for the exploitation of the continental shelf

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[73] Act No. 80 of 25 August 1976, ibid., p. 130.

[74] Act of 22 December 1976, ibid., p. 190.

[75] United States Department of State, op. cit., pp. 41-42.

[76] Agreement between Japan and the Republic of Korea Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, 30 January 1974. Text in *The Law of the Sea: Maritime Boundary Agreements (1970-1984)* (United Nations publication, Sales No. E.87.V.12) 283.

resources in the Gulf of Thailand,[77] and the 1989 treaty between Australia and Indonesia on the Zone of Cooperation in the 'Timor Gap'.[78] The latter three instruments are the first joint development agreements providing in detail for the exploitation of oil and gas by a joint authority and a system of production sharing.

High seas

In the Northwestern Pacific, Japan and the USSR (now the Russian Federation) have long been cooperating in the conservation and management of living resources through bilateral agreements. Particularly with respect to the high seas, the two Governments concluded in 1985 an agreement on cooperation in fisheries which refers specifically to the adoption of the United Nations Convention on the Law of the Sea.[79] Under the agreement, fisheries for anadromous stocks were prohibited on the high seas except in cases where the prohibition would result in economic dislocation for the fishermen from the State other than the State of origin of such stocks. Subsequently, the Soviet Government announced a total ban on the harvesting of USSR-origin salmon on the high seas by 1992.

The prohibition of harvesting anadromous stocks on the high seas was confirmed by all the States concerned in the North Pacific area, i.e., Canada, Japan, Russia and the United States, with the adoption in February 1992 of a new Convention for the conservation of anadromous stocks,[80] as discussed below under "Regional and subregional cooperation".

A sharp rise in recent years in distant-water fishing vessels in the Sea of Okhotsk, particularly in the high seas enclave, has caused alarm in Russia and led various unions of Far Eastern fishermen to demand the Russian Govern-

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[77] Memorandum of Understanding between Malaysia and the Kingdom of Thailand on the Establishment of the Joint Authority for the Exploitation of the Resources of the Seabed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, 21 February 1979, 6 *International Journal of Estuarine and Coastal Law* (1991) 61; Agreement between the Government of Malaysia and the Government of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority, 30 May 1990, ibid., p. 64.

[78] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in the Area between the Indonesian Province of East Timor and Northern Australia, 11 December 1989, 29 ILM (1990) 569.

[79] English text in 28 JAIL (1985) 297.

[80] Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, done at Moscow, 11 February 1992. Text in *Law of the Sea Bulletin* No. 22 (1993) 21.

ment accord to the Whole Sea of Okhotsk a status of internal waters. The problem of over-fishing has since been taken up by an international conference, as discussed also below under "Regional and subregional cooperation".

In addition to the special zones which had been created outside its territorial sea, affecting fishing activities by foreign vessels, China set up in 1981 two further Special Fishery Protection Zones, expanding its fishery rights claim further eastward in the East China and Yellow Seas.[81]

Land-locked states

Since the adoption of the Convention in 1982, the number of land-locked States in Central Asia increased as a result of the dissolution of the former Soviet Union. Those new States, i.e., Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, will look for access to the seas, just as the other land-locked States of the subregion - Afghanistan, Bhutan, Laos, Mongolia and Nepal - have done in the past.

With the Convention in force, Part X will have its full effect, particularly in relation to the question of access to and from the sea, freedom of transit and the use of port facilities. India and Nepal adopted a transit agreement on 25 March 1978. Under the Convention, landlocked States will also enjoy the right to participate, on an equitable basis, in the exploitation of an appropriate portion of the surplus of the living resources of the exclusive economic zone of coastal States in the same subregion or region, taking into account the relevant economic and geographical circumstances of all States concerned (Article 69).

Protection and preservation of the marine environment

Prior to the adoption of the Convention on the Law of the Sea several States, including Bangladesh, India, Myanmar, Pakistan, Philippines, Sri Lanka and Vietnam, had already claimed jurisdiction for the control of marine pollution within their 200-mile zones.

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[81] C. PARK, op. cit., *supra* n. 26, p. 260.

China adopted a special law, the Marine Environment Protection Law[82] in 1982, applicable to pollution damage to the marine environment by various sources in its internal waters and territorial sea, as well as to all other areas under its jurisdiction. The law applies moreover to the discharge of harmful substances and the dumping of wastes which are conducted outside the areas of national jurisdiction that cause pollution damage to the areas within its jurisdiction.

Indonesia's 1983 Act follows Article 56 of the Convention and provided for 'jurisdiction' with respect to the protection and conservation of the marine environment. It further imposes on those who are conducting any activity within its exclusive economic zone "the duty to take steps towards preventing, minimizing, controlling and surmounting the pollution of the environment".[83]

Marine scientific research

Several States in the subregion have enacted legislation concerning scientific research activities for both the exclusive economic zone and the continental shelf. The legislation adopted during the 1970s generally claimed 'exclusive jurisdiction' over the conduct of marine scientific research in the exclusive economic zone and on the continental shelf. This is the case of, e.g., India,[84] Myanmar,[85] Pakistan,[86] Philippines,[87] Sri Lanka,[88] and Vietnam.[89]

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[82] *Effective* as of 1 March 1983. English text in: Legislative Affairs Commission of the Standing Committee of the National People's Congress, *The Laws of the People's Republic of China 1979-1982* (1987) 298, and reproduced in J. GREENFIELD, *China's Practice in the Law of the Sea* (1992) 250.

[83] Act No. 5 of 18 October 1983 on the Indonesian Exclusive Economic Zone, Art. 8, loc. cit., p. 152.

[84] The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, sect. 6 and 7, loc. cit., pp. 49-50.

[85] Territorial Sea and Maritime Zone Law of Myanmar, 1977, sects. 14 and 18, loc. cit., pp. 9 and 10.

[86] Territorial Waters and Maritime Zones Act, 1976, sects. 5 and 6, loc. cit., pp. 87-88.

[87] Presidential Decree of 1978 Establishing an Exclusive Economic Zone and for Other Purposes, sect. 2(b), loc. cit., p. 245.

[88] Maritime Zones Law, 1976, sects. 5 and 6, loc. cit., pp. 121-122.

[89] Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf, 1977, para. 3, loc. cit., p. 336.

Subsequent legislation, as that of Thailand (1981),[90] Indonesia (1983),[91] and Malaysia (1984),[92] follow the wording of the 1982 Convention and refer to 'jurisdiction' with regard to marine scientific research. While the Malaysian law contains no provision regarding implied consent as provided for in Article 252 of the Convention, the Indonesian law has established a procedure for implied consent on the basis of that article.

The 1976 law of Maldives[93] requires the assent of the Government for conducting scientific research in its exclusive economic zone, and the 1988 regulations[94] contain detailed rules and procedures, including the suspension or termination of the research activities "in accordance with Article 253" of the Convention.

Japan has issued provisional procedures for a request to conduct research in the territorial sea, on the continental shelf and in the fishing zone of Japan.[95] The Government is to approve those research projects which are submitted in accordance with the procedures on conditions of reciprocity and certain other requirements.

International seabed area

Three Asian States – China, India and Japan – applied for registration as pioneer investors in accordance with resolution II of the Third United Nations Conference on the Law of the Sea, governing preparatory investment in pioneer activities relating to polymetallic nodules, and the relevant understandings adopted by the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea. On 17 August and 17 December 1987, the Preparatory Commission approved the applications of India and Japan, respectively, and registered the Government

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[90] Royal Proclamation of 23 February 1981, para. 2, *The Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National Jurisdiction* (United Nations publication, Sales No. E.89.V.9) 249.

[91] Act on the Indonesian Exclusive Economic Zone, 1983, Art. 4, loc. cit., p. 151.

[92] Exclusive Economic Zone Act, 1984, sect. 4, *The Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas under National Jurisdiction*, op. cit., p. 158.

[93] Law No. 30/76 relating to the Exclusive Economic Zone of the Republic of Maldives, 1976, sect. 2, ibid., p. 161.

[94] Regulations for Marine Scientific Research in the Maritime Zones of the Republic of Maldives, 1988, ibid.

[95] Text transmitted to the [UN] Secretariat from the Government of Japan by note of 28 July 1988, ibid., p. 143.

of India and the Deep Ocean Resources Development Co. (DORD) of Japan as pioneer investors.[96] The application of China for registration of the China Ocean Resources Research and Development Association (COMRA) as pioneer investor was approved on 5 March 1991.[97] In addition, the Republic of Korea has been engaged in exploratory activities in the international seabed area since the mid-1980s and submitted for registration as a pioneer investor in January 1994.

Regional and subregional cooperation

Regional cooperation takes several different forms and cover different subjects. Some of the cooperative groups deal with several sectors of ocean affairs, others deal with one or a few sectors only. In addition, some of the political or economic and social institutions of a more general nature have also been engaged in cooperative activities involving certain marine sectors. In varying degrees, the Convention on the Law of the Sea has played a role in their initiation, launching of new programmes and guiding their activities.

The most comprehensive endeavour, comprising the whole Indian Ocean region, is the Indian Ocean Maritime Affairs Cooperation (IOMAC), which started its activities initially as a conference in 1987 aimed at facilitating implementation of the 1982 Convention's regime. The Conference turned itself into a permanent organization in 1990. The mandate of IOMAC includes marine science, ocean services and marine technology, living and non-living resources, ocean law, policy and management, marine transport and communications, marine environment, and "other fields relevant to cooperation in marine affairs".[98]

Another forum for cooperation in multi-sectoral issues is the Association of South-East Asian Nations (ASEAN). It has been giving particular emphasis to various aspects of environmental protection through, *inter alia*, its Committee on Environment and the Committee's Experts Group on Environment. ASEAN has adopted an Oil Spill Regional Action Plan, with a contingency plan regarding offshore installations and coastal refineries. Subregional stockpiles of pollution fighting equipment are also arranged, e.g. in the

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[96] For a background leading up to the registration of the first group of pioneer investors, see TREVES, op. cit. n. 43, p. 236.

[97] For relevant information regarding the registration of these three and other pioneer investors, see *Law of the Sea Bulletin*, Special Issue III (1991).

[98] Agreement on the Organization for Indian Ocean Marine Affairs Cooperation, 7 September 1990, art. 4 (2), *Law of the Sea Bulletin*, No. 16 (December 1990), p. 59; 1 AsYIL 379.

Celebes Sea area and the Malacca/Singapore Straits. ASEAN has also been active in promoting collaboration in the field of shipping and port management, mainly through its Committee on Transportation and Communication (COTAC).

The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) has been focusing a great deal of attention to marine related activities, in particular those which are derived from, or required by, the legal regime embodied in the Convention. It has thus implemented a series of co-operative projects for the development of non-living marine resources and the protection and preservation of the marine environment. The ESCAP secretariat has also been playing catalystic roles in organizing seminars and workshops in those areas as well as in other fields related to the Convention.

As for cooperation in specific sectors, particular mention should be made of fisheries and environmental protection. In the sector of fisheries, subregional cooperation has been prominent in such areas as the Bering Sea, the Sea of Okhotsk and the Indian Ocean.

In the Bering Sea and the Sea of Okhotsk, the establishment of exclusive economic zones or exclusive fishery zones by the coastal States, together with the elaboration of a special regime on anadromous stocks by the Third United Nations Conference on the Law of the Sea, radically altered the pattern of cooperation in the conservation and management of living resources. The salmon harvesting on the high seas had thus been drastically reduced annually until 1991 and, as mentioned before, its total ban was agreed upon in 1992 by the four countries concerned with the adoption of the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean.[99]

Another example of subregional cooperation is the pollock fishery by fishermen from China, Japan, Poland, the Republic of Korea, Russia and the United States in the Central Bering high seas (the so-called 'Donut Hole'). The fishery started in the early 1980s and the total catch had reached a dramatic scale of 1.4 million metric tons in 1989, before it began to decline in 1990.[100] The States concerned, after two years of talks, have recently reached an agreement on a two-year voluntary suspension of fishing in 1993-1994 in the area.

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[99] For a background, see W.T. BURKE, 'Anadromous species and the new international law of the sea', 22 ODIL (1991) 95; A.A. SAGUIRIAN, 'Russia and some pending law of the sea issues in the Pacific: Controversies over high seas fisheries and delimitation of marine spaces', 23 ODIL (1992), p. 1.

[100] See L. MIOVSKI, 'Solutions in the Convention on the Law of the Sea to the problem of overfishing in the Central Bering Sea: Analysis of the Convention, highlighting the provisions concerning fisheries and enclosed and semi-enclosed seas', 26 *San Diego Law Review* (1989) 525.

With respect to the Sea of Okhotsk, the States concerned with fisheries in the high seas enclave therein, e.g., China, Japan, Poland, the Republic of Korea and the Russian Federation, held a conference in May-June 1993 to discuss problems pertaining to the utilization and conservation of pollock resources. They established an ad hoc committee to gather scientific data and, pending the result of its work, the participants recognized the desirability of taking, "on a voluntary basis", interim measures for conserving pollock resources.

In the Indian Ocean, cooperation particularly in fisheries research and data collection has been pursued through the Indian Ocean Fishery Commission (IOFC), established by FAO. IOFC's detailed study on the conservation and management of Indian Ocean Tuna led to the adoption in November 1993 of an agreement to establish the Indian Ocean Tuna Commission. The Commission would comprise the Indian Ocean States and the countries harvesting tuna in the Indian Ocean and the adjacent seas.

With respect to the protection and preservation of the marine environment, UNEP has designated three areas under its Regional Seas Programme, i.e., the East Asian Seas covering Indonesia, Malaysia, Philippines, Singapore and Thailand; the South Asian Seas, covering Bangladesh, India, Maldives, Pakistan and Sri Lanka; and the North-West Pacific covering China, the Democratic People's Republic of Korea, Japan, the Republic of Korea and the Russian Federation. An Action Plan was adopted for the East Asian Seas in 1981, but the initial momentum generated by the Plan has gradually decreased in recent years due to various obstacles.[101] The South Asian Seas countries have prepared a draft action plan and its legal and institutional framework, but they have not yet reached a consensus. With regard to the North-West Pacific, UNEP convened the first meeting of experts and national focal points in 1991 with a view to developing an action plan. A second meeting was held in October 1992, with all the above-mentioned States participating for the first time.[102]

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[101] UNEP, Seventh Interagency Consultation on Oceans and Coastal Areas Programme, Paris, 17-20 December 1990, *Report of the Consultation* (UNEP/IAMRS, 7/5), Annex IV, para. 3.8.1.

[102] See the Report of the Second Meeting of Experts and National Focal Points on the Development of the North-West Pacific Action Plan, Beijing, 26-30 October 1992. UNEP (OCA)/NOWP. WG2/5.

PARTICIPATION IN MULTILATERAL TREATIES*

Editorial introduction

This section is meant to record the participation of Asian states in open, multilateral law-making treaties which mostly aim at world-wide adherence. In view of the limited space available, a selection has been made of treaties of which the present status is available to the Editors. Others will be included in following volumes of the *Yearbook*. Treaties on which data have been included in a previous volume are referred to, but data once recorded will not be reincluded.

For the purpose of this section states broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered.

The Editors wish to express their gratitude to all those international organizations which have so kindly responded to our request by making available information on the status of various 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 1994 (ST/LEG/SER.E/13).
- No indication is given of reservations and declarations made.
- Sig. = signature; Cons. = consent to be bound.

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State	*Cons.*
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State	*Cons.*
Philippines	20 Mar 94 (*corrected*)

CULTURAL PROPERTY

Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1954: *see* Vol. 3 p. 224, Vol. 4 p. 303.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954
(Cont'd from Vol. 3 p. 224, Vol. 4 p. 303)
(Status as provided by UNESCO on 15 September 1995)

State	*Cons. (deposit)*
Kyrgyzstan	3 Jul 95

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, Vol. 3 p. 224, Vol. 4 p. 303)
(Status as provided by Unesco on 15 September 1995)

State	*Cons. (deposit)*
Kyrgyzstan	3 Jul 95

Convention concerning the Protection of the World Cultural and Natural Heritage, 1972

(Cont'd from Vol. 3 p. 225, Vol. 4 p. 304)

(Status as provided by UNESCO on 15 September 1995)

State	*Sig.*	*Cons. (deposit)*	*State*	*Sig.*	*Cons. (deposit)*
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(*see* Vol. 3 p. 225, Vol. 4 p. 304)

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Geneva, 1 September 1994

Entry into force: -

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
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(Cont'd from Vol. 3 p. 227)
(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Cambodia	28 Nov 94	26 Feb 95	Kazakhstan	7 Mar 94	5 Jun 94

Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969
(Cont'd from Vol. 3 p. 227)
(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons.*	*E.i.f.*
Japan	24 Aug 94	22 Nov 94

Protocol of 1992 to amend the International Convention on Civil Liability for Oil Polution Damage, 1969
London, 27 Nov. 1969
Entry into force: not yet
(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons.*	*E.i.f.*
Japan	24 Aug 94	

Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971
(Cont'd from Vol. 3 p. 228 and Vol. 4 p. 305)
(Status as provided by UNESCO on 15 September 1995)

State	*Cons. (deposit)*	*State*	*Cons. (deposit)*
Malaysia	10 Nov 94	Philippines	8 Jul 94

Protocol Relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended

(Cont'd from Vol. 3 p. 229 and Vol. 4 p. 306)

(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons.*	*Excepted annexes*	*State*	*Cons.*	*Excepted annexes*
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Kazakhstan	7 Mar 94		Pakistan	22 Nov 94	

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(Cont'd from Vol. 1 p. 185, Vol. 3 p. 230, Vol. 4 p. 306)

State	*Cons.*	*State*	*Cons.*
Nepal	6 Jul 94	Turkmenistan	18 Nov 93

Amendments to Articles 6 and 7 of the Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1987

(Cont'd from Vol. 3 p. 228)

State	*Cons.*
Iran	20 Jul 94

Protocol on Substances that Deplete the Ozone Layer, 1987

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State	*Cons.*	*State*	*Cons.*
Nepal	6 Jul 94	Turkmenistan	18 Nov 93
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(Cont'd from Vol. 2 p. 186, Vol. 3 p. 230, Vol. 4 p. 306)

State	*Cons.*	*State*	*Cons.*
Korea (Rep.)	28 Feb 94	Pakistan	26 Jul 94

Amendment to the Montreal Protocol, 1990
(Cont'd from Vol. 1 p. 186, Vol. 2 p. 186, Vol. 3 p. 230, Vol. 4 p. 306)

State	*Cons.*	*State*	*Cons.*
Bangladesh	18 Mar 94	Turkmenistan	15 Mar 94
Nepal	6 Jul 94	Vietnam	26 Jan 94

Framework Convention on Climate Change, 1992
(Cont'd from Vol. 4 p. 307)
(Status as at 2 Feb. 95 as provided in A/AC.237/INF.15/Rev. 2/Corr. 1, 7 Feb. 95)

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Indonesia	5 Jun 92	23 Aug 94	Myanmar	11 Jun 92	25 Nov 94
Korea (DPR)	11 Jun 92	5 Dec 94	Thailand	12 Jun 92	28 Dec 94
Laos	4 Jan 95		Vietnam	11 Jun 92	16 Nov 94

Convention on Biological Diversity, 1992
(Cont'd from Vol. 4 p. 307)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Bangladesh	5 Jun 92	3 May 94	Malaysia	12 Jun 92	24 Jun 94
India	5 Jun 92	18 Feb 94	Myanmar	11 Jun 92	25 Nov 94
Indonesia	5 Jun 92	23 Aug 94	Pakistan	5 Jun 92	26 Jul 94
Kazakhstan	9 Jun 92	6 Sep 94	Sri Lanka	10 Jun 92	23 Mar 94
Korea (DPR)	11 Jun 92	26 Oct 94	Vietnam	28 May 93	16 Nov 94
Korea (Rep.)	13 Jun 92	3 Oct 94			

Amendment to the Montreal Protocol, 1992
(Cont'd from Vol. 4 p. 307)

State	*Cons.*	*State*	*Cons.*
Japan	20 Dec 94	Vietnam	26 Jan 94
Korea (Rep.)	2 Dec 94		

FAMILY MATTERS

Convention on the Recovery Abroad of Maintenance, 1956: *see* Vol. 2 p. 191.
Convention on the Law Applicable to Maintenance Obligations Towards Children, 1956: *see* Vol. 3 p. 231.

Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, 1961: *see* Vol. 3 p. 231.
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, 1973: *see* Vol. 3 p. 231.

Convention on Protection of Children and Co-operation in respect of Intercountry Adoption
The Hague, 29 May 1993
Entry into force: 1 May 1995
(Status on 17 July 1995 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Sig.*		*Cons.*		*State*	*Sig.*	*Cons.*
Sri Lanka	24 May 94	23 Jan 95	Philippines	17 Jul 95			

FINANCE

Agreement Establishing the Asian Development Bank, 1965: *see* Vol. 4 p. 308.
Convention Establishing the Multilateral Investment Guarantee Agency, 1988: *see* Vol. 3 p. 232, Vol. 4 p. 308.

HEALTH

Protocol Concerning the Office International d'Hygiène Publique, 1946: *see* Vol. 4 p. 308.

HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

Convention on the Political Rights of Women, 1953: *see* Vol. 1 p. 188, Vol. 2 p. 189.
Convention on the Nationality of Married Women, 1957: *see* Vol. 1 p. 188.
Convention on the Elimination of All Forms of Discrimination against Women, 1979: *see* Vol. 1 p. 188, Vol. 2 p. 190, Vol. 3 p. 233, Vol. 4 p. 309.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: *see* Vol. 1 p. 187, Vol. 2 p. 189, Vol. 3 p. 233, Vol. 4 p. 310.
International Convention against Apartheid in Sports, 1985: *see* Vol. 3 p. 233, Vol. 4 p. 310.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990: *see* Vol. 4 p. 310.

Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1992: *see* Vol. 4 p. 310.

Convention against Discrimination in Education, 1960
(Cont'd from Vol. 3 p. 232, Vol. 4 p. 309)
(Status as provided by UNESCO on 15 September 1995)

State	*Cons. (deposit)*
Kyrgyzstan	3 Jul 95

International Covenant on Economic, Social and Cultural Rights, 1966
(Cont'd from Vol. 1 p. 187, Vol. 2 p. 189, Vol. 3 p. 232)

State	*Cons.*
Kyrgyzstan	7 Oct 94

International Covenant on Civil and Political Rights, 1966
(Cont'd from Vol. 1 p. 187, Vol. 2 p. 189, Vol. 3 p. 233)

State	*Cons.*
Kyrgyzstan	7 Oct 94

Optional Protocol to the International Covenant on Civil and Political Rights, 1966
(Cont'd from Vol. 1 p. 187, Vol. 2 p. 189)

State	*Cons.*
Kyrgyzstan	7 Oct 94

International Convention on the Elimination of All Forms of Racial Discrimination, 1966
(Cont'd from Vol. 1 p. 186)

State	*Cons.*
Turkmenistan	29 Sep 94

Convention on the Rights of the Child, 1989
(Cont'd from Vol. 1 p. 189, Vol. 2 p. 190, Vol. 3 p. 233, Vol. 4 p. 310)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Iran	5 Sep 91	13 Jul 94	Kyrgyzstan		7 Oct 94
Japan	21 Sep 90	22 Apr 94	Uzbekistan		29 Jun 94
Kazakhstan	16 Feb 94	12 Aug 94			

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV, 1949: *see* Vol. 1 p. 190, Vol. 3 p. 234, Vol. 4 p. 311.
Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977: *see* Vol. 1 p. 190, Vol. 2 p. 197, Vol. 3 p. 234, Vol. 4 p. 311.

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. 190, Vol. 2 p. 197, Vol. 3 p. 234, Vol. 4 p. 311)
(Status as at 31 December 1994, provided by the ICRC)

State	*Cons.*	*State*	*Cons.*
Brunei	14 Oct 94	Maldives	3 Sep 91

INTELLECTUAL PROPERTY

Convention for the Protection of Literacy and Artistic Works, 1886, most recently revised Paris, 1971: *see* Vol. 3 p. 235.
Universal Copyright Convention, 1952: *see* Vol. 3 p. 236 and Vol. 4 p. 312.
Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: *see* Vol. 3 pp. 236-237.
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 3 p. 237.
Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: *see* Vol. 2 p. 192 and Vol. 4 p. 312.
Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 4 p. 312.

Convention for the Protection of Industrial Property, 1883
(most recently revised 1967)
(Cont'd from Vol 3 p. 235 and Vol. 4 p. 312)
(Status as included in WIPO doc. 423(E) of 1 July 1995)

State	*Party*	*Latest Act to which State is party*	*State*	*Party*	*Latest Act to which State is party*
Singapore	23 Feb 95	Stockholm	Turkmenistan	25 Dec 91	id.

Convention Establishing the World Intellectual Property Organization, 1967
(Cont'd from Vol. 3 p. 237 and Vol. 4 p. 312)
(Status as included in WIPO doc. 423(E) of 1 July 1995)

State	*Membership*	*State*	*Membership*
Cambodia	25 Jul 95	Turkmenistan	25 Dec 91
Laos	17 Jan 95		

INTERNATIONAL CRIMES

Slavery Convention, 1926 as amended in 1953: *see* Vol. 2 p. 195, Vol. 4 p. 313.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956: *see* Vol. 2 p. 196, Vol. 4 p. 313.
Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963: *see* from Vol. 1 p. 191, Vol. 4 p. 314.
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, Vol. 4 p. 314.
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971: *see* Vol. 1 p. 192, Vol. 2 p. 196, Vol. 4 p. 314.
International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973: *see* Vol. 4 p. 315)
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 the Crime of Genocide, 1948
(Cont'd from Vol. 1 p. 191)

State	*Cons.*
Malaysia	20 Dec 94

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973
(Cont'd from Vol. 3 p. 238, Vol. 4 p. 314)

State	*Cons.*
China	5 Aug 87 (*corrected*)

International Convention Against the Taking of Hostages, 1979
(Cont'd from Vol. 1 p. 193, Vol. 2 p. 196, Vol. 4 p. 315)

State	*Cons.*
India	7 Sep 94

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988
Entry into force: 1 March 1992
(Cont'd from Vol. 1 p. 193)
(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Sig.*	*Cons.*
China	25 Oct 88	20 Aug 91

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988
Entry into force: 1 March 1992
(Cont'd from Vol. 1 p. 193)
(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Sig.*	*Cons.*
China	25 Oct 88	20 Aug 91

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
(Cont'd from Vol. 1 p. 194, Vol. 4 p. 315)
(Information furnished by the secretariat of the ICAO on 17 July 1995)

State	*Cons.*
India	22 Mar 95 (effective 21 Apr 95)

International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989
(Cont'd from Vol. 2 p. 197)

State	*Sig.*	*Cons.*
Maldives	17 Jul 90	11 Sep 91

INTERNATIONAL REPRESENTATION
(*see also*: Privileges and Immunities)

Vienna Convention on the Representation of States in their relations with International Organizations of a Universal Character, 1975: *see* Vol. 4 p. 315.

INTERNATIONAL TRADE

Convention on Transit Trade of Land-locked States, 1965: *see* Vol. 3 p. 239.
Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 1 p. 184.
UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 1 p. 185.

UN Convention on Contracts for the International Sale of Goods, 1980
(Cont'd from Vol. 1 p. 185)
(Status as provided in UNCITRAL doc. A/CN.9/416, 2 May 1995)

State	*Sig.*	*Cons.*
Singapore	11 Apr 80	16 Feb 95

JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention Relating to Civil Procedure, 1954: see Vol. 3 p. 239.
Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961: *see* Vol. 3 p. 239.
Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: *see* Vol. 3 p. 240.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965

(Cont'd from Vol. 3 p. 240)

(Status on 17 July 1995 as furnished by the Permanent Bureau of the Hague Conference on Private International Law)

State	*Cons.*
Pakistan	6 Jul 89 (*corrected*)

LABOUR

Abolition of Forced Labour Convention, 1957 (ILO Conv. 105): *see* Vol. 3 p. 242.
Forced Labour Convention, 1930 (ILO Conv. 29): *see* Vol. 3 p. 240, Vol. 4 p. 316.
Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87): *see* Vol. 3 p. 241, Vol. 4 p. 316.
Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): *see* Vol. 3 p. 241, Vol. 4 p. 317.
Equal Remuneration Convention, 1951 (ILO Conv. 100): *see* Vol. 3 p. 241, Vol. 4 p. 317.
Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111): *see* Vol. 3 p. 242, Vol. 4 p. 317)
Employment Policy Convention, 1964 (ILO Conv. 122): *see* Vol. 3 p. 242, Vol. 4 p. 317.

NARCOTIC DRUGS

International Opium Convention, 1925 and amended by the Protocol of 1946: *see* Vol. 2 p. 193.
Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the protocol of 1946: *see* Vol. 2 p. 193.
Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: *see* Vol. 1 p. 194.
Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 1946: *see* Vol. 4 p. 319.
Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1946: *see* Vol. 4 p. 318.
Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931 and amended by Protocol, 1946: *see* Vol. 2 p. 193, Vol. 4 p. 318.
Agreement Concerning the Suppression of Opium Smoking and amended by Protocol, 1946: *see* Vol. 4 p. 318.

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, Vol. 4 p. 319.
Protocol amending the Single Convention on Narcotic Drugs, 1961: *see* Vol. 2 p. 194.

Single Convention on Narcotic Drugs, 1961
(Cont'd from Vol. 1 p. 195, Vol. 2 p. 194)

State	*Cons.*
Kyrgyzstan	7 Oct 94

Convention on Psychotropic Substances, 1971
(Cont'd from Vol. 2 p. 195)

State	*Cons.*	*State*	*Cons.*
Kyrgyzstan	7 Oct 94	Sri Lanka	15 Mar 93

Single Convention on Narcotic Drugs, 1961, as Amended by the Protocol of 25 March 1972, 1972
(Cont'd from Vol. 1 p. 195, Vol. 2 p. 194)

State	*Cons.*
Kyrgyzstan	7 Oct 94

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988
(Cont'd from Vol. 1 p. 195, Vol. 2 p.195, Vol. 3 p. 243, Vol. 4 p. 319)

State	*Cons.*
Kyrgyzstan	7 Oct 94

NATIONALITY AND STATELESSNESS

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 2 p. 190.
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. 191.

NUCLEAR MATERIAL

Convention on the Physical Protection of Nuclear Material, 1980: *see* Vol. 1 p. 196.
Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 3 p. 244.
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): *see* Vol. 3 p. 244.
Convention on Early Notification of a Nuclear Accident, 1986: *see* Vol. 3 p. 244, Vol. 4 p. 320.
Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: *see* Vol. 3 p. 245, Vol. 4 p. 320.

OUTER SPACE

Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967: *see* Vol. 3 p. 245.
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.

PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the United Nations, 1946: *see* from Vol. 2 p. 186, Vol. 3 p. 246, Vol. 4 p. 321.
Convention on the Privileges and Immunities of the Specialized Agencies, 1947: *see* Vol. 4 p. 321-322.
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 Special Missions, 1969: see Vol. 2 p. 188.
Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes, 1969: *see* Vol. 3 p. 246.

Vienna Convention on Diplomatic Relations, 1961
(Cont'd from Vol. 2 p. 187, Vol. 4 p. 322)

State	*Cons.*
Kyrgyzstan	7 Oct 94

Vienna Convention on Consular Relations, 1963
(Cont'd from Vol. 2 p. 188, Vol. 4 p. 322)

State	*Cons.*	*State*	*Cons.*
Kyrgyzstan	7 Oct 94	Vietnam	8 Sep 92

REFUGEES

Convention relating to the Status of Refugees, 1951: *see* Vol. 1 p. 189, Vol. 3 p. 247, Vol. 4 p. 322.
Protocol relating to the Status of Refugees, 1967: *see* Vol. 1 p. 189, Vol. 3 p. 247, Vol. 4 p. 322.

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968
(Cont'd from Vol. 3 p. 247, Vol. 4 p. 323)

State	*Cons.*
Tajikistan	9 Mar 94

Convention on Road Signs and Signals, 1968
(Cont'd from Vol. 3 p. 247, Vol. 4 p. 323)

State	*Cons.*
Tajikistan	9 Mar 94

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
(Cont'd from Vol. 1 p. 184, Vol. 4 p. 323)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Singapore	10 Dec 82	17 Nov 94	Vietnam	10 Dec 82	25 Jul 94
Sri Lanka	10 Dec 82	19 Jul 94			

Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982
New York, 28 July 1994
Entry into force: provisionally, on 16 November 1994, in accordance with article 7
(all countries listed below agreed to provisional application)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Afghanistan			Malaysia	2 Aug 94	
Bangladesh			Maldives	10 Oct 94	
Bhutan			Mongolia	17 Aug 94	
Brunei			Myanmar		
Cambodia			Nepal		
China	29 Jul 94		Pakistan	10 Aug 94	
India	29 Jul 94		Papua New Guinea		
Indonesia	29 Jul 94				
Iran		1 Nov 94	Philippines	15 Nov 94	
Japan	29 Jul 94		Singapore		17 Nov 94
Laos	27 Oct 94		Sri Lanka	29 Jul 94	
			Vietnam		

SEA TRAFFIC AND TRANSPORT

Convention Regarding the Measurement and Registration of Vessels employed in Inland Navigation, 1956: *see* Vol. 4 p. 324.
International Convention for the Safety of Life at Sea, 1960: *see* Vol. 3 p. 248.
Convention on Facilitation of International Maritime Traffic, 1965 (as amended): *see* Vol. 3 p. 249.
Special Trade Passenger Ships Agreement, 1971, *see* Vol. 3 p. 250.
Protocol on Space Requirements for Special Trade Passenger Ships, 1973, *see* Vol. 3 p. 250.
Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 2 p. 192.
UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 1 p. 185.

International Convention on Load Lines, 1966

(Cont'd from Vol. 3 p. 249)

(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons.*	*E.i.f.*	*State*	*Cons*	*E.i.f.*
Camboda	28 Nov 94	28 Feb 95	Kazakhstan	7 Mar 94	7 Jun 94

Protocol Relating to the International Convention on Load Lines, 1966

London, 11 November 1988

Entry into force: not yet

(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons.*	*E.i.f.*
Korea (Rep.)	14 Nov 94	

International Convention on Tonnage Measurement of Ships, 1969

(Cont'd from Vol. 3 p. 250)

(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Cambodia	28 Nov 94	28 Feb 95	Pakistan	17 Oct 94	17 Jan 95
Kazakhstan	7 Mar 94	7 Jun 94	Papua New Guinea	25 Oct 93	25 Jan 94

Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended

(Cont'd from Vol. 3 p. 251 and Vol. 4 p. 324)

(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons. and e.i.f.*	*State*	*Cons. and e.i.f.*
Cambodia	28 Nov 94	Kazakhstan	7 Mar 94

International Convention for Safe Containers, as amended 1972

(Cont'd from Vol. 3 p. 251)

(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons.*	*E.i.f.*
Kazakhstan	7 Mar 94	7 Mar 95

International Convention for the Safety of Life at Sea, 1974, as amended

(Cont'd from Vol. 3 p. 251)

(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Cambodia	28 Nov 94	28 Feb 95	Kazakhstan	7 Mar 04	7 Jun 94
Iran	17 Oct 94	17 Jan 95			

Protocol Relating to the International Convention for the Safety of Life at Sea, 1974 (as amended)

(Cont'd from Vol. 3 p. 252)

(Status as included in IMO doc. J/5893, as at 31 December 1994)

State	*Cons.*	*E.i.f.*	*State*	*Cons.*	*E.i.f.*
Cambodia	28 Nov 94	28 Feb 95	Kazakhstan	7 Mar 84	7 Jun 94

SOCIAL MATTERS

International Convention for the Suppression of the Traffic in Women and Children, 1921: *see* Vol. 4 p. 325.

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: *see* Vol. 4 p. 326.

Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, 1923, amended by Protocol in 1947: *see* Vol. 4 p. 326.

International Convention for the Suppression of the Traffic in Women of Full Age, 1933: *see* Vol. 4 p. 326.

Convention for the Suppression of the Traffic in Women of Full Age, 1933, amended by Protocol, 1947: *see* Vol. 4 p. 326.

International Agreement for the Suppression of the White Slave Traffic, 1904, amended by Protocol 1949: *see* Vol. 4 p. 324.

International Convention for the Suppression of the White Slave Traffic, 1910, amended by Protocol 1949: *see* Vol. 4 p. 325.

Agreement for the Suppression of the Circulation of Obscene Publications, 1910, amended by Protocol 1949: *see* Vol. 4 p. 325.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 4 p. 327.

Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 4 p. 327.

Convention for the Suppression of the Traffic in Women and Children, 1921, amended by Protocol in 1947
(Cont'd from Vol. 4 p. 325)

State	*Cons.*	*State*	*Cons.*
Pakistan	12 Nov 47 (*corrected*)	Singapore	26 Oct 66 (*corrected*)
Philippines	30 Sep 54 (*corrected*)		

TELECOMMUNICATIONS

Agreement establishing the Asia-Pacific Institute for Broad-casting Development, 1977: *see* Vol. 3 p. 253.
Amendment to Article 11, Paragraph 2 (a), of the Constitution of the Asia-Pacific Telecommunity, 1981: *see* Vol. 4 p. 328.

Constitution of the Asia-Pacific Telecommunity, 1976
(Cont'd from Vol. 3 p. 252, Vol. 4 p. 327)

State	*Cons.*
Korea (DPR)	22 Feb 94

Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended)
(Cont'd from Vol. 3 p. 253, Vol. 4 p. 328)

State	*Cons.*	*Cons.* Amendm. 1985
Thailand	14 Dec 94	

Amendments to articles 3 (5) and 9 (8) of the Constitution of the Asia-Pacific Telecommunity, 1991
(Cont'd from Vol. 4 p. 328)

State	*Cons.*	*State*	*Cons.*
Brunei	4 Feb 94	Thailand	14 Jan 94
Indonesia	26 Sep 94		

TREATIES

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: *see* Vol. 4 p. 329.

Convention on the Law of Treaties, 1969

(Cont'd from Vol. 1 p. 183, Vol. 4 p. 328)

State	*Cons.*
Malaysia	27 Jul 94

WEAPONS

Protocol for the prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Warfare, 1925: *see* Vol. 3 p. 254.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: *see* Vol. 3 p. 255.
Treaty on the Non-Proliferation of Nuclear Weapons, 1968: *see* Vol. 3 p. 256.
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, 1971: *see* Vol. 3 p. 256.
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972: *see* Vol. 3 p. 255.
Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: *see* Vol. 2 p. 198, Vol. 4 p. 329.
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980: *see* Vol. 2 p. 198.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993

(Cont'd from Vol. 4 p. 330)

State	*Sig.*	*Cons.*	*State*	*Sig.*	*Cons.*
Maldives	4 Oct 93	31 May 94	Turkmenistan	12 Oct 93	29 Sep 94
Sri Lanka	14 Jan 93	19 Aug 94			

ASIA AND INTERNATIONAL ORGANIZATIONS

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE ANNUAL SURVEY OF ACTIVITIES 1994-1995,

including the work of its Thirty-fourth Session, held in Doha (Qatar), 17-22 April 1995*

M.C.W. Pinto**

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* The account of the main activities of the Committee and the main views expressed during or in connection with the Committee's Thirty-fourth Session has been adapted from (the unpublished version of) the Secretariat's *Report of the Thirty-fourth Session ('Report')*. Since 1994 the Secretariat published "Asian-African Legal Consultative Committee: Report and Selected Documents of the [. . .] Session".

** General Editor

Asian Yearbook of International Law, Volume 5 (Ko Swan Sik *et al.*, eds.; 90-411-0375-9
, pp. 317-380

1. MEMBERSHIP AND ORGANIZATION

1. There were forty-three Members of the Committee on 17 April 1996: Bahrain, Bangladesh, China, Cyprus, Egypt, 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. Botswana is an Associate Member.

2. The Thirty-fourth Session of the Committee was held in Doha from 17-22 April 1995 at the invitation of the Government of Qatar. H.H. Sheikh HAMAD BIN KHALIFA AL-THANI, the Heir Apparent and Minister of Defence of Qatar delivered the inaugural address, and H.E. Sheikh AHMED BIN SAIF AL-THANI, Minister of Justice of Qatar, an address of welcome. H.E. Dr. NAJEEB MOHAMMED AL-NAUIMI, Minister Legal Adviser to the Heir Apparent of Qatar was elected President, and the Honourable ABDELAZIZ ABADALLA SHIDDO, Minister of Justice and Attorney-General of Sudan was elected Vice-President of the Committee. The Secretary-General of the Committee, Mr. TANG CHENGYUAN, and the members of the AALCC Secretariat were responsible for the organization of the Session.

3. Subsequent to the meeting in Doha, the Committee decided to accept the invitation of the Philippines to hold its Thirty-fifth Session in Manila from 4-9 March 1996.

Future role of AALCC

4. In the course of general statements made at the commencement of the Session, several delegates made observations concerning the role of AALCC. The delegate of *Indonesia* noted that the 40th anniversary of the historic Asian-African Conference held at Bandung would be celebrated on 24 April 1995, and recalled the Ten Principles of international relations[1] formulated there,

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[1] ". . . Free from mistrust and fear, and with confidence and goodwill towards each other, nations should practise tolerance and live together in peace with one another as good neighbours and develop friendly co-operation on the basis of the following principles:

1. Respect for fundamental human rights and for the purposes and principles of the Charter of the United Nations.
2. Respect for the sovereignty and territorial integrity of all nations.

which had later been recognized as the basic philosophy of the Non-aligned Movement when it came into being in Belgrade in 1961. He called for continued solidarity among Asian and African countries to ensure that a "new world order" would not re-impose old patterns of dominance. He urged that AALCC, which had been established following the Bandung Conference, intensify its role in promoting the dissemination and progressive development of international law.

5. The delegate of *China* recalled that AALCC had come into being under the guidance of the Bandung spirit which had been based on the Five Principles of Peaceful Co-existence and other universally recognized norms governing international relations. He urged that AALCC continue in its positive role of providing a forum for consultations on international legal issues of common interest so as to strengthen understanding and coordination among Member States. The delegate of *Korea* said that AALCC should continue to promote common awareness of the merit of peaceful resolution of disputes, as well as the development of consensus on regional and global issues among its Members.

6. While emphasizing AALCC's achievements in the past, and praising the work of its Staff under successive Secretaries-General, several delegates made specific suggestions as to the Committee's future role. Thus, the delegate of *India* stressed the importance of establishing priorities when dealing with a wide range of topics in a short period of time. In his opinion, discussion at the

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3. Recognition of the equality of all races and of the equality of all nations large and small.
4. Abstention from intervention or interference in the internal affairs of another country.
5. Respect for the right of each nation to defend itself singly or collectively, in conformity with the Charter of the United Nations.
6. (a) Abstention from the use of arrangements of collective defence to serve the particular interests of any of the big powers.
   (b) Abstention by any country from exerting pressure on other countries.
7. Refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country.
8. Settlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' own choice, in conformity with the Charter of the United Nations.
9. Promotion of mutual interests and co-operation.
10. Respect for justice and international obligations.

The Asian and African Conference declares its conviction that friendly cooperation in accordance with these principles would effectively contribute to the maintenance and promotion of international peace and security, while co-operation in the economic, social and cultural fields would help bring about the common prosperity and well-being of all. . . ." (From Part G of the *Final Communique of the Asian-African Conference*, issued 24 April 1955).

Committee's meetings should focus on broader issues of long-term significance rather than those which concerned one or two Members, and on technical and legal issues, rather than on political aspects. The delegate of *Uganda* urged that there be consultations regarding the Committee's agenda, followed by a focus on specific issues which should be studied in depth. The delegate of *Egypt* suggested that a Co-ordinating Committee be formed, composed of the current President, the outgoing President and one other member, with a view to making AALCC more effective, and implementing its decisions. The delegate of *Sudan* called for a re-formulation of AALCC's role to enable it to be more effective in international fora, and in particular, in checking the use of the United Nations as a tool by some countries. The necessary changes could, in his view, be effected through modifying the bye-laws and regulations of AALCC. The delegate of *Ghana* urged that future sessions of the Committee should be timed to facilitate maximum participation, and should not coincide with major religious events.

7. Among the topics suggested for future study by the Committee were: environment and development, including biological diversity and climate change; legal issues concerning trade, and the need for arbitration centres and other institutional machinery for settling disputes to take into account differences in the trade and commercial practices among countries; international rivers; the status of refugees and displaced persons; and the proposal to establish an International Criminal Court.

8. The delegate of *Syria* proposed that the Committee make "an academic study about International Nuclear Law which should determine rights and duties of nuclear and non-nuclear States". The delegate of *Jordan* referred to the need to free the Middle East from nuclear weapons through a proper regulatory mechanism.

2. QUESTIONS UNDER CONSIDERATION BY THE INTERNATIONAL LAW COMMISSION

9. The Committee had before it the following Secretariat documents: *Report on the Work of the International Law Commission at its Forty-sixth Session* (Doc. No. AALCC/XXXIV/DOHA/95/1) containing surveys of the Commission's work on four topics, viz. the Draft Code of Crimes against the Peace and Security of Mankind, including the Draft Statute for an International Criminal Court, law of the non-navigational uses of international watercourses, international liability for injurious consequences arising out of acts not prohibited by international law, and State responsibility; and *International*

Criminal Court: an update (Doc. No. AALCC/XXXIV/DOHA/95/1A) containing a summary of the views expressed on the subject by representatives in the Sixth (Legal) Committee of the General Assembly at its Forty-ninth Session in 1994, and a report on a Seminar on the subject organized by AALCC in collaboration with the Indian Society of International Law in New Delhi on 12 January 1995.

2.1. Draft Code of Crimes against the Peace and Security of Mankind: the establishment of an International Criminal Court

10. The delegate of *Japan* reporting on the *ad hoc* meeting on the International Criminal Court (ICC) which had convened in New York from 3-13 April 1995, said that discussion there had focussed on four major sets of issues. As to *organizational aspects*, he said that most countries had favoured establishment of the ICC by a treaty requiring ratification by a substantial number of States for its entry into force, and having its relationship to the United Nations governed by agreement between the two institutions. As to *jurisdiction*, representatives had emphasized the principles *nullum crimen sine lege* and *non bis in idem*, and had expressed the view that the description of crimes listed in article 20 of the draft Statute were too vague to be applied in the administration of criminal justice. He noted that there had been no consensus on the role of the Security Council in relation to such matters. As to *procedure and due process*, he said there had been a consensus that criminal procedures should not be left to be drawn up by the judges of the ICC as suggested by the Commission, but should be drafted and approved by States, and that an expert group had been established for the purpose. As to *budget and administration* he said opinions had been divided, some States preferring that States Parties to the treaty establishing the ICC should finance it, while others proposed that the ICC should be financed out of the regular budget of the United Nations. He noted that some of the issues referred to would be discussed in depth at a meeting to take place in August 1995.

11. The delegate of *Sri Lanka* said that any international criminal court established should function with strict impartiality on the basis of objective criteria, and stressed that in defining its jurisdiction the sovereignty and territorial integrity of States had to be respected. The delegates of *Sudan* and *Republic of Korea* expressed similar views.

12. The delegate of *China* observed that the question of the establishment of an international criminal court was politically sensitive and legally and technically complicated. He emphasized that domestic courts would continue to play a primary role in the administration of criminal justice, and any

international court that might be established should have only a complementary role. In his view, the jurisdiction of such a court could only be based on the consent of States and the voluntary submission of cases by them. Several issues connected with the subject still remained to be resolved, including the role of the Security Council, and in his view no diplomatic conference to establish the ICC should be convened until the conditions for it were right, and a general consensus had been reached concerning the draft Statute.

13. The delegate of *Ghana* conceded that there might be a need for an international criminal court and that such a court could play an important role in a new world political and economic order. However, he had observed a certain element of discrimination in the way some countries viewed the occurrence of serious crimes in different regions of the world. Crimes of an international nature committed in Africa had evoked less interest than similar crimes occurring elsewhere. For that reason the relationship between the ICC and the United Nations was important, and ought to be the subject of a careful study by AALCC. He emphasized that trial by a municipal court should be recognized internationally, and the principle of double jeopardy applied. He proposed that the issue of intervention by regional or sub-regional organizations in the event of an absolute breakdown of governmental functions resulting in mass suffering and death, should also be studied by AALCC with a view to drawing up guidelines on what might constitute legitimate intervention.

14. The delegate of *India* observed that the Draft Code of Crimes against the Peace and Security of Mankind was no less important than the Draft Statute of the International Criminal Court, and that both raised issues that were in need of further careful study. He emphasized that whatever the procedure ultimately adopted, it would be necessary to respect the primacy of national jurisdiction.

15. The delegate of *Pakistan* noted that there were still divergent views on many important issues concerning establishment of the ICC, in particular, on whether the Court's jurisdiction should be compulsory or consensual; whether it should be exclusive, concurrent, or of a review character; and whether it should be linked to the Draft Code or not. It also remained to be decided who would have standing to bring a complaint before the Court, and whether State consent would be required before the complaint could be entertained. Continuing, the delegate stressed that offences and the punishments provided for them had to be clearly defined, noting that investigation would be carried out under the local law of the States concerned. In his view, a code of criminal procedure should provide *inter alia* for: the registration of crimes, arrest of the

accused, interrogation of the accused and suspects, recording of the statements of witnesses, recovery of articles used in the commission of a crime, the taking of expert evidence when required, the treatment accorded to confessions, and the recording of pre-trial statements by witnesses. The powers and functions of prosecutors and investigating officers would also need clear definition. Adequate safeguards should be provided for the rights of the accused, dealing with matters such as the place of the trial, defence by competent counsel, and the language to be used in the proceedings. It would also, in his view, be necessary to adopt a code relating to evidence so as to be able to distinguish between admissible and inadmissible evidence at the time of the trial. He observed that measures such as he had outlined could result in the need for States to amend their laws, and that this might not be acceptable to many.

2.2. Law of the non-navigational uses of international watercourses

16. The delegate of *Syria* said that he favoured adoption of the Commission's draft on the non-navigational uses of international watercourses as a framework convention. He offered the following observations regarding the draft for consideration by the Committee: (1) the articles should be applied to cases of closed groundwater constituting a hydrological unitary whole; (2) the definition of the term "international watercourses" in Article 2 should be maintained, and the words "flowing into a common terminus" should not be deleted; (3) the interpretation of what constitutes "equitable and reasonable utilization and participation" should be added in the text of Article 5; (4) provision should be made in Article 17 of the draft for the appointment of an international observer if one of the watercourse States found this to be necessary; (5) he could agree that the principle incorporated in Article 16 prohibiting causing harm to others, should apply to confined groundwater; and (6) a new article, i.e. Article 34, should be added, which would acknowledge "water" as being equal in value with "territory" and therefore protected by the provisions relating to "territory" in the United Nations Charter.

Decision

17. Discussion of this item (*Report*, pages 48-60) was followed by adoption of an essentially procedural decision (*Report*, pages 96-7).

3. LEGAL PROBLEMS REFERRED TO THE COMMITTEE BY PARTICIPATING STATES

3.1. The status and treatment of refugees

18. The Committee had before it two documents prepared by the Secretariat in consultation with the office of the UN High Commissioner for Refugees: "Model legislation on the status and treatment of refugees" (Doc. No. AALCC/XXXIV/DOHA/95/2); and "Establishment of safety zones for displaced persons in their country of origin" (Doc. No. AALCC/XXXIV/DOHA/95/3. The documents represent substantial advances in the study of these topics on the basis of guidance offered by Member States at earlier sessions of the Committee (as to model legislation, see 4 AsYIL pp. 339-343; and as to safety zones, *ibid.*, pp. 343-354), and in the course of inter-sessional consultations engaged in by the Secretariat.

19. Document DOHA/95/2, having outlined the history of the treatment of its subject by the Committee, and emphasizing the "necessity for ratification of the 1951 Convention relating to the Status of Refugees", goes on to present the draft text of a model law entitled "An act for the recognition and protection of persons who seek refugee status within the territory of this country". The draft text, and the commentary which precedes it, are reproduced below.

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MODEL LEGISLATION

A. *Structure*
B. *General Provisions*
   (i) Basic principles
      (a) Non-refoulement
      (b) Non-discrimination
      (c) Family unity
   (ii) Definition of refugee
   (iii) Exclusion clause
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C. *Rights and Obligations of Refugees*

   (i) Rights of refugees
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      (a) National treatment
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(c) Most-favoured-nation treatment
(d) Treatment not less favourable than that accorded to aliens
(iii) Obligations of refugees
(iv) Provisional measures

D. *Organizational Arrangements*

MODEL LEGISLATION

A. *Structure*

22. The Model Legislation on the Status and Treatment of Refugees proposed by the Secretariat comprises a preamble and Thirty-one sections arranged in Three Parts viz. General Provisions; (Sections 1-9); Rights and Obligations (of refugees) (Sections 10-24); and Organizational Arrangements (Sections 25-31). Read together they set out the scope ratione personea, and ratione materiae, of the proposed legislation and also provide for the establishment of an administrative/executive organ to deal with matters relating to refugee status determination and rights and duties of refugees in the receiving State. The last part also makes provision for quasi-judicial or judicial review of decisions in matters relating to the status of refugees. The text of the Model Legislation on the Status and Treatment of Refugees prepared by the Secretariat (See Annex) has already been circulated among Member States.

B. *General Provisions (Sections 1-9)*

23. Part I of the Model Legislation comprising nine sections addresses itself to such matters as (i) title, purpose and scope of the proposed Act (Section 1-3); (ii) definitions or use of terms (Section 4); (iii) the basic principles of the treatment of refugees (Section 5); (iv) meaning of the term 'refugees' (Section 7); (v) determination of a class of persons as refugees (Section 7), and (vi) exclusion and cessation clauses (Section 8-9). Sections 1 and 3 dealing with the title and territorial applicability of the proposed legislation are self-explanatory and require no comment.

24. Section 2 of the proposed legislation in setting out the purpose seeks to reinforce and fortify the norm identified in the preamble of the proposed legislation i.e. the protection of persons who seek refuge. One criticism hitherto levelled against the legislative approach adopted by States to regulate refugees has been that the issue of refugee protection is approached as one of defining not the rights (of the refugees) themselves but rather the powers vested in refugee officials. It has been argued in this regard that the protection of refugees' rights becomes an exercise of powers and discretion of those officials rather than enforcement of specific rights identified and generalized

by law. In other cases, it is further argued, the realization of refugee rights is left to depend ultimately on an exercise of Ministerial discretion.

25. Mindful of this lacuna in some of the existing national legislation the AALCC Secretariat has proposed describing of the purpose of the Act as establishing "a procedure for granting of refugee status to asylum seekers, to guarantee to them fair and due treatment and to establish the requisite machinery therefore".

(i) *Basic principles*

26. Section 5 of the Model Legislation whilst enumerating the basic principles of the treatment of refugees seeks to ensure that an asylum seeker receives fair and due treatment from state officials engaged in relief and assistance work for refugees. The other principles enumerated in this section are non-refoulement, non-discrimination, and the principle of family unity.

(a) *Non-refoulement*

27. The principle of non-refoulement has been incorporated in all regional and international instruments relating to the status and treatment of refugees, including the AALCC Bangkok Principles and thus requires no explanation or justification for its inclusion. It may be stated, however, that the principle of non-refoulement is neither absolute nor universal. The clauses allowing exceptions to the principle of non-refoulement incorporated in the 1951 Convention, the 1967 Declaration on Territorial Asylum as well as the Bangkok Principles, 1966 are a pointer that this principle is not absolute. In Japan - which acceded to the 1951 Convention - the Courts are known to allow refoulement when the Minister of justice finds the application of the principle of non-refoulement "seriously detrimental to the interests of Japan and security thereof".

(b) *Non-discrimination*

28. The principle of non-discrimination has hitherto been incorporated in the Universal Declaration of Human Rights, 1948 and OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969. The International Convention on the Elimination of all Forms of Racial Discrimination, 1955, the International Covenant on Civil and Political Rights, 1966 and the practice of States more than affirm that the principle of non-discrimination is a generally accepted principle of international law and that discriminatory practices of States are not permissible. However, in as much as the reference to a "membership of a particular social group or political opinions" found in Article IV of the OAU Convention is omitted in the present

clause the principle of non-discrimination incorporated herein may be considered as narrow and restricted in its scope and therefore may require further consideration.

(c) *Family unity*

29. As regards the principle of family unity, it draws its strength from the Universal Declaration of Human Rights, 1948, the practice of competent international organizations in the field of humanitarian affairs as well as from the practice of States. The International Covenant on Economic, Social and Cultural Rights 1966; the International Convention on the Protection of all Migrant Workers and Members of their Families, 1990 and the 1984 Declaration of Cartagena adopted by Central and South American States and the African Charter on Human and People's Rights, 1981 all incorporate the principle of family unity. It may be stated that the concept of family unity may be found in Article 37 of the Vienna Convention on Diplomatic Relations, 1961, which admits of and allows immunity in respect of the family of a diplomatic agent. More recently the Convention on the Rights of the Child, 1990 reaffirmed the principle of family unity.

(ii) Definition of refugee (Sections 6 and 7)

30. Sections 6 and 7 define the scope *ratione personae* of the proposed legislation and are at the core of the matter of refugee status determination both in respect of individuals and - in the event of a large influx - the determination of the status of a group or class of persons as refugees.

Historically, the term 'refugee' was used in various instruments prior to 1951 to refer to the ethnic or territorial origins of different uprooted groups, and to their loss of national protection. There was in those instruments no reference to persecution in the sense that this term is currently employed.

31. The first formal reference to persecution as part of the refugee definition came in the 1946 Constitution of the International Refugee Organization (hereinafter called the IRO), a temporary specialized agency of the United Nations and the predecessor of UNHCR. Paragraph 7(a)(i) of Section C of the Constitution of the IRO referred to a "persecution or fear, based on reasonable grounds owing to race, religion, nationality or political opinions" [*footnote:* Section B] as being a valid objection to repatriation. Paragraph 3 of Section A of part I extended IRO's competence to the "victims of Nazi persecution" still within their country of origin. IRO's Constitution also made reference for the first time to 'displaced persons' as well as refugees - a concept which came to be extensively applied to UNHCR's mandate.

32. Thereafter the United Nations Declaration of Human Rights in 1948 alluded to everyone's right to seek asylum from 'persecution', without further defining the term, and the General Assembly employed the term "well-founded fear of persecution" for specified reasons as the central criterion in determining the ambit of UNHCR's Statute.

33. This definition was essentially repeated in the 1951 Convention Relating to the Status of Refugee while its application was limited to victims of persecution as a result of events occurring before January, 1951. The extent and scope of the term 'refugee' was, however, expanded in as much as it included "membership of a social group" as one of the possible causes of persecution. States parties could also, if they desired, restrict the causative events to those occurring in Europe. The 1967 Protocol to the Convention removed both the temporal limitation as well as the optional geographic limitation from this definition.

34. The definitions of the 'refugee' in the Convention and Protocol have, since 1967, remained unchanged, although it may be recalled that Recommendation E of the Final Act of the Conference of Plenipotentiaries which adopted the Convention in 1951, urged all States parties to extend its benefits as far as possible to persons who did not fall within its strict ambit. While this, of course, is not binding on States it is indicative of the general agreement, at that time, of the need for a liberal interpretation of the term 'refugee', by States in determining who should receive international protection.

35. This need also became very apparent in regard to UNHCR's activities, and by the 1960's the need for groups outside the original statutory definition to be assisted was clear, particularly in the wake of the General Assembly Resolution on the Granting of independence to Colonial Peoples and the independence movements in Africa.

36. Consequently there were a series of General Assembly resolutions, extending over the next two decades, which formally endorsed the High Commissioner's involvement with a much broader category of exiles. Thus in 1959 the General Assembly requested the High Commissioner to use his 'good offices' to transmit contributions to "refugees not within the competence of the United Nations" (without defining this phrase further). Then from 1961 to 1963 a series of General Assembly resolutions endorsed UNHCR activities for refugees within the High Commissioner's mandate "or those for whom he extends his good offices".

37. This liberalizing trend was reinforced in 1969 by the OAU Convention Governing the Specific Aspects of Refugee problems in Africa, which added to the statutory refugee definition an important expansion of the term in so far as it applied in Africa, viz., that:

> "'Refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in other place outside his country of origin or nationality."

This expanded definition remains the most formal extension of the refugee concept accepted by Governments, as has, following proposals made at the Arusha Conference on Refugees in Africa in 1979, been endorsed by the General Assembly as applying to UNHCR's activities in the African continent.

38. Sections 6 and 7 of the model legislation are based on these considerations. An additional factor in favour of the term refugee adopted in section 6 is that most of the African States that have during the 1980's enacted legislation relating to the status and treatment of refugees have adopted somewhat similar definitions.

(iii) *Exclusion clause* (Section 8)

39. The previous conduct of an asylum seeker is a significant input in the decision concerning this refugee status to the point of automatically excluding him from the protective umbrella of the international instruments, e.g. where a person has committed a crime against peace, a war crime or a crime against humanity or a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee, or has been guilty of acts contrary to the Purposes and Principles of the United Nations. Nor can the benefit of the principle of non-refoulement be claimed by a person who on reasonable grounds is regarded as a danger to the security of the country in which he is, or who having been convicted by a final judgement of particularly serious crime, constitutes a danger to the community of that country. Such serious offences as the Unlawful Seizures of Aircraft, the Taking of Hostages and murder are just and fair grounds for extradition or expulsion of the individual.

40. This exclusion clause as incorporated in Article 1(F) of the 1951 Convention has since been adopted in several national laws, for instance Article 8 of the Malawi Refugee Act, 1989; Section 3(4) of the Zimbabwe Refugee Act, 1983 and Section 3(2) of the Lesotho Refugee Act 1989. Article 33 paragraph 2 of the 1951 Convention, Article 3 of the General Assembly Declaration on Territorial Asylum, 1967 and the 1966 Bangkok Principles are among the instruments which affirm the exception to the rule of non-refoulement. In sum, the principle of non-refoulement is not absolute and the term 'refugee' excludes fugitives from justice.

41. Among the primary duties of a refugee is not to have committed a common crime. For if he has, he can be excluded from the country of refuge. The aim of the exclusion clause Article 1(F) of the Convention, is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious crime and to ensure that he does not enjoy the benefit of refugee status so as to exonerate himself from justice. It also seeks to render due justice to a refugee who has committed a common crime of a less serious nature or has committed a political offence. Only a crime committed or presumed to have been committed by an applicant "outside the country of refuge prior to his admission to that country as a refugee" is a ground for exclusion.

42. A refugee committing a serious crime in the country of refuge is subject to due progress of law in that country. Article 32 of the 1951 Geneva Convention provides that a refugee lawfully in the territory of a contracting State shall not be expelled "save on grounds of national security or public order". Such a refugee shall be expelled only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority". Article 33, which prohibits expulsion or return, however, provides in paragraph 2 that under extreme circumstances a refugee may be expelled when "there are reasonable grounds for regarding (him) as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country".

(iv) *Cessation clause*

43. When the circumstances in connection with which a person has been recognized as a refugee have ceased to exist he can no longer continue to refuse to avail himself of the protection of the country of his nationality or return to the country of his nationality or to return to the country of his habitual residence. In such case the 1951 Convention ceases to apply. The Convention *a fortiori* does not apply to persons receiving protection or assistance from organs or agencies other than the UNHCR. This cessation clause of the 1951 Convention has, *inter alia*, been incorporated in section 3 paragraph 5(1)(a) of the Zimbabwe Refugee Act 1983 and Article 4 of the Lesotho Refugee Act, 1983.

44. The Statute of the UNHCR envisages, it may be recalled, two forms of permanent solution for the problem of refugee viz. voluntary repatriation or their assimilation into new national communities. Paras a, b, and c of Section 9 of the proposed model conform to these objectives and draw strength, *inter alia,* from Article II of the AALCC Bangkok Principles, 1966.

C. Rights and Obligations of Refugees (Sections 10-24)

(i) *Rights of refugees*

45. Part II of the Model Legislation comprising fifteen sections (10 to 24) addresses itself to the Rights and Obligations of Refugees whilst in the territories of the State affording them protection. The first of these viz. section 10 addressed to the rights of refugees offers alternative formulations. Option A is based on the express recognition of all rights set out in the regional and universal conventions to which the State is a party and recognizes and accepts the references to the term 'refugees' in those instruments as references to refugees recognized and protected by and under the proposed Act. This formulation draws its inspiration from Section 12 of the Zimbabwe Refugee Act, 1983. This alternative would require that either the specific provisions of the instruments which are to be given effect be set out in a schedule or annexed to the proposed act or to be identified and included in the corpus of the Statute.

46. The second alternative i.e. option B is somewhat restrictive in its scope of application and apart from fair and due treatment without discrimination restricts the rights of the refugees to those that are generally accorded to aliens in particular to such matters as right to property, right to transfer assets, and the rights to engage in agriculture, industry etc. It may be recalled in this regard that the Bangkok Principles concerning Treatment of Refugees adopted by the AALCC had included the minimum standard of treatment and that Article VI of those Principles provided, *inter alia,* that a State shall accord to refugees treatment in no way less favourable than that accorded to aliens and that the standard of the treatment shall include the rights relating to aliens to the extent that they are applicable to refugees.

47. A refugee whether he is in the territory of the State of asylum, in transit, or in the receiving State for resettlement enjoys certain basic civil rights. Article 14(1) of the Universal Declaration of Human Rights stipulates: "Everyone has the right to seek and to enjoy in other countries asylum from persecution". The Preamble to the 1951 Convention Relating of Refugees reaffirms that "human beings shall enjoy fundamental rights and freedoms without discrimination" and endeavours to assure refugees the widest possible exercise of these fundamental rights and freedoms.

48. The rights and protection to be afforded or granted to a refugee by a State are obligatory not only under the Convention but also under customary international law and general principles recognized by nations. It may be recalled in this regard that the Bangkok Principles adopted by the AALCC in 1966 recognize this principle, and a State party to the 1951 Geneva Convention and its Protocol thereto is obliged to grant the protection and rights to the

refugees as described in the instruments. The 1951 Geneva Convention primarily codified the then existing international custom and general principles of law on the international legal rights and obligations of refugees.

(ii) *Established standards of treatment*

49. While the Convention on Refugees 1951 envisages the same treatment as is accorded to aliens generally, it goes a little further with respect to some specific rights, in respect of which refugees are granted more favourable treatment than that accorded to aliens. the four established standards of treatment are:(i) national treatment i.e. the treatment accorded to nationals; (ii) treatment accorded to nationals of the country of habitual residence; (iii) Most-favoured-nation treatment accorded to nationals of a foreign country; and (iv) treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

(a) National treatment

50. This standard is generally accorded to refugees as regards (a) freedom to practice their religion and the religious education of their children (Article 4); (b) access to courts (Article 16, paragraphs 1 and 2); (c) wage-earning employment of refugees who have completed three years residence in the country or who have spouse or one or more children possessing the nationality of the country (Article 17, paragraph 2); rationing (Article 20) (e) elementary education (Article 22, paragraph 1); (f) the right to public relief and assistance (Article 23); (g) matters of labour legislation and social security (Article 24) and (h) taxation (Article 29).

(b) *Treatment accorded to nationals of habitual residence*

51. This treatment is accorded to refugees with regard to (a) the protection of their intellectual property, such as inventions, trade marks and trade names, and of their rights in literary, artistic and scientific works (Article 14), (b) access to courts, (c) legal assistance and (d) exemption from *cautio judicatum solvi* in countries other than that of their habitual residence (Article 16, paragraph 3).

(c) *Most-favoured-nation treatment*

52. This treatment is granted to refugees as regards (a) their right to form and to join non-political and non-profit making associations and trade unions (Article 15), (b) the right to engage in wage-earning employment, if the refugees concerned do not fulfil the conditions necessary for the enjoyment of national treatment (Article 17, paragraph 1).

(d) *Treatment not less favourable than that accorded to aliens*

53. The principle of treatment as favourable as possible and in any event not less favourable then that accorded to aliens is applied to refugees with regard to (a) acquisition of movable and immovable property, property rights and interests (Article 13); (b) the right to engage on their own account in agriculture, industry handicrafts and commerce, and to establish commercial and industrial companies (Article 18), (c) to practice liberal professions (Article 19); (d) to obtain housing (Article 21); and (e) to benefit from higher education (Article 22, paragraph 2)

(iii) *Obligations of refugees (Section 12)*

54. The principle of national sovereignty requires that all persons including refugees, conform to the laws and regulations of the country of asylum as well as to the measures taken for maintenance of public order. Section 11 of the Model Legislation draws its strength from Article 2 of the 1951 Convention and Article 3 of the OAU Convention of 1969.

(iv) *Provisional measures (Section 14)*

55. Article 8 of the 1951 Convention stipulates that in time of war or other grave and exceptional circumstances a State may take provisional measures essential to national security in the case of a particular person pending a determination that the person is in fact a refugee and that the continuance of such measures is necessary in his case in the interest of national security. The stipulation of Article 8 of the Convention Relating to the Status of Refugees, 1951 should be read together with Article 44 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949. Article 44 of the Fourth Geneva Convention, *inter alia,* stipulates that in applying the measures of control the power in whose jurisdiction protected persons find themselves shall not treat refugees as enemy aliens, exclusively on the basis of their nationality.

D. *Organizational Arrangements (Sections 25-36)*

56. States generally determine their own policies regarding the admission of refugees and displaced persons and there are no international conventions which require the admission of refugees and displaced persons. States are free to enact their own laws and regulations governing such admissions. In deciding whom to admit States are often guided by generally acceptable humanitarian principles of international law.

57. Several States are also known to screen refugees at the border and many reject refugees without any procedural review. The right of refugees to appeal

adverse or negative refugee status determination is unevenly available. According to a UNHCR report on the procedures employed by States Parties to the 1951 Convention and to the Protocol of 1967 thereto, only 28 States permitted appeals. In Malawi, for instance, any person who is dissatisfied with a decision of the Refugee Committee in regard to his application status or revocation of its decision granting him refugee status may appeal to the Minister and the Minister may confirm, set aside or vary the decision.

58. The two-fold thrust of Part III of the Model Legislation is to provide machinery for refugee status determination by a Bureau/Department/Division or Unit of the receiving State. In practice, however, the refugee status determination machinery varies from State to State. Thus, in Thailand the Government officials in the refugee status determination process for the Vietnamese Boat People were all drawn from the Ministry of Interior, who based their decisions on the recommendations of lawyers and the appeals considered by more senior officials from the same Ministry. In Malaysia the responsibility of refugee status determination both in the initial stages and the review stages was entrusted to the National Task Force for Vietnamese Illegal Immigrants composed of officials from the Army, Navy and Police. There the National Task Force, in turn, is known to have appointed officers to interview asylum seekers and both the first instance and review decisions were taken by senior officials of the National Task Force. In the Philippines the asylum seekers were interviewed and first instance decisions made by immigration officials. Appeals against the first instance decisions were reviewed by an Appeal Board comprising senior Government officials.

59. African State practice is not very divergent. In Nigeria a National Commission for Refugees, an Eligibility Commission and an Appeal Board for refugee status determination and safeguarding the rights of asylum seekers was established in 1989. In Zimbabwe the Refugees Act of 1983 provides that any person who is aggrieved by a refusal of the Commissioner to recognize him as a refugee may appeal in writing to the Minister. The right to appeal against a negative decision of the Commissioner may also be executed in the event of withdrawal of recognition of a person as a refugee. In Malawi too, as mentioned above, any person dissatisfied with a decision in regard to his application for a refugee Status or revocation of the decision granting refugee status to him may appeal to the Minister who may confirm, set aside or vary the decision.

60. The Lesotho Refugee Act incorporates somewhat detailed provisions in this regard and establishes an Inter-ministerial Committee for Determination of Refugee Status, and a Refugee Advisory Board. Under that Act, where the Minister on the advice of the Inter-ministerial Committee for the Determination of Refugee Status decides not to recognize an asylum seeker as a refugee, that person has the right to reapply to the Minister to reconsider his applica-

tion. The Minister may refer the matter to the Advisory Board who shall then make recommendation on the same to the Minister for a final decision. The Lesotho Act goes on stipulate that where after the reconsidering of the applicant's case the Minister decides to reject the recommendation of the Committee or the Board the applicant shall have the right to seek appropriate relief from the High Court Of Lesotho

61. It is against this backdrop that Part III of the draft of the Model Legislation entitled Organizational Arrangements aims at establishing an institutional and administrative machinery for matters dealing with refugee status determination related matters. This part of the draft proposes the establishment of an executive organ and a review/appellate body for the purpose of judicial or quasi-judicial review of the decisions, or orders of the executive body (Sections, 25,26 and 27). This part also explicitly provides the composition and functions of both the executive organs as well as the review/appellate authority and other matters allied to their functioning. (Sections 28 to 36).

MODEL LEGISLATION ON THE STATUS AND TREATMENT OF REFUGEES

An Act for the recognition and protection of persons who seek refugee status within the territory of this country.

Be it enacted by (as, for example, the Parliament, or the President and Parliament, etc of the concerned country) as follows:

GENERAL PROVISIONS

1. *Short title.* This Act/Law shall be called the Refugees (Recognition and Protection) Act, (year of enactment).

2. *Purpose of the Act.* The purpose of this act is to establish a procedure for granting of refugee status, to asylum seekers, to guarantee to them fair and due treatment and to establish the requisite machinery therefor.

3. *Scope of the Act.* This Act shall apply throughout the territory of this State or in such areas of the State as the Government may notify.

4. *Definitions.* In this Act, unless the next otherwise requires,
   (1) 'Asylum seeker' means an alien who in need of protection, seeks recognition and protection as a refugee;
   (2) 'Member of his family', in relation to a refugee includes
      (a) the spouse(s) of the refugee;

(b) any unmarried child of the refugee under the age of majority;
(c) the father and mother of the refugee who, by reason of age or disability, are, mainly dependent upon the refugee for support; and
(d) any other person related to the refugee by blood or marriage who is solely dependent upon him;

(3) 'Identity Card' means a document issued under the provisions of this Act to a recognized refugee;
(4) 'Refugee' means a refugee as defined in Article 6;
(5) 'Refugee Committee' means the Committee established as an administrative organ by and under the provisions of this Act;
(6) 'Refugee Appellate Authority' means the appellate authority established by and under the provisions of this Act to hear appeals against orders passed by the Refugee Committee as provided under the rules framed by and under the provisions of this Act;
(7) 'Voluntary repatriation' means the voluntary return of refugees to their country of origin on their own free and voluntary decision;
(8) 'Travel document' means a document which is issued by the Refugee Committee for the purpose of enabling a refugee to travel outside this country in accordance with the procedure established by the rules framed by and under the provisions of this Act;
(9) 'Country of origin' signifies, as appropriate, the refugee's country of nationality, or, if he has no nationality, his country of former habitual residence.

5. *Basic Principles for the Treatment of Refugees*

In the application of this Act due regard shall be had to the following principles:

(a) A refugee shall neither be expelled nor returned to the frontiers of territories where his life or freedom would be threatened.
(b) A refugee shall not be discriminated against on the basis of his race, religion or nationality;
(c) A refugee shall have the right to receive fair and due treatment by the officials of the Government or its agencies who are engaged in relief and assistance work for the refugees;
(d) As far as practicable, the principle of family unity shall be preserved and due consideration shall be given to refugee women and children.

6. *Meaning of refugee*

Option A

Subject to the provisions of this section a person shall be regarded as a refugee if:

(a) owing to a well-founded fear of being persecuted or prosecuted for reasons of race, religion, nationality, sex, membership of a particular

group or political opinion, he is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or

(b) not having a nationality and being outside the country, of his former habitual residence, he is unable or, owing to a well-founded fear of being persecuted or prosecuted for reasons of race, religion, membership of a particular social group or political opinion is unwilling to return to it; or

(c) owing to external aggression, occupation, foreign domination, internal conflicts, massive violation of human rights or other events seriously disrupting public order in either part or whole of his country of origin, he is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin; or

(d) he has been considered a refugee under any other law in force at the time of commencement of this Act.

Option B

The term 'Refugee' shall mean a person who owing to a well-founded fear of being persecuted or prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it.

7. *Declaration of class of persons as refugees*

(1) Notwithstanding anything above, the Refugee Committee may declare a class of persons under clauses (a), (b), (c) or (d) of section 6 to be refugees and may at any time amend or revoke such declaration; provided that no such amendment or revocation shall affect the right of any asylum seeker or any other person who is a member of the class of persons concerned and who entered this country before the date of such amendment or revocation, to continue to be regarded as a refugee for the purposes of this Act.

(2) The Refugee Committee shall cause any declaration in terms of this section, and any amendment or revocation thereof, to be publicized in a manner as it considers will best ensure that it is brought to the attention of authorized officers and persons to whom it relates.

8. *Persons not regarded as refugees*

A person shall not be regarded a refugee for the purposes of this Act if:

(a) he is alleged to have-committed a crime against peace and security of mankind, a war crime or a crime against humanity, regardless of the time it was committed; or

(b) he is alleged to have committed a serious non-political crime outside this country prior to his admission to this country as a refugee.

9. *Persons who shall cease to be refugees*

A person shall cease to be a refugee for the purposes of this Act if:

(a) he voluntarily re-avails himself of the protection of the country of his nationality; or
(b) having lost his nationality, he voluntarily re-acquires it; or
(c) he becomes a citizen of this country or acquires the nationality of some other country and enjoys the protection of the country of his new nationality; or
(d) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist; provided that the provisions of this clause shall not apply to a person who satisfies the Refugee Committee that he has compelling reasons, arising out of previous persecution, for refusing to avail himself or so to return as the case may be; or
(e) he is alleged to have committed a serious non-political crime outside this country after his admission into this country as a refugee.

RIGHTS AND OBLIGATIONS

10. *Rights of Refugees*

Option A

The rights of refugees stipulated by International Conventions to which this State is a party and those customarily recognized by States will be respected and guaranteed as far as practicable is possible.

Option B

Every refugee, for the time he stays within this country shall have the right,

(a) to fair and due treatment, without discrimination as to race, religion, sex or political opinion, or country of origin;
(b) to receive the same treatment as is generally accorded to aliens relating to
    (i) movable and immovable property, other similar rights pertaining thereto, and also to leases and other contracts relating to movable and immovable property;
    (ii) education, other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and

charges, provided, however, he is accorded the same treatment as is accorded to nationals with respect to elementary education;

(iii) the right to transfer assets held and declared by a refugee at the time of his admittance into the country, subject to the laws and regulations;

(iv) the right to engage in agriculture, industry, handicrafts and commerce and establish commercial and industrial companies in accordance with applicable laws and regulations;

(c) have the same right as nationals of this country with respect to practising their religion and the religions education of their children;

(d) to have free access to courts of law, including legal assistance and exemption from *cautio judicatum solvi.*

11. *Obligations of refugees*

(1) Every refugee shall conform to the laws of this country.

(2) A refugee shall not engage in activities which may endanger the State security, harm public interests or disrupt public order.

(3) A refugee is prohibited from engaging in activities contrary to the principles of the United Nations in particular from undertaking any political activities within the territory of this country against any country including his country of origin.

12. *Personal status*

(1) The personal status of a refugee shall be governed by the law of the country of his nationality or domicile or by the law of the country of his residence.

(2) Rights acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by this country, subject to compliance, if this be necessary, with the formalities required by the law of this country, provided that the right in question is one which would have been recognized by the law of this State had he not become a refugee.

13. *Exemption from exceptional measures*

Option A

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, this country shall/may not apply such measures to a refugee who is a national of the said State solely on account of such nationality.

Option B

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, this country shall in appropriate cases, grant exemptions in favour of such refugees.

14. *Provisional measures*
Nothing in this Act shall prevent the Government, in time of armed conflict or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security, in the case of a particular person, pending a determination by the authority concerned that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

15. *Industrial property and artistic rights*
In respect of the protection of industrial property, such as inventions, patents, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded the same protection as is accorded to nationals of this country.

16. *Right of association*
As regards the right of association refugees lawfully staying in the territory of this country shall/may be accorded the most favourable treatment accorded to aliens, in the same circumstances.

17. *Liberal professions*
Refugees who hold degrees or diplomas recognized by the competent authorities of this country and are desirous of practising a liberal profession, shall be accorded treatment as favourable as possible as is accorded to aliens generally in the same circumstances.

18. *Rationing*
Where a rationing system exists, which regulates the general distribution of essential commodities in short supply, refugees shall be accorded the same treatment as practicable possible as is accorded to nationals/aliens.

19. *Housing*
As regards housing, refugees shall be accorded treatment as favourable and/or as practicable as possible, as is accorded to aliens generally in the same circumstances.

20. *Identity cards*
An identity card shall be issued to any person recognized as a refugee in accordance with sections 6 and 7 of this Act.

21. *Travel documents*
A refugee lawfully staying in this country shall be issued travel documents for the purpose of travel outside the territory of this country unless compelling reasons of national security or public order otherwise require.

22. *Fiscal charges*
No duties, charges or taxes of any description whatsoever, shall be imposed on refugees, other or higher than those which are levied on nationals in similar situations.

23. *Transfer of acquired assets*
Favourable consideration may be accorded to an application of a refugee for permission to transfer assets which he has acquired by lawful means during his stay in this country.

24. *Families of refugees*
(1) The members of the family of a refugee shall be permitted to enter this country and, subject to the provisions of this Act, shall be entitled to remain herein as long as the refugee is permitted to remain, and necessary documents be issued to them.
(2) Where a member of the family of a refugee within this country ceases to be a member of such family by reason of marriage, attaining the age of majority or the cessation of dependence upon the refugee, he shall be permitted to continue to remain in this country subject to the relevant laws and regulations.
(3) Upon the death of a refugee, or upon his divorce from any spouse, every person who, immediately before such death or divorce was within this country as the member of the family of such a refugee, shall be permitted to continue to remain and regularize his status in accordance with the provisions of this Act or any other applicable law.
(4) Nothing in this section shall prevent a member of the family of a refugee, or a person who has, in terms of sub-sections (2) and (3), been permitted to continue to remain in this country from himself applying for recognition and protection as a refugee under the provisions of this Act.

ORGANIZATIONAL ARRANGEMENTS

25. In order to implement the provisions of this Act, the Government shall establish or identify, [by notification in the Official Gazette]

Option A

(1) A [Division/Bureau/Department/Unit] to receive and consider applications for refugee status and to make decisions; and
(2) A *quasi*-judicial Authority vested with the power to revise or review the above decisions and to make final orders thereon.

Option B

(1) A Refugee Committee as the principal executive organ; and
(2) an appellate authority to be known as the Refugee Appellate Authority.

26. *Composition of Refugee Committee.* The Refugee Committee shall consist of the following members, namely:
(a) a high-ranking official designated by the Minister-in-charge of refugee affairs in the Government who shall be its Chairman; and
(b) such number of other officials from the immigration social welfare, law and justice and other relevant departments.

27. *Functions of the Refugee Committee.* The functions of the Refugee Committee shall include:
(1) to designate such officials as may be necessary to receive and consider applications for refugee status and to grant (or refuse) asylum seekers refugee status according to the relevant provisions of this Act;
(2) to supervise the observance of the refugees rights and duties as stipulated in this Act;
(3) to propose refugee policy and make appropriate proposals and recommendations to the Government concerning the refugee matters; and
(4) to coordinate the activities or policies of the various Government ministries and departments relating to refugees.

28. *Consideration of Applications by the Refugee Committee*
The Refugee Committee shall consider every application referred to it in terms of Article 27 within a reasonable time (sixty days) of the application being so referred. It may, within that period of time make such inquiry or investigation as the Committee may consider necessary.

29. *Withdrawal of refugee status*
(1) if at any time the Refugees Committee considers that there are reasonable grounds for believing that a person who has been recognized as a refugee for the purposes of this Act, should not have been recognized on account of such person having made his application for recognition based on fraud, false and deliberate misrepresentation or any other abusive grounds, the Committee shall cause a written notice

to be served upon the person whose status as a refugee is under reconsideration,

(a) informing such person of the fact that his status as a refugee is to be reconsidered; and

(b) inviting such person to make written representation to the Committee within a period of fourteen days from the date of service of the notice, regarding his status as a refugee.

(2) The Committee shall consider every written representation made before it and where appropriate the views of the representative of the UNHCR and, may cause such inquiry or investigation to be made as it thinks necessary.

(3) Upon receipt of the report on the inquiry or investigation and after giving an opportunity to the person against whom proceedings are taken, the Refugee Committee may withdraw the recognition of the person concerned as a refugee, and shall cause the person concerned to be notified of the decision in the matter.

(4) Any person who is aggrieved by the decision of the Refugee Committee withdrawing his recognition as a refugee may, within fourteen days of being notified of such withdrawal, appeal to the Refugees Appellate Authority.

(5) If a decision is taken to withdraw the status of refugee he should be given an opportunity to remove himself from this country or to get his status regularized under any other law of this country.

30. *Expulsion of refugees*

(1) The Refugee Committee may order expulsion of any refugee in accordance with relevant laws and procedures if it considers it to be necessary or desirable on grounds of national security or public order.

(2) Before making an order in terms of subsection (1), the Refugee Committee shall cause a written notice to be secured upon every refugee whom it intends to expel and affording him the right to make a representation to the Committee.

(3) Before ordering expulsion of any refugee under sub-section (1) the representative of the UNHCR shall be informed.

APPELLATE AUTHORITY

31. *Refugee Appellate Authority*

The Government may, by notification in the Official Gazette, establish with effect from such date as it may specify an appellate authority to be known as the Refugee Appellate Authority.

32. *Composition of the Refugee Appellate Authority*

The Refugee Appellate Authority shall consist of

(a) an eminent person preferably a jurist (judge of the Supreme Court) who shall be its President; and
(b) four other members who shall have adequate knowledge or experience of dealing with matters relating to immigration, foreign affairs and national security.

33. *Jurisdiction of the Refugees Appellate Authority*
(1) The Refugee Appellate Authority shall have exclusive jurisdiction over all matters arising out of the application, interpretation and implementation of the provisions of this Act.
(2) Any asylum seeker or, as the case may be, any refugee aggrieved by any order made by the Refugee Committee in respect of sections 29 and 30 may appeal to the Refugee Appellate Authority within fourteen days from the date of the order;

provided that the Refugee Appellate Authority may enter appeal after the expiry of the stipulated period if it is satisfied that there was justifiable cause for not filing it within that period.

34. *Power to make rules and disposal of appeals*
The Refugee Appellate Authority shall determine its own rules of procedure relating to matters referred to it. In so far as possible the Refugee Appellate Authority shall dispose of an appeal made before it within a period of sixty days.

35. *Finality of orders*
Every order of the Refugee Appellate Authority shall be final.

36. *Rules and Regulations*
The Government may adopt such rulings as are required or are necessary or expedient to give effect to the provision of this Act.

20. Document DOHA/95/3 contains a "Proposed legal framework for the establishment of a safety zone for displaced persons in their country of origin", formulated by the Secretariat on the basis of the Thirteen Principles adopted by the Committee at its Twenty-eighth Session held at Nairobi in 1989 (reproduced in 3 AsYIL at pp. 265-6). The text of the "Proposed legal framework", the commentary which precedes it, and a table of examples of safety zones established by the United Nations, are reproduced below.

. . .

8. *Introduction*

People have been uprooted by persecution, conflict and famine in all ages. What is unique at the present time is the massive scale of such movements.

The world's refugee population is estimated to be 17 million, [*footnote:* E\CN.4\1992\23, para 5] while the displaced people, largely women and children, who abandon their homes in search of food and water. Armed conflict, forced relocation. communal violence, natural and ecological disasters, systematic violation of human rights, as well as traditionally recognized sources of persecution combine to produce these massive involuntary movements within and outside state borders. There is nothing to suggest that this trend will be reversed in the immediate future.

9. The problems faced by internally displaced persons are to be seen in the larger context of the post-cold war period in which long suppressed ethnic and religious conflicts have been unleashed in many parts of the world. At the same time, there is a greater willingness on the part of the international community to address these problems and to try and develop for internally displaced persons standards and mechanisms comparable to those that assist and protect refugees. [*footnote:* There is adequate legal protection provided to refugees by virtue of the 1951 Convention and the 1967 Protocol, the 1959 OAU Convention, the 1984 Cartagena Declaration as well as the 1966 Bangkok Principles]

10. The crisis of internally displaced persons from the perspective of the international community is that they fall within domestic jurisdiction and are, therefore, not covered by the protection normally accorded to those who cross international borders and become refugees. International responses to emergencies involving them have been taken up by agencies like UNHCR, UNICEF or the ICRC, but in the absence of a clear mandate and an international body with special responsibilities for the protection of the internally displaced, the international response has been *ad hoc* in the appointment by the Secretary-General in 1991 of an Emergency Relief Coordinator to improve the provision of relief and assistance to those caught up in humanitarian emergencies. [*footnote:* In 1991, the Commission on Human Rights addressed the protection dimension of internal displacement (Res 1991 25).]

11. Principles of existing law: Human rights and humanitarian law may be seen as the principal sources of existing protection for internally displaced persons; along with refugee law, they also may be the foundation for articulating a basis for further protection. While these bodies of law are conceptually distinct, they have influenced and informed each other and also contributed to a general corpus of laws capable of application to the problems experienced by the internally displaced.

12. Unlike refugee law, which largely applies only when a border is crossed, or humanitarian law, which applies to situations of armed conflict, human rights law proclaims broad guarantees for fundamental rights of all human

beings. The International Bill of Human Rights, composed of (a) Universal Declaration of Human Rights; (b) International Covenant of Economic, Social and Cultural Rights; and (c) International Covenant on Civil and Political Rights, represents the basic body of human rights law, recognizes the inherent dignity and equality of all human beings and sets a standard for achievement of their rights. Although human rights law provides a basis for protection and assistance for internally displaced persons, it does not directly address some of the situations affecting the internally displaced, such as forcible displacement and access to humanitarian assistance.

13. Since the UN has established protected areas of Safe Zones in time of armed conflicts such as in Cambodia, Bosnia, Rwanda, Somalia, the AALCC's study on the question has concentrated on the legal concept of a Safety Zone for internally displaced persons in armed conflict and on formulating basic principles. The Committee has been focusing on legal aspects of the following issues:

1. The circumstances under which a Safety Zone could be established.
2. Whether international organizations should be entrusted with the responsibility of the management of a Safety Zone?
3. The status of the Safety Zone.

14. *The formulation of a legal framework for the establishment of a Safety Zone for displaced persons*

The AALCC in co-operation with the UNHCR has formulated "A Legal Framework for the Establishment of a Safety Zone for Displaced Persons in their country of origin" in order to incorporate basic principles agreed upon in international humanitarian laws and the decisions of international organizations. As is shown in the attached document, the framework is divided in seven parts, namely (1) the aim of establishing a Safety Zone; (2) conditions of establishment; (3) supervision and management; (4) duties of the Government and the conflicting parties concerned; (5) rights and duties of the displaced persons in a safety zone; (6) protection of the officials of the international organizations who manage the safety zone; (7) closure of the safety zone.

15. *The legal aspects of these issues*

The answers to some aspects of the three issues raised by the Committee are found in the framework.

(1) The circumstances under which a Safety Zone could be established.

A Safety Zone shall be established only when a considerable number of displaced persons arises as a result of armed conflicts or civil wars, and when their life and property are threatened as a consequence. Mass voluntary exodus or forced displacement of tens of thousands of people from their places of residence will be necessary conditions for the establishment of a Safety Zone.

The Safety Zone shall be established only by the decision of the Security Council of the United Nations with the consent of the Government concerned and of the parties to the conflict. The Security Council must judge the conflict as a threat to the peace or a mass violation of human rights. Both the Government and the conflicting party should regard the measures as taken for the protection of the life and property of the civilians by international organizations. They must admit those actions as being neutral in character. The establishment of a Safety Zone is a form of humanitarian measure by the UN. The action will not violate the sovereignty of the state concerned. It will not affect nor threaten the territorial integrity of the State.

(2) Whether neutral bodies like International Organizations should be entrusted with the responsibility for the management of the Safety Zone?

The Safety Zone should be placed under the supervision of the UN as it is established by the decision of the Security Council. The Security Council should designate an international organization to manage the Safety Zone. The designated international organization like UNHCR or ICRC should be responsible for the supply of shelter, food, medical care and other essential items of basic civic amenities for internally displaced persons. It will co-operate with other international organizations like WFO, WFP, WHO, UNICEF etc. and Member States for the implementation of its work.

The Safety Zone should be protected by security forces to keep off armed attacks by the conflicting parties. The arrangement must be done by the Security Council.

3. The Status of the Safety Zone

The Safety Zone should be an integral part of the country. However, due to armed conflicts, actual administrative power of the state is restricted and must be supplemented by management by a designated international organization.

The area surrounding a Safety Zone should be demilitarized. The armed forces of both conflicting parties should be withdrawn from the area so that the Safety Zone should be immune from hostile activities.

16. Proposed Legal Framework for the Establishment of a Safety Zone for Displaced Persons in their Country of Origin

1. *The aim of establishing a Safety Zone*

(1) to protect the life and property of displaced persons in their country of origin from consequences of armed conflicts, by placing them in a UN protected area;
(2) to prevent the exodus of refugees to neighbouring countries;
(3) to realize the principle of 'burden-sharing' in the assistance of displaced persons;

(4) to develop the ideas of the Geneva Convention for the Protection of War Victims (1949) and the Protocol (1977).

2. *Conditions*

(1) The Safety Zone shall be established when a considerable number of displaced persons arises as a result of armed conflicts or civil wars, and their lives and property are threatened as a consequence.

(2) The Safety Zone shall be established by decision of the Security Council of the United Nations with the consent of the Government concerned and of the parties to the conflict.

(3) An agreement should be signed between the UN and the Government concerned, or among the UN and conflicting parties in case of the lack of unified government, to secure a specified geographical area for the Safety Zone.

(4) The area should be demilitarized and be immune from hostile activities. The armed forces of the State and the conflicting parties should be withdrawn from the area.

(5) The establishment of the Safety Zone should not violate the sovereignty of the State concerned. It should not threaten the territorial integrity of the State.

3. *Supervision and the management*

(1) The Safety Zone should be placed under the supervision of the UN.

(2) The Security Council will designate an international organization to manage the Safety Zone.

(3) An UN designated international organization should be responsible for the supply of shelter, food, medical care and other essential items of basic civic amenities for the displaced persons. It will co-operate with other international organizations and Member States for the implementation of its work.

(4) The UN may provide a multinational security force, if necessary and practicable, for the protection of the displaced persons in the Safety Zone.

(5) The cost of the maintenance of the Safety Zone should be met by voluntary contributions of:

a. Member States of the UN;

b. UN Agencies;

c. Inter-Governmental and Non-Governmental Organizations.

4. *Duties of the Government and the conflicting parties concerned*

(1) The Government of the State and the conflicting parties should have the duty to co-operate with the competent international organizations to establish and to manage the Safety Zone.

(2) The lives and property of displaced persons should be guaranteed and be strictly protected by the Government and of the conflicting parties concerned.

5. *Rights and Duties of Displaced Persons*
   (1) The right of displaced persons to receive fair and just treatment by the officials who supervise and manage the Safety Zone should be respected.
   (2) The rights and duties of displaced persons in the Safety Zone should, as far as practicable and possible, be in accordance with those of a national of the State.

6. *Protection of the officials of International Organizations*

The Safety and Security of the officials of the international organizations engaged in supervising and managing the Safety Zone should be guaranteed by both the Government of the State and the conflicting parties.

7. *Closure of the Safety Zone*

The establishment of a Safety Zone should be of a temporary nature, and the Zone should be closed by the decision of the Security Council. In case of closure all the displaced persons should be returned safely to their permanent places of residence.

Some Examples of the Establishment of a 'Safety Zone' by the UN in armed conflicts

Country	**Year**	**Name of the protected zone**	**Location**	**Management**	**Strength of military forces involved**	**Remarks**
Cambodia	1992	UN Protected Area	West of the country	UN Transitional Authority in Cambodia	22,000	To promote repatriation and resettlement of refugees and displaced persons
Bosnia & Herzegovina	1992	Safe Area	Sarajewo, Srebrenica and four other cities	UN Protection Force, NATO Forces also involved	24,000	To protect Safe Areas and Activities of the UNHCR
Rwanda	1994	Protected Zone	South-West of the country	France, afterward UN	1,400 6,000	To accommodate mainly displaced persons who lost government protection

21. Introducing the item, the *Deputy Secretary-General*, outlined the history of the Committee's consideration of the topics under discussion and the main elements in the two documents before the Committee. He invited Member Governments to examine the documents and communicate their views to the Secretariat.

22. The *Representative of the United Nations High Commissioner for Refugees (UNHCR)* observed that, of the present refugee population of some 24 million, the overwhelming majority were found in the territories of the Member States of AALCC. The majority of the world's internally displaced persons were also to be found in those countries. It was therefore imperative for the countries of the region to continue to develop a common approach to the humanitarian problems of such persons. Observing that the countries of the region differed in domestic norms and legal traditions in regard to refugees, making it virtually impossible to produce a single text of refugee protection legislation acceptable to all countries, he said he favoured the development of 'model' legislation for the purpose, which could be adapted to specific domestic or regional legal systems or concerns. Noting that, while some Members of AALCC were parties to the 1951 Convention on the Status of Refugees, others, mostly from Asia were not, he proposed the formation of a Working Group composed of the AALCC Secretariat, the office of UNHCR and representatives of the Member States of AALCC, including both States that were parties to the 1951 Convention and those that were not.

23. The *President* said that it was the responsibility of the international community to deal appropriately with the growing problems of refugees and internally displaced persons. In his opinion those problems should not be dealt with *ad hoc*, but on the basis of an international convention. He suggested that the further steps needed on the legal aspects could be discussed within the proposed Working Group.

24. The delegate of *Egypt* said that in his opinion the codification of legal norms in connection with safety zones was premature, since there did not appear to be a common legal content in practices relating to them. For the time being, the idea should be "to bring safety to people, rather than people to safety". As a first step, there should be a comprehensive study of the reasons and origins of conflicts, including their deep cultural dimensions. AALCC could undertake such a study, concentrating on regional aspects, and seeking collaboration with regional organizations which were well equipped to deal with the problems. Meanwhile, UNHCR, the International Committee of the Red Cross (ICRC) and non-governmental organizations should work out

operational guidelines based on past practices which took into account the particular characteristics of each conflict, working therefore at the functional, rather than the legal level.

25. The delegate of *Uganda* proposed that the Committee go into the topic of refugees more deeply, and attempt to address fundamental questions such as the causes of refugee flows. Model legislation was, in his view, a temporary measure. What was needed was that African and Asian States should develop what he termed a "culture of accommodation and reconciliation".

26. The delegate of *China* said that the model legislation presented by the Secretariat would provide a suitable basis for the enactment of domestic legislation for AALCC Member States, and would be an appropriate supplement to the 1951 Refugees Convention and its 1967 Protocol. The provisions of the model legislation seemed to reflect the position and practice of the majority of Asian and African States, and their incorporation into national laws would exert a positive influence for the solution of issues concerning refugees among those States. As to the issue of the establishment of safety zones for displaced persons in their country of origin, it raised questions not merely of the legal status of such zones, but also problems connected with the jurisdiction and sovereignty of that country. Accordingly, in his view, this topic would need more profound and cautious study. Greater emphasis should be placed on resolving problems related to refugees. He believed that permissible, timely and effective measures should be taken to facilitate the return of refugees to their country of origin, in safety and dignity.

27. The delegate of *Ghana* found that the proposal for model legislation on the status and treatment of refugees was complementary to that concerning the establishment of safety zones for displaced persons in their countries of origin. As to the latter topic many problems remained unresolved, including conditions for the establishment of safety zones, and implications regarding the sovereignty of the State concerned, and urged that work on it should continue.

28. The delegate of *Iran* found that many concerns of Asian and African countries regarding the problems of refugees had been taken into account in preparation of the Secretariat draft model legislation, which he found commendable.

29. The delegate of *Sudan* said that in studying safety zones, careful consideration should be given to whose consent was needed as a condition for the establishment of such a zone, especially where a decision by the Security

Council would have to be invoked. He would prefer it if any such Security Council decision were to be invoked after consultation among the parties concerned.

30. The delegate of *Japan* considered it essential that States become parties to the 1951 Convention relating to the Status of Refugees, and its 1967 Protocol, and take appropriate domestic legislative measures to implement those agreements. In his view, the draft model legislation would be more helpful if it included more detailed provisions concerning refugee recognition procedures. He said that the comparatively wide definition of the term 'refugee' in the Secretariat draft might not be realistic, as it might lead to additional burdens for neighbouring countries which provided protection and assistance to refugees, along with UNHCR. As to safety zones, he observed that although the proposed legal framework envisaged that establishment of a safety zone was subject to the consent and co-operation of the government, and of the conflicting parties, such consent would not be easy to obtain. Further study was required of the establishment of a safety zone *without* the consent of the government and the conflicting parties concerned. Account should be taken of the difficulties arising from the establishment of the safety zone controlled and supervised by foreign authorities in the territory of a sovereign State.

31. The delegate of *Jordan* said that, in his view, AALCC should support the Arab stand concerning resolving the problems of refugees, displaced persons and deportees. The delegate of *India* said that, as each State was faced by special problems concerning refugees, not one model of legislation could provide answers for all of them. The Secretariat's draft was before the Committee, and it was for governments now to give their preliminary views concerning it. No purpose would be served by submitting the draft to a Working Group at this stage. As to the concept of safety zones, he declared that it had neither legal sanction nor moral appeal. The delegate of *Sri Lanka* emphasized that the creation of a safety zone had to be subject to the consent of the State in whose territory the activity was being carried out, and could not be imposed on that State. In his view, dealing with internally displaced persons was within the mandates of UNHCR and ICRC. What was needed was additional funding for those organizations so as to make their initiatives more effective, not new mechanisms.

32. The delegate of *Syria* said that the item "Status and treatment of refugees" had always been distinct from the item "Deportation of Palestinians in violation of international law", and that the Committee should continue to deal

with the items separately. The *President* confirmed that the two subjects were distinct from each other, and would be dealt with separately.

Decision

33. In the decision (*Report*, pp. 98-9) which followed discussion of the item (*Report*, pp. 64-74), the Committee, *inter alia*:

". . .

1. APPEALS to Member States to take all possible measures to eradicate the causes and conditions which force people to leave their countries and cause them to suffer unbounded misery;

2. URGES Member States who have not already done so to ratify or accede to the Convention relating to the Status of Refugees, 1951 and the 1967 Protocol thereto;

3. COMMENDS the Secretariat for having prepared the Model Legislation on the Status and Treatment of Refugees in co-operation with the Office of the UNHCR.

4. ALSO COMMENDS the Secretariat for revising the Nairobi Principles of 1989 and for formulating the "Legal Framework for the Establishment of a Safety Zone for Displaced Persons in their Country of Origin".

5. REQUESTS the Member Governments to send in their observations and comments on (i) the questionnaire sent by the Secretary-General in March 1994 and (ii) Model Legislation set out in Doc. No. AALCC/XXXIV/Doha/95 2;

6. ALSO REQUESTS the Member Governments to send their comments and observations on the proposed Legal Framework for the Establishment of Safety Zone for Displaced Persons in their Country of origin prepared by the Secretariat;

7. DIRECTS the Secretariat to study further the concept of Safety Zone in light of the comments received;

. . . "

3.2. Law of international rivers

34. The Committee had before it a document entitled "Law of International Rivers" prepared by the Secretariat (Doc. No. AALCC/XXXIV/DOHA/95/ 4) containing a brief history of the Committee's consideration of the item (on which see 4 AsYIL p. 354), as well as a summary of the work of the International Law Commission at its Forty-sixth Session on the topic "The law of the non-navigational uses of international watercourses" (including draft articles adopted on a second reading), and the resolution adopted by the Sixth (Legal) Committee of the General Assembly at its Forty-ninth Session in 1994.

35. The delegate of *Bangladesh* said that the upstream withdrawal of water from the Ganges, which was an international river, at Farakka, in total disregard of the fundamental and ancient rights of the lower riparian State, had not only adversely affected his country's climate, flora and fauna but also the lives of over 40 million of its nationals, particularly in the northern region. He also noted his country's efforts toward a regional approach to solution of the problem, and stressed that there was an urgent need for appropriate rules of international law on international rivers which would protect the rights of countries placed in a position similar to Bangladesh. He emphasized that the issue was of crucial importance to his country, and urged AALCC to address it.

36. The delegate of *Pakistan* said that his country, as a lower riparian State shared the concerns expressed by the delegate of Bangladesh, and supported his views on the item under discussion.

37. In the decision adopted (*Report*, p. 100) following discussion of the item (*Report*, pp. 39, 47, 57), the Committee, *inter alia*:

> ". . .
>
> 2. COMMENDS the adoption of the draft articles on the Non-Navigational uses of International Watercourses as adopted by the International Law Commission on second reading;
>
> 3. URGES the Member States to consider utilizing the Secretariat studies and commentaries while furnishing comments on the draft articles before July 1996 to the United Nations;
>
> 4. REQUESTS the United Nations General Assembly to consider adopting a Convention on the Law of the Non-Navigational Uses of International Water-

courses on the basis of the draft article adopted by the International Law Commission and the comment made thereon by the Member States;

. . ."

3.3. Law of the sea

38. The Committee had before it two documents prepared by the Secretariat: "Law of the Sea: Report of the Secretary-General" (Doc. No. AALCC/XXXIV/DOHA/95/5); and "Law of the Sea: Report on the work of the Assembly of the International Seabed Authority during the second part of its First Session held in Kingston, Jamaica, 27 February-17 March 1995" (Doc. NO. AALCC/XXXIV/DOHA/95/5A).

39. Document No. DOHA/95/5 contains a summary of the provisions of the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*, adopted on 29 July 1994 (UN doc. A/48/L.60 and add. 1), and in parts IV and V of the Report, concise descriptions of the work of the final session of the Preparatory Commission (August, 1994), and the *first part* of the First Session of the Assembly of the International Seabed Authority convened by the Secretary-General of the United Nations in accordance with paragraph 3 of article 308 of the UN Convention on the Law of the Sea, on 16 November 1994 to coincide with the entry into force of the Convention; as well as decisions taken at the *ad hoc* Meeting of States Parties to the UN Convention on the Law of the Sea on 22 November 1994. Parts IV and V of the document are reproduced below.

Law of the Sea: report of the Secretary-General (AALCC)

". . .

IV. *Meeting of the International Seabed Authority*

43. The final session of the PREPCOM was held in New York in August 1994. The PREPCOM had two substantive items in its agenda, viz. the implementation of Resolution II of UNCLOS and had then considered matters arising from the imminent entry into force of the United Nations Convention on the Law of the Sea. On the question of implementation of Resolution II of the UNCLOS the PREPCOM, *inter alia,* considered (i) the relinquishment of pioneer areas; (ii) compliance with understanding on the fulfilment of

obligations by the registered pioneer investor, Inter-Oceanmetal Organization (IOM) and its certifying States; (iii) waiver of the annual fixed fee and the obligation of the three registered pioneer investors and of their certifying States to carry out stage I of the exploration work; and (iv) report of the Group of Technical Experts to the General Committee on the application of the Government of the Republic of Korea for registration as a pioneer investor.

44. On matters arising from the imminent entry into force of the Convention the issues before the PREPCOM included (i) consideration of the provisional agenda for the first session of the Assembly and of the Council of the Authority; (ii) consideration of the budget for the first financial period of the International Seabed Authority; (iii) date of the first session of the Assembly of the Authority; (iv) proposed meeting of the States parties to the Convention relating to the practical arrangements for the establishment of the International Tribunal for the Law of the Sea; and (v) final report of the PREPCOM to the Assembly of the International Seabed Authority at its first session.

45. It may be recalled that paragraph 3 of Article 308 of the Convention on the Law of the Sea provides that the Assembly of the Authority shall meet on the date of entry into force of the Convention and shall elect the Council of the Authority, which is the executive organ of the Authority comprising 36 members. Accordingly, the Secretary-General of the United Nations, H.E. Mr. Boutros-Boutros Ghali, opened the first session of the International Seabed Authority in Kingston on 16 November 1994 to coincide with the coming into force of the Convention. The three-day session which was largely ceremonial in nature decided to convene a resumed session between 27 February and 17 March 1995.

. . .

V. *Ad hoc meetings of States Parties to the United Nations Convention on the Law of the Sea*

46. On the question of establishment of the International Tribunal for the Law of the Sea the PREPCOM at its session held in August 1994 had recommended that the Secretary-General convene an *ad hoc* meeting of the States Parties to the Convention soon after the entry into force of the Convention. Following this recommendation of the PREPCOM relating to the establishment of the International Tribunal an *ad hoc* meeting of States Parties to the Convention on the Law of the Sea was convened in New York in November 1994. That meeting of the States Parties to the Convention decided on 22 November 1994 *inter alia* that: (i) there will be a deferment of the first election of the members of the Tribunal. The date of the first election of the

members will be 1 August 1996. This will be a one-time deferment; (ii) nominations would open on 16 May 1995. A State in the process of becoming a party to the Convention may nominate candidates. Such nominations shall remain provisional and shall not be included in the list to be circulated by the Secretary-General of the United Nations in accordance with Article 4(2) of Annex VI, unless the State concerned has deposited its instrument of ratification or accession before 1 July 1996; (iii) nominations will close on 17 June 1996; (iv) the list of the candidates will be circulated by the Secretary-General on 5 July 1996; (v) subject to the above decisions all procedures relating to the election of the members of the Tribunal as provided for in the Convention shall apply; and (vi) no changes shall be made to this schedule unless the States Parties agree by consensus."

40. Document DOHA/95/5A, describes the *second part* of the First Session of the Assembly of the International Seabed Authority (Kingston, 27 February - 17 March 1995), during which difficult questions concerning the composition of the Council were addressed. The document is reproduced below in its entirety.

REPORT OF THE WORK OF THE ASSEMBLY OF THE INTERNATIONAL SEABED AUTHORITY DURING THE SECOND PART OF ITS FIRST SESSION HELD IN KINGSTON, JAMAICA, 27 FEBRUARY - 17 MARCH 1995

1. The second part of the first session of the Assembly of the International Seabed Authority was convened in Kingston, Jamaica, from 27 February to 17 March 1995. The first part, which was primarily of a ceremonial nature, had earlier been held in Kingston from 16 to 18 November 1994 to commemorate the establishment of the International Seabed Authority, which coincided with the entry into force of the United Nations Convention on the Law of the Sea. The third part of the first session is scheduled to be held in Kingston from 7 to 18 August 1995.

The Assembly was attended by delegates from 87 Member States and one entity, the European Community. 15 States and 5 International Organizations took part in the Sessions as Observers and the AALCC was represented by the Assistant Secretary General, Mr. ASGHAR DASTMALCHI.

2. Mr. HANS CORELL, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, acting as the Temporary President of the Assembly, opened the second part of the first session. During the initial meeting the Assembly decided to commence its work under the draft rules of

procedure recommended by the preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea until such time as it adopted its own rules of procedure.

The Assembly had on its agenda the election of the President, the adoption of its rules or procedure, election of members of the Council of the Authority, the nomination and election of the Secretary-General of Authority and election of members of its other major organs (the Legal and Technical Committee and the Finance Committee). Consideration of the final report of the preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea, the organization of a Secretary, a provisional budget and other financial matters, and the transfer of property and records from the Preparatory Commission to the Authority were also on the agenda of the meeting.

3. The Assembly elected by acclamation, Dr. HASJIM DJALAL (Indonesia) as President of its first session. He had served as Chairman of the Special Commission of the Preparatory Commission and had been actively involved in several aspects of negotiations of the *Convention on the Law of the Sea.* Mr. DJALAL also served recently as Chairman of the 'Group of 77' developing countries.

On the election of Vice-Presidents for the Assembly, discussions took place on whether regional groups as well as special interest groups should be represented on the Bureau of the Assembly. While some believed that burdening the Assembly with a large Bureau representing regional and special interests would detract from its efficiency, a few speakers said that the special interest groups recognized by the *Convention on the Law of the Sea* must be represented. Finally, four Vice-Presidents – Algeria, Mexico, Russian Federation and Canada – were elected by acclamation from the list of candidates drawn up by the President of the Assembly after consultations with regional Groups. The four Vice-Presidents represent all the regional groups except Asia, which holds the presidency.

4. The Assembly, following informal consultations held by the President, appointed the following 10 members to a Working Group assigned to develop the Assembly's rules of procedure: Egypt (Chairman), Germany, United Kingdom, Russian Federation, Poland, Brazil, Jamaica, Republic of Korea, Indonesia and Senegal.

The Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea had recommended to the Assembly for its consideration draft rules of procedure contained in document LOS/PCN/WP20/Rev.3. In addition, and in the light of the adoption by the United Nations General Assembly on 28 July 1994 of the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,* the Secretariat had prepared document ISBA A WP.1 containing

suggestions for revising the draft rules of procedure of the Assembly issued by the Preparatory Commission taking into account the provisions of the Agreement. At the request of the Assembly, the Secretariat then prepared a working paper by merging these two documents, and the new document (ISBA/A/WP.2) was then considered by the Working Group. Following discussions, the working group submitted to the Assembly an updated version of the draft rules of procedure (document ASBA/A/WP.3).

5. According to the draft rules of procedure the Assembly shall meet in regular annual sessions, unless it decides otherwise (rule 1). Provisions also exist for the holding of special sessions, with an advance notice of at least 30 days (rule 4). Meetings shall be held at the seat of the Authority, unless the Assembly chooses otherwise (rule 5). At the beginning of each session the Assembly shall appoint a nine-member Credentials Committee and elect a President and four Vice-Presidents in a way that would ensure the representative character of the Bureau (rules 24, 28). The Bureau shall meet periodically throughout the session to review the process in the Assembly's work and make recommendations (rule 35).

Regarding the Secretariat of the Authority, which will be headed by the Secretary-General, the draft provides that it would receive, translate, reproduce and distribute documents, reports and resolutions of the Assembly and its subsidiary organs and generally perform all other work required by the Assembly (rule 17).

The meetings of the Assembly will be held in public, unless the Assembly decides that exceptional circumstances require that the meeting be held in private (rule 43). As a general rule, meetings of the subsidiary organs shall be held in private. The President may declare a meeting open when at least a majority of the members of the Assembly are present (rule 45).

Each member of the Assembly shall have one vote, and participation in decision-making by inter-governmental organizations shall be in accordance with Annex IX of the Convention of the Law of the Sea (rule 60). As a general rule, decision-making should be by consensus (rule 61). However, if all efforts to reach consensus fail, decision on procedural questions shall be taken by a majority of members present and voting, provided that such a majority includes a majority of the members participating in the session.

The Assembly's decisions on matters within the Council's competence shall be based on the latter's recommendations. The Assembly shall take financial and budgetary decisions based on the Finance Committee's recommendations (rule 61).

The draft provides that all elections will be held by secret ballot (rule 72). When a person or member of the Assembly is to be elected and no candidate obtains, in the first ballot, the votes of a majority of the members of the Assembly present and voting, a second ballot restricted to the two candidates

receiving the largest number of votes shall be taken (rule 73). If in the second ballot the votes are equally divided, the President shall decide between the candidates by drawing lots. The rules also provide guidelines for other voting scenarios.

Concerning the establishment and composition of subsidiary organs, the rules state that account shall be taken of the principle of equitable geographical distribution and of special interests and the need for members to be qualified and competent in the relevant technical questions dealt with by those organs (rule 77). Any Assembly member not a member of a subsidiary organ shall have the right to explain its views to that organ when a matter affecting that member is being discussed (rule 78).

Regarding the suspension of voting rights, any member of the Assembly in arrears in the payment of financial contributions to the Authority shall have no vote if the amount owed equals or exceeds its assessed contributions for the preceding two years (rule 80). The Assembly may permit those members to vote if it is satisfied that the failure to pay is due to conditions beyond the member's control.

Members of the Authority which have been found by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, to have 'grossly and persistently' violated the provisions of part XI of the Convention (which deals with the seabed mining regime) may be suspended from the exercise of the rights and privileges of membership by the Assembly upon the recommendation of the Council (rule 81).

The rules stated that the following may participate as observers in the Assembly: Sates and entities referred to in Article 305 of the Convention which are not members of the Authority; national liberation movements which in their respective regions are recognized by the Organization of African Unity or the League of Arab States; observers to the Third United Nations Conference on the Law of the Sea who signed the Final Act of the Conference and are not referred to in article 305; the United Nations and its specialized agencies; the International Atomic Energy Assembly; and non-governmental organizations with which the Secretary-General has entered into arrangements or which have been invited by the Assembly (rule 82). Observers are not entitled to participate in the taking of decisions.

Regarding the composition of the 36-member Council, the rules reproduce the five categories of membership outlined in paragraph 15 of the annex to the *Agreement relating to the Implementation of Part XI of the Convention* (rule 84).

Before electing the members of the Council, the Assembly shall establish lists of countries fulfilling the criteria for membership in each category (rule 83). States fulfilling criteria in more than one category will be included in all relevant groups, but may only be proposed for election by one group and shall represent only that group in voting. Each group shall nominate only as many

candidates as the number of seats. The principle of rotation shall apply. as a general rule, when the number of candidates exceeds the number of seats.

The rules state that the Secretary-General of the Authority shall be elected for four years by the Assembly from among candidates proposed by the Council; he may be re-elected (rule 88). The Assembly, on the recommendation of the Council, shall elect the 15 members of the Governing Board of the enterprise - the seabed mining arm of the Authority (rule 89). The Director-General of the Enterprise shall be elected by the Assembly, upon the recommendation of the Council and the nomination of the Governing Board (rule 92). The Director-general, who will not be a member of that Board, shall hold office for a fixed term not exceeding five years, and may be re-elected.

Regarding administrative and budgetary questions, the rules of procedure state that the annual budget of the Authority shall be approved by the Assembly following its submission by the Council, taking into account the recommendations of the Finance Committee (rule 93). No resolution involving expenditure shall be recommended unless it is accompanied by an estimate of expenditures prepared by the Secretary-General and any recommendations of the Finance Committee (rule 94).

The Assembly shall assess the contributions of members of the Authority to the administrative budget in accordance with an agreed scale of assessments based upon the scale used for the regular budget of the United Nations, until the Authority shall have sufficient income from other sources to meet its administrative expenses (rule 95).

On the Finance Committee, the rules state that the Assembly shall elect 15 members to the Committee from candidates nominated by States Parties, taking into account equitable geographical representation and special interests (rule 96). The first four categories of Council members shall be represented on the Finance Committee by at least one member and until the Authority remains dependent on assessed contributions, the five largest contributors to the budget will also be represented on the Committee. Members of the Finance Committee will be elected for five-year terms.

6. The Assembly in the course of discussing the draft rules of procedure recognized the difficulties and lack of agreement on the provision or Rule 85 on the terms of office of some Council members, which calls for determining by lot which Council members will serve an initial two-year term. But finally the Assembly adopted the Rules of Procedure, and decided that the determination of the members of the Council whose terms were to expire at the end of two years, should as a general rule, be left to the agreement of each group. If no agreement could be reached, the members whose terms were to expire at the end of two years should be chosen by lot to be drawn by the President of the Assembly immediately after first election.

7. The complexity of determining the criteria for membership in the various groups of States in the Council, caused great difficulties and consumed almost the entire time of the session. According to the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,* the Council shall consist of 36 members from five groups of States.

Group I would have four members from among those parties which, during the last five years, have either consumed more that 2 per cent in value terms of total world consumption or have had net imports of more than 2 per cent in value terms of total world imports of the commodities produced from the categories of minerals for be derived from the international seabed area – the 'Area'. Of those four, one should be the State with the largest economy in Eastern Europe in terms of gross domestic product on the date of the entry into force of the Convention.

Group II would have four members from among the eight parties which have made the largest investment in preparation for and in the conduct of activities in the Area.

Group III would consist of four State parties which, on the basis of production in areas under their jurisdiction, are major net exporters of the categories of minerals to be derived from the Area, including at least two developing States whose exports of such minerals have a substantial bearing upon their economies.

Group IV would have six members from among developing States, representing special interests. The special interests to be represented would include those States with large populations, land-locked or geographically disadvantaged States, island States, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals and least developed States.

The last group, group V, would have 18 members elected on the basis of equitable geographical distribution, provided that each geographical region shall have at least one member elected. For this purpose, the geographical regions shall be Africa, Asia, Eastern Europe, Latin America and the Caribbean, and the Western Europe and Other States.

8. Different formulae and several criteria for membership in the Council were discussed in the Assembly. The President of the Assembly was asked to draw up a list of countries for applying for membership in the Council under specific interest categories defined by the *Convention* and the *Agreement,* to enable those States to start negotiating on nomination for the Council. As the number of potential candidates in each interest group exceeded the number of seats allotted for that group, so it seemed necessary that the principle of rotation, as mentioned in the Agreement, should be applied as a general rule. States in those groups should themselves determine how to apply the principle. There was no doubt that a State could be nominated from only one group, even if that State met the criteria for membership in more than one group.

9. During the debate, it appeared that the question of equitable geographical distribution of seats in the Council would be problematic. Many speakers said that the Council should provide both for representation among interest groups and for equitable geographic distribution. As both are important, so it should be determined which countries fell into which categories, with countries specified for more that one category being listed in only one. It was argued by some developing countries that equitable geographical distribution must be an essential part of the final make-up of the Council. Out of the 36 members of the Council, the appropriate representation for each regional group had to be determined. To some degree the allocation in Group I(a), II(b) and III(c) would affect membership in Group IV(d) and V(e).

10. In determining the appropriate representation in the Council there were divergent views, whether distribution of Council seats among the regional groups should be in proportion to their membership in the Assembly of the Authority or other criteria including the 'so-called North-South balance', the principle of fairness and flexibility to be considered economic weightage in determining seat allocations which reflected the financial contributions of States to the Authority, the seriousness of a member's candidacy and the idea that distribution of seats should be forward-looking with no reference to past formulae, were discussed extensively.

11. The representative of Sudan proposed that by dividing the number of members in the Assembly 139 by the 36 Council seats, each Council seat would represent 3.86 Assembly members. By dividing the number of Member States in each region by that figure he calculated the following formula for proportional representation. Africa, which has 44 members, would have 11.39 seats; Asia with 38 members, should have 9.84 seats; Eastern Europe, with 13 member States, should have 3.76 seats; Latin America and the Caribbean with 23 members, should get 5.96 seats, and the Western European and other States, with 21 members, would get 5.44 seats. Several representatives of developing countries explained that the *Convention* and the *Agreement relating to the Implementation of Part XI,* provided clear guidance on how Council seats were to be allocated. The letter of those agreements should be adhered to. If the Assembly pursued the concept of 'weighted voting', it would be opening up a Pandora's box and, in effect, going backwards.

12. The industrialized countries of the West believed that the principle of equitable geographical representation on the Council should not be based on proportionality, in other words, simply the number of members in each group. Although their group was small, it included powerful consumer and producer interests that should be adequately reflected on the Council. So the need to seek a proper balance between industrialized countries on the one hand and developing countries, on the other, should be adhered to. The aim was that the

majority of the South would not be in a position to automatically achieve a decision with a two-thirds majority, only to be vetoed in one of the chambers on the Council. The North-South "balance would also prevent a minority from constantly blocking decisions". Balance works both ways.

13. The representative of France speaking on behalf of the Western European and other States Group, said that he agreed that the Assembly must abide by the letter of the *Agreement* which spoke of equitable geographical distribution. His Group was not trying to go back in the *Agreement,* but the last category of members described in the *Agreement* dealt specifically with equitable geographical distribution. There was no case for equitable geographical distribution in the Council to be based solely on the number of States in each regional group. Proportionality was not the sole parameter for applying the criterion of equitable geographical distribution. Criteria other than numbers should be used. The councils of other international organs, such as the Food and Agriculture Organization (FAO), had strong powers; therefore, the Council of the International Seabed Authority would have a very important character. The Assembly should take a closer look at the positive arguments in favour of the two ideas of his Group. The first was the question of partnership in the exploitation of the deep seabed to ensure that products were extracted and distributed. Partners should be equal and the notion of blocs should not be emphasized excessively. If that were to be the case, then the industrialized countries, which were in a minority, would not be keen to accede to the Convention. If the industrialized group were relegated to a minority, they would be frustrated.

The Assembly should base its decisions on real, international, objective criteria. For example, in the United Nations Development Programme (UNDP) and the United Nations Children's Fund (UNICEF), the Western European States had the largest number of seats. Those were facts that had a meaning in the capitals of those States. The Western States would prefer to avoid the use of blocs and a North-South dichotomy. No party should be put in an uncomfortable, minority position.

14. Other representatives of the industrialized countries while endorsing the views put forward by France indicated that the composition of the Council should inspire confidence in those capitals where ratification of the Convention was still being considered. The application of equity in the present context required a political decision, taking into account a multitude of factors to achieve a balanced co-operation, not confrontation. It was mentioned that the Authority was not a political international organization like others, it was an economic body, dedicated to exploiting resources of the deep seabed. States such as the Western States should be able to bring to bear their economic weight in the work of the Authority. There was reference to other bodies in the United Nations system, in which proportionality had not been the basis for

determining equitable geographical distribution. The UNDP and the UNICEF governing bodies had distributions that were consistent with the desire of the Western States, to ensure the positive engagement of the Industrialized Countries to develop the technology for the mining of the deep seabed. If those States failed to undertake the work, there would be no benefits to be shared.

In essence, it was mentioned, there were only two groups of States: those which undertook activities and those that did not do so. Partnership between both the groups was needed. The West had not put forward exaggerated proposals, because the Convention had made clear that there could be at least nine Council members from developed countries.

15. The developing countries, surprised by the new demands of the industrialized States, reminded them that the North was not in danger of being swamped in the Council, in a manner similar to that of the United Nations Conference on Trade and Development. In fact, many industrialized developing countries such as the Republic of Korea which were neither in the South nor in the North, were likely to be major operators in the International Seabed Area. There could not be a rigid dichotomy between two supposed categories of countries in respect of deep seabed mining. Many so-called developing countries were more industrialized than countries in Europe and they were in fact in a state of an 'in-betweenity'. Many speakers from 'the Group of 77' were of view that the Assembly should adhere to the clear formula dealing with the composition of the Council as contained in the Agreement and not consider the criteria for determining Council membership. It should work with the legal text before it, remembering that it was enacting legislation of a permanent nature. States that might lack the capability or technology today might develop those abilities in the future, and their interest should not be frustrated today.

16. The representative of Brazil proposed that the Assembly should try to evaluate the real interest of States and regions by assessing their presence at the current session, the very first of the International Seabed Authority. Based on the list of participants, there was a total of 75 States taking active part in the Assembly: 23 from Africa, 19 from Asia, 15 from Latin America and the Caribbean, 15 from Western European and other States, and 3 from Eastern Europe. That was a ratio of 2.08 Assembly members to each Council seat. Based on a division by 2.08, therefore, 11 Council seats should be allotted to Africa, 9 to Asia, 7 to Latin America and the Caribbean, 7 to Western Europe and other States, and 1 to Eastern Europe, for a total of 35 seats. The one seat outstanding in the Council could be allocated later.

17. Some developing countries recalled that they had made several concessions to ensure universal participation in the Convention by recognizing the interests

of nations that had not ratified the Convention. Equitable geographical representation was necessary to secure co-operation by all sides. No group of States should be allowed to exercise hegemony over the Council. The comparison of the Authority with other international organizations was odious as the Authority was different from other bodies. The Council should not elevate the interests of some groups above those of others to such an extent that they would dominate the Council at the expense of those which had ratified the Convention. The Authority was to govern the Common Heritage of Mankind, which was why all interests must be kept in balance.

18. The President, after several lengthy discussions, proposed a formula for allocating the seats in the Council in respect of each regional group. His proposal took into account the concept of proportionality and the need to maintain a balance in the representation in the Council. The President made the following suggestion:

(a) The distribution of seats among the geographical regions for this election of the members of the Council shall be without prejudice to the distribution of seats among the geographical regions for the next election of the members of the Council, which shall have to take into account the new membership of the Authority at that time;
(b) Representation by a member in the present Council of a particular group of States referred to in paragraph 15(a) to (d) of section 3 of the Annex to the *Agreement,* whether or not the principle of rotation is applied in that Group, shall be without prejudice to its representing other groups of States in the future; at the same time, the representation by members in the present Council of the various groups of States does not preclude the rights of other States to represent these groups in the future.
(c) The general balance of seats established in the present Council between developing and developed countries shall be maintained in the future.

The President's proposal regarding the allocation of seats in the Council was discussed extensively in meetings of regional groups. Since no unanimous decision emerged from the discussions of the proposal it was not possible to reach consensus on this issue.

19. The meetings of the group of States referred to in paragraph 15(a) of the Agreement, "States parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent in value terms of total world consumption or have had net imports of more than 2 per cent in value terms of total world imports of the commodities produced from the categories of minerals to be derived from the Area", known as Group A or group 1 were attended by Belgium, Brazil, China, France, Germany, Italy, Japan, Republic of Korea, Russian Federation, all be United Kingdom and United States (Coordinator). The Group met to discuss the nomination of four

States meeting the criteria contained in that paragraph for election to the Council.

The Group decided not to recommend a list of States meeting the criteria of paragraph 15(a). Members of the Group held different views on the interpretation of the criteria. Some expressed the view that the criteria require that a consuming or importing State must meet the 2 per cent threshold for the value of each of the four minerals (manganese, copper, cobalt and nickel). Others expressed the view that the criteria require that States meet the threshold for the combined value of all four minerals. Without prejudice to the resolution of this question in regard to future elections, the Group decided to take a flexible and inclusive approach to its deliberations.

The Group took note of the fact that the United States, the United Kingdom, the Russian Federation, Japan, Germany, Belgium and Italy informed the President of the Assembly of their interest in being nominated for election to the Council. Belgium, Italy and Germany decided to withdraw their request to be nominated by the Group on the understanding that, without prejudice to the interests of other States meeting the criteria in paragraph 15(a), the application of the principle of rotation in future elections would provide opportunities for their election to the Council as representatives of the Group.

The Group agreed to the nomination of Japan, the Russian Federation, the United Kingdom and the United States. The Group agreed to nominate the Russian Federation and the United States for election for a two-year term and to nominate Japan and the United Kingdom for a four-year term. It should be noted that the acceptance by the Russian Federation and the United States of two-year terms is on the understanding that the Assembly will affirm, at the time of election, that paragraph 15(a) requires the inclusion of one State from the Eastern European region having the largest economy in that region in terms of gross domestic product and of the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product, should those States seek re-election to the Council under that paragraph, and upon the understanding that the principle of rotation would apply to Japan and the United Kingdom after four years.

20. After the initial meetings of the group of States referred to in paragraph 15(b), or Group II "which have made the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals", known as Group B or Group II, the coordinator of the Group, Canada, informed the President that after considering information provided by delegations with respect to investments by their States in preparation for and in the conduct of activities in the Area, the delegations unanimously agreed that the following States constitute the eight largest investors for purposes of paragraph 15(b): China, France, Germany (Coordinator), India, Japan, the Netherlands, Russian Federation and the United States.

The Group of the eight largest investors proceeded to discuss the nomination of the four candidates to represent the Group in the Council. Five States, China, France, Germany, India and the Netherlands, declared their intention to represent the Group in the Council. In consultations between the interested States as well as between them and the coordinators it was not possible to reach agreement on which four States shall be nominated. It was also not possible to decide which of the candidates will be nominated to serve on the Council for a two-year term or for a four-year term. Also unresolved was the question of the application of the principle of rotation.

21. The meetings of the group of States referred to in paragraph 15(c), or Group III, "States parties which, on the basis of production in areas under their jurisdiction, are major net exporters of the categories of minerals to be derived from the Area", known as Group C, were attended by Australia (Coordinator), Brazil, Canada, China, Chile, Cuba, France, Gabon, India, Indonesia, Mauritania, Mexico, Namibia, Philippines, Poland, Russian Federation, South Africa, United States and Zambia.

Six countries from this Group - Australia, Chile, Gabon, Indonesia, Poland, and Zambia - presented their candidatures for the four seats available in this Group. Although some delegations have indicated a willingness to be flexible, at this stage - and particularly in the light of the fact that other issues still need to be resolved - there has been no final agreement on the four candidates.

It was also agreed that the principle of rotation should apply to future elections of candidates for the Group, and that this should be interpreted as meaning that there is a general expectation that members of this Group will move on and off the Council. This would not preclude the possibility of individual countries making informal arrangements between themselves, such as reciprocal support arrangements. Nor would it preclude countries having consecutive terms on the Council, if this was agreed by the Group.

It was further agreed that at this stage it was not appropriate to make a definitive list of countries eligible for election to the Group. However, some delegations suggested that this was something which should be considered in the future. Reference was made to an informal understanding reached at the Third United Nations Conference on the Law of the Sea that the Group should reflect an equal balance between developing and developed countries. But some delegations challenged it and questioned the logic and reason to maintain an equal balance between the North and the South in this group exclusively. The issue of which candidates would be nominated for a two-year term and which would be nominated for a four-year term was not discussed.

22. The meetings of the group of States referred to in paragraph 15(d), of the *Agreement* "developing States parties, shall represent special interests. The special interests to be represented shall include those States with large

populations, States which are land-locked or geographically disadvantaged, island States, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals and least developed States", known as Group D, were attended by Argentina, Bangladesh, Brazil, Burkina Faso, Cameroon, China, Costa Rica, Cuba, Egypt, Fiji, Gabon, India, Indonesia (Coordinator), Jamaica, Kuwait, Malaysia, Malta, Marshall Islands, Mauritania, Mexico, Mozambique, Myanmar, Nigeria, Oman, Paraguay, Philippines, Republic of Korea, Sudan, Trinidad and Tobago, United Arab Emirates, Viet Nam and Zambia. Several States declared their intention to seek nomination to the Council within this Group, and other States also expressed their interest in being nominated in either Group D or Group E. In view of the discussions taking place in other Groups, no definitive list of candidates of this croup has been drawn up.

23. The President, at the concluding meeting expressed the hope that during the third part of the first session of the International Seabed Authority which would be held in Kingston from to 18 August 1995 the matter of the election of the Council members would be resolved. Some delegates, however, could not conceal their dissatisfaction, as no business was accomplished, except the adoption of the Rules of Procedure".

41. Discussion of this item *(Report, pp. 60-64)* was followed by adoption of an essentially procedural decision *(Report, pp. 101-102).*

3.4. Deportation of Palestinians in violation of international law, particularly the Geneva Convention of 1949 and the massive immigration and settlement of Jews in the occupied territories

42. The Committee had before it a *Report of the Secretary-General* of AALCC bearing the title of the item (Doc. No. AALCC/XXXIV/DOHA/95/6), *inter alia,* outlining the evolution of the 'Middle East Peace Process', and inviting guidance from members as to the future work of the Secretariat, as follows:

". . .

9. It may be recalled that on September 13, 1993 the PLO-Chairman YASSER ARAFAT and the Israeli Prime Minister H.E. Mr. ITZHAK RABIN had signed the Declaration of Principles on Interim Self-Government Arrangements. [*footnote:* A/48/48-6-S/26560, Annex. Also in *International Legal Materials,* Vol. (1993) p. 1525.] The Agreement opened the way for Palestinian self-rule providing for Israel's withdrawal and the establishment of interim Palestinian self-government, first, in the Gaza Strip and in the West Bank town of

Jericho, and later in the rest of the West Bank. The Declaration of Principles deferred the issue of Israeli settlements to the permanent status negotiations which are to begin no later than the beginning of the third year after the start of the interim period. In the meantime Israel retains legal and administrative authority over these settlements and their inhabitants and is responsible for their security. Under the terms of the *Declaration of Principles on Interim Self-Government Arrangements* the permanent status negotiations on the issue of Jerusalem are to start not later than the beginning of the third year of the interim period. Other sensitive issues such as the return of Palestinian refugees, future boundaries and the status of Palestine are envisaged for further negotiations which are to commence no later than two years after the Israeli withdrawal marks the beginning of a five year interim period at the end of which it is expected that the negotiations will lead to permanent settlement implementing Security Council Resolutions 242 (1969) and 338. It may be stated that the Committee at its Thirty-third Session *inter alia* welcomed the signing of the above mentioned accord of September 1993.

10. Thereafter on 4 May 1994 the Palestine Liberation Organization and the State of Israel signed an *Agreement on the Gaza Strip and the Jericho Area.* The accord, concluded in Cairo *inter alia* provided for Israel's withdrawal from the Gaza Strip and Jericho Area and granted Palestinians a measure of self-government. The accord of 4 May 1994 grants Palestinians control over their internal political arrangements and daily affairs including elections, tax collection and the adoption and enforcement of legislation. The Agreement marks the beginning of the five year interim period for negotiating a settlement of the permanent Status of the occupied territory. Since then a twenty four member Palestinian authority vested with legislative and executive power has been established. A Palestinian police force has also been established.

11. The Middle East Peace Conference convened at Madrid on 31 October 1991 and the mutual recognition between the State of Israel and the Palestine Liberation Organization, as the representatives of the Palestinian people was welcomed by the General Assembly by its resolution 46/58 when it expressed its full support for the "achievements of the peace process thus far, in particular the *Declaration of Principles on Interim Self-Government Arrangements* signed by Israel and the PLO and the Agreement between Israel and Jordan on the common Agenda. The General Assembly went on to term these developments an important initial step in achieving a comprehensive, just, and lasting peace in the Middle East and urged all parties to implement the agreements reached.

12. The General Assembly at its Forty-eighth Session in its resolution on the Peaceful Settlement of the Question of Palestine *inter alia* stressed the significance of upcoming negotiations for the final settlement and reaffirmed

the following principles for the achievement of a final settlement and comprehensive peace:

(a) The realization of the legitimate national rights of the Palestinian people; primarily the right to self-determination;
(b) The withdrawal of Israel from Palestinian territory occupied since 1967, including Jerusalem, and from other occupied Arab territories;
(c) Guaranteeing arrangements for peace and security of all States in the region including those named in Resolution 181 (III) of 29 November 1947, within secure and internationally recognized boundaries;
(d) Resolving the problem of Palestinian refugees in conformity with the General Assembly resolution 194 (III) of 11 December 1948 and subsequent relevant resolutions;
(e) Resolving the problem of the Israeli Settlements which are illegal and an obstacle to peace, in conformity with relevant United Nations resolutions; and
(f) Guaranteeing freedom of access to Holy Places, religious buildings and sites. [*footnote:* See General Assembly Resolution 48/158-D on the Peaceful Settlement of the Question of Palestine.]

Similar resolutions were also adopted at the Forty-ninth Session of the General Assembly. [*footnote:* See General Assembly Resolutions 49/62-D of 14 December 1994 and 49/88 of 16 December 1994.]

13. It may be mentioned that the resolution entitled 'Middle East Peace Process' was sponsored by more than 100 States and received an unprecedented majority and that the resolution on *intifadah* which the General Assembly had adopted every year since its Forty-third Session (1988) was deferred.

14. Against this backdrop to the progress of work since the item was first placed on the work programme of the Secretariat, the recent developments and the resolution of the Committee at its Thirty-third Session, the Committee may wish to consider whether the Secretariat has exhaustively dealt with the Legal Aspects of the item referred to it and determine the course of future work of the Secretariat on the matter.

43. The Committee, having heard statements by, *inter alia,* the delegate of *Palestine*, the *Deputy Secretary-General* and the delegate of *Syria* (*Report*, pp. 70, 71-2, and 73) adopted, after accepting amendments proposed by *Sudan* and *Japan*, a decision directing the Secretariat "to continue to monitor the developments in the occupied territories from the viewpoint of relevant legal aspects . . . ."

4. MATTERS OF COMMON CONCERN HAVING LEGAL IMPLICATIONS

4.1. The United Nations Conference on Environment and Development: follow-up

44. The Committee had before it a document prepared by the Secretariat under the title of the item, containing notes on the outcome of the first Conference of the Parties to the *Convention on Biological Diversity* held in the Bahamas from 28 November to 9 December 1994; on progress made following adoption of the *UN Convention to Combat Desertification*, which had been signed at Paris on 14 and 15 October 1994 by some 87 States and one regional organization; the convening of a Global Conference on Sustainable Development of Small Island Developing States at Bridgetown, and the Barbados Declaration and Programme of Action adopted at the Conference; and the Second Session of the UN Commission on Sustainable Development, held in New York in May 1994. The *Assistant Secretary-General*, introducing the item, observed that on two crucial issues, viz. the financial mechanism and transfer of technology to the developing countries, much remained to be done. He outlined the Secretariat's work programme, but noted that due to financial constraints AALCC staff had been unable to attend environmental meetings. He said that the document contained no information on the *Framework Convention on Climate Change*, since the first meeting of the Conference of the Parties to that Convention was to convene in Berlin from 28 March to 7 April 1995, leaving no time for preparation of a note prior to the present Session.

45. The delegate of the *Philippines*, reporting on the first meeting of the Conference of the Parties to the *Framework Convention on Climate Change* which had recently concluded its work in Berlin, said that the substantive matters taken up at the Conference were (1) adequacy of commitments, (2) joint implementation, (3) the "financial mechanism", and (4) transfer of technology.

46. The delegate of *Sudan* observed that several countries had made reservations when ratifying the *Convention on Biological Diversity*, and requested the AALCC Secretariat to examine those reservations, and advise Members concerning their effects.

47. The delegate of *China* recalled that there had been consensus on the principle that resources and the environment should be harmonized with

economic development, so as to bring society and economy on to a path of sustainable growth. In his view, however, the efforts made by the developed countries in particular, had fallen short of what was required for the effective implementation of the decisions of the UN Conference on Environment and Development. He expressed the hope that they would meet their original commitments to provide new and additional financial resources, and to transfer environmentally sound technologies under the most favourable terms to the developing countries. He recalled that the *Framework Convention on Climate Change* had as its objective "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (Article 2); stipulated that developed country Parties should take the lead in combating climate change and its adverse effects; and forged a global partnership whereby developed countries had the responsibility to provide financial and technological assistance to the developing countries to help the latter to comply with their obligations. He found that one year after the entry into force of the Convention the developed countries had not adequately complied with their obligations, and had failed to honour their commitment either to provide new and additional financial resources, or to transfer technology.

48. Continuing, the delegate of *China* said that in his view, under the Convention's provisions on "joint implementation" (Article 4, sub-paragraphs 2(a) and (d)), participation by a developing country Party in pilot joint implementation activity was to be on a voluntary basis. He stressed that "joint implementation" could only be regarded as an auxiliary means by which developed countries could implement the Convention, their main commitment being to reduce the emission of greenhouse gases by adopting domestic measures. Developed country Parties could not shift their emission limitation commitments on to developing country Parties by means of joint implementation, nor could the funds and technology applied by a developed country in such projects be interpreted as being in part fulfilment of its general commitment under the Convention to transfer funds and technology. "Joint implementation" was a means whereby developing country Parties could assist a developed country Party to implement the Convention. Such projects were to be carried out voluntarily, on the basis of equality and with full respect for the sovereignty of the developing countries.

49. As to the *Convention on Biological Diversity*, the delegate of *China* called on the developed country Parties to fulfil their commitment to provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of measures to implement the Conven-

tion. In his view, the amount of the funds required should be decided by the Conference of the Parties, and should be raised by the future financial mechanism in accordance with its replenishment procedure. As an interim financial mechanism, GEF should set the ratio of funds to be used to implement the Convention and take immediate measures to ensure that such funds would be obtained.

50. Concluding, the delegate of *China* expressed the view that the *UN Convention to Combat Desertification* would facilitate international co-operation in this field. Observing that rights and obligations under the Convention were uneven, in that the developed country Parties did not undertake substantive obligations under it to provide financial resources, he appealed to all countries and to the developed countries in particular, to fulfil the commitments made in this regard at the Rio Summit, because only by that means could desertification be halted.

51. The delegate of *Republic of Korea* said that transfer of technology, either from the public or private domain should present no problems, although transfer from the latter could raise intellectual property issues. He suggested that AALCC might identify any problems associated with transfer of publicly-owned technology and prepare guidelines on the subject.

52. The delegate of *Kuwait* said that her Government had participated actively both in the Intergovernmental Negotiating Committee on Climate Change, and the recently concluded Berlin meeting of the Conference of the Parties to the *Framework Convention on Climate Change*. She recalled that the important issues addressed by her Government's delegation, had been the need for the Bureau of the Conference to include a representative of the developing oil-producing countries, to protect the interests of that small, vulnerable group; the adoption of protocols by consensus; that "joint implementation" should be carried out strictly between developed countries; and the inadequacy of measures taken by the developed countries to implement their obligations under the Convention.

53. The delegate of *Sri Lanka* said that the main cause of environmental degradation in the developed countries was the high level of consumption in the developed countries, while poverty, under-development and lack of resources caused such degradation among the developing countries. He stressed that, while protection of the environment might be the common responsibility of the international community as a whole, the developed countries had a particular responsibility to take corrective measures.

54. The delegate of *India* said that the UN Conference on Environment and Development had resulted in recognition of the concept of 'sustainable development', which brought together the concepts of economic development and environmental protection, and had laid the foundation for a global partnership in which all countries, developed and developing, had roles to play. He observed that it was difficult for the developing countries adequately to pursue enlightened environmental approaches in their programmes of development when protectionism was on the rise, the debt burden was increasing and the terms of trade deteriorating, resulting in reverse financial flows.

55. Continuing, the delegate of *India* said that environmental standards applicable in developed countries could have inappropriate and unwarranted social or economic costs if applied in developing countries, and that the formulation of 'harmonized' or 'global' environmental standards or their uniform application in the developing countries might not be feasible. Accordingly, in his view, development strategies undertaken in pursuance of 'sustainable development' were a matter for national decision-making, and the role of international co-operation should be to support and supplement such efforts, not to supplant them. The review of national policies or plans by external agencies, and the imposition of mandatory guidelines in sectors such as forestry or energy, would not be acceptable.

56. The delegate of *India* stressed that the integration of environmental concerns into economic development policies and programmes should be carried out without introducing any new form of conditionality in aid or development financing, and the principle should not be used as a pretext for erecting new trade barriers. It was also important that new and additional funding should be provided and should include multilateral funding, and that multilateral funding institutions or mechanisms should be administered democratically and not dominated by donor countries. Moreover, the provision of adequate funds would not, by itself suffice: the transfer of environmentally sound technologies to countries in need of them, should also be ensured.

Decision

57. Discussion of the item (*Report*, pp. 78-87) was followed by adoption of an essentially procedural decision (*Report*, p. 104).

4.2. United Nations Decade of International Law

58. The Committee had before it a document prepared by the Secretariat under the title of the item (Doc. No. AALCC/XXXIV/DOHA/95/8) which recounted the history of the item, and the various activities undertaken or promoted by AALCC in connection with it. The *Secretary-General*, introducing the item recalled that, since the Committee's Tokyo meeting, AALCC had contributed a report on its activities to the *Congress on Public International Law* held at UN headquarters in March 1995, and had organized seminars on the Status and Treatment of Refugees, the proposed International Criminal Court, and the Globalization and Harmonization of Commercial and Arbitration Laws. He said that a seminar on the Role and Work of the International Court of Justice was planned for September 1995, to commemorate its Fiftieth Anniversary.

59. The delegate of *Iran* said that it was imperative that all Members of AALCC endeavour to promote the objectives of the Decade and to facilitate successful implementation of its programmes which were directed at upholding the supremacy of law in international relations. He recalled that the proposal made by his delegation in the Sixth Committee of the General Assembly in 1992, to convene a Congress on Public International Law had received wide support, and had been successfully implemented in March 1995, attracting representatives of institutions, and experts in international law from all over the world. He emphasized the role of AALCC as a regional organization with responsibility for promoting the progressive development and codification of international law, and observed that the Committee was fulfilling its mandate *inter alia* through persuading Member States to give serious attention to the observance of the Decade, and assisting those Members who had not yet acceded to or ratified key multilateral conventions, to do so.

Decision

60. Discussion of the item (*Report*, pp. 87-90) was followed by adoption of an essentially procedural decision (*Report*, pp. 105-6).

4.3. 'Agenda for Peace'

61. The Committee had before it a document entitled 'Agenda for Peace: Convention on the Safety of United Nations and Associated Personnel' (Doc. No. AALCC/XXXIV/DOHA/95/9) prepared by the Secretariat, recounting the

history of consideration of the item by AALCC, and containing an overview of the work of the *Ad hoc Committee to elaborate an international convention dealing with the safety and security of United Nations and associated personnel*, with particular reference to responsibility for attacks on such personnel, established following initiatives taken by *New Zealand* and *Ukraine* during the 48th Session of the General Assembly in 1993 (Resolution 48/37, adopted 9 December 1993), and culminating in adoption of the *United Nations Convention on the Safety of United Nations and Associated Personnel* during the 49th Session of the General Assembly. The Secretariat's overview concludes with the "General Comments" reproduced below.

". . .

GENERAL COMMENTS

43. Over the last few years, there has been increasing involvement of the United Nations in dealing with crises and conflict situations. There are as many as 16 peace-keeping operations where the United Nations has deployed nearly 75,000 personnel both civilian and military. The number of violent attacks and commission of other types of crimes against these personnel have increased many-fold.

44. The *Convention on the Safety of United Nations and Associated Personnel* provides a useful legal framework.

45. The Convention would apply to any operation mandated by the United Nations whether it is peace-keeping or humanitarian. It would extend its coverage to the different categories of United Nations personnel, including military personnel, police personnel and civilian personnel. Such a broad coverage is in line with the increasing involvement of the United Nations in various kinds of operations. The involvement of non-governmental organizations and its personnel in any United Nations operations should be carefully executed.

46. It is the established practice to seek consent of the host State prior to the beginning of any United Nations operation in the concerned State. Problems, however, could arise where because of the circumstances, the host government may not be in full control of the situation. Similarly, whether the situation is one of an international character, or is non-international, armed conflict would also pose difficulties in obtaining such a consent.

47. The States which agree to send their military personnel to join the UN operation do it on a voluntary basis. The provisions of the United Nations

Charter impose no such obligation. It has been the practice of the United Nations to conclude bilateral agreements with the concerned states on the basis of status-of-forces agreements. Of late, it has been a model for concluding bilateral agreements for the deployment of civilian personnel as well. It is for consideration whether the personnel deployed pursuant to a mandated United Nations operation should remain under the command and control of the United Nations. While it is recognized that there is a certain distinction between the direct operations of the UN and UN authorized operations, recent events have shown that unilateral withdrawal of the military contingents by certain States put the entire United Nations operation in jeopardy. Such a situation would pose grave risks for the safety and security of other United Nations personnel engaged in that operation.

48. The main thrust of the Convention is to establish the duty of States to take all appropriate measures to ensure the safety and security of the United Nations personnel. The host state, in particular would assume the responsibility to protect United Nations personnel who are deployed in its territory from attacks or other acts of violence. The host State should give due respect to the international character of the United Nations operation, respect the privileges and immunities of the United Nations and of United Nations personnel, and take all necessary measures to ensure the safety and security of the personnel deployed to carry out that operation;

49. Article 105(l) of the United Nations Charter stipulates that "The organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes". Further, the *General Convention on the Privileges and Immunities of the United Nations,* approved by the General Assembly on 13 February 1946 and the *Convention on Privileges and Immunities of the Specialized Agencies* approved on 21 November 1947 elaborate provisions dealing with the privileges and immunities of the United Nations and the Specialized Agencies respectively. 'Status-of-forces' agreements incorporate relevant provisions from these Conventions and provide for certain privileges and immunities of the military and civilian personnel deployed in the United Nations operations. Further, as regards the civilian contractors and non-governmental organizations and their personnel who are engaged in United Nations operations through contractual or other arrangements, it may be pointed out that the Security Council in its resolution 868 of 29 September 1993, decided that the safety and security arrangements undertaken by the United Nations or the host country should extend to all persons engaged in operations authorized by the Security Council (A/Ac.242/1, para 12). A word of caution is necessary in this regard. Extension of privileges and immunities to such a wide category of people may open the door to its abuse. Identification of such personnel and keeping their track record will not be an easy thing, especially when they are engaged in

> humanitarian operations. If proper measures are not taken, there might exist a certain risk of undermining the rights of sovereign states. The host government may not agree to extend privileges and immunities to locally recruited employees, or to any non-governmental organizations whose credibility is questionable.
> . . . "

62. The delegate of *Japan* welcomed the adoption of the *Convention on the Safety of United Nations and Associated Personnel* as a step toward increased international co-operation in protecting both UN peacekeeping personnel and others involved in humanitarian activity, including the personnel of non-governmental organizations supporting the work of the United Nations; and in establishing a framework for the prosecution and punishment of those violating the law. He urged that a declaration by the Security Council or the General Assembly provided for in Article 1, sub-paragraph (c)(ii) of the Convention be utilized to ensure the applicability of the Convention to such personnel, emphasizing that it was of crucial importance that the co-operation of the host State in any such measures, be obtained.

63. Continuing, the delegate of *Japan* said that his Government had contributed $2.5 million to the Cambodia Mine Action Centre in March 1994. He said that his Government, convinced of the importance of such initiatives, would continue to support the current preparations for a review conference on the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons*, in order to restrict the use of anti-personnel mines and promote acceptance by the international community of obligations regarding mine clearance. He said his Government welcomed the "Supplement" to *An Agenda for Peace*, and expressed the hope that the principles set forth therein would be respected as being elements essential to the success of peace-keeping operations.

Decision

64. Discussion by the Committee (*Report*, pp. 90-92) was followed by an essentially procedural decision (*Report*, p. 107).

4.4. Trade Law: Progress Report concerning the Legislative Activities of the United Nations and Other International Organizations in the field of International Trade Law

65. The Committee had before it two documents prepared by the Secretariat: the first, with the title of the item, focussed on the activities of UNCITRAL, UNCTAD, UNIDO, and UNIDROIT (Doc. No. AALCC/ XXXIV/DOHA/ 95/10); and the second was the *Report on the International Seminar on Globalization and Harmonization of Commercial and Arbitration Laws*, held at New Delhi from 31 March-1 April 1995 (Doc. No. AALCC/XXXIV/ DOHA/95/10-A). The Committee also had before it two other documents prepared by the Secretariat: *Report of the Secretary-General on the Progress made by the Data Collection Unit* (Doc. No. AALCC/XXXIV/ DOHA/95/14) on the activities of the Committee's Data Collection Unit financed by the Republic of Korea; and *Progress Report on AALCC's Regional Centres for Arbitration*, on the work of arbitration centres located at Kuala Lumpur, Cairo and Lagos, and proposals for establishment of a regional arbitration centre in Teheran (Doc. No. AALCC/XXXIV/DOHA/ 95/15). A detailed report on the work of the Cairo Regional Arbitration Centre is included as part XII of the Committee's *Report* (pp. 109-126).

4.4.1. Trade Law: the New GATT Accord

66. The Committee had before it a document prepared by the Secretariat entitled "*The New GATT Accord: an overview with special reference to the World Trade Organization (WTO), trade-related investment measures (TRIMS) and trade-related aspects of intellectual property rights (TRIPS)*" (Doc. No. AALCC/XXXIV/DOHA/95/11).

Decision

67. The Committee, having considered together the Trade Law items referred to under heads 4.4 and 4.4.1 above (*Report*, pp. 75-8), adopted an essentially procedural decision (*Report*, p. 108).

CHRONICLE

CHRONICLE OF EVENTS AND INCIDENTS RELATING TO ASIA WITH RELEVANCE TO INTERNATIONAL LAW
July 1994-June 1995

Ko Swan Sik*
with contributions from WAN ARFAH HAMZAH (Kuala Lumpur) and KRIANGSAK KITTICHAISAREE (Bangkok/Washington D.C.)

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AIR TRAFFIC

Japan-US dispute on air cargo flight routes

The two countries failed to agree over a US request for new air cargo flight routes to Asia under the 1952 US-Japanese Air Transport Services Agreement. At the centre of the dispute are 'beyond rights', i.e. permission for US lines, particularly Federal Express Corp., to fly to third countries, particularly to FedEx's new transfer facility at Subic Bay in the Philippines, via Japanese cities.

The Japanese side turned down the request, classifying it as excessive. Japan insisted on prior amendment of the 1952 treaty because of its 'inequities'. It alleged it had been trying to renegotiate the treaty for twenty years but had been rebuffed by the US. Under the treaty three US airlines (among which FedEx) were given virtually unlimited rights to fly not only from the US to Japan, but also onward from Japan to other Asian countries. It was reported that United Airlines and Northwest Airlines got a third of their profit from routes that go through Japan. Japanese airlines, in return, had only limited rights to fly beyond the US. The Japanese position is that when it signed the treaty in 1952 it had just been freed from US occupation and was not in a good bargaining position. Furthermore, most air passengers were then Americans while nowadays most passengers flying between the US and Japan are Japanese, yet Japanese airlines still have only a 30% share of the traffic. In addition, because of the limited range of airplanes in those days, the American carriers needed to make a landing in Japan on their way to other Asian destinations. Besides, under the 1952 treaty Japanese airlines flying into the US only have onward rights from San Francisco. Japan should

like to scrap the restrictions on the places that can be served by either side and instead reach a deal on numbers of flights.

Apart from the revision of the 1952 treaty, Japan also held that the new FedEx routes would upset the air-cargo market balance in the Pacific region. FedEx's response was that Japanese carriers (such as Nippon Cargo Airlines) had a 5-to-1 advantage in weight of cargo shipped between Asia and the US. In retaliation of the Japanese refusal to grant the requested flight routes, the US thereupon started preparing sanctions on Japanese air cargo operations in the US.

Compared to the US-Japanese dispute on automobiles (*see:* International trade) the aviation case showed a reversal of roles: each side was here seeking a kind of solution which it found unacceptable in the automobile case. In the background of the dispute is the effort of the US to win 'open skies', i.e. the deregulation of air traffic, whereas Asian airlines fear that they would be unable to compete with US carriers which are in a better position to draw on their huge home market. (IHT 05, 16 and 21-06-95; FEER 08-06-95 p. 56)

Hong Kong-Australia dispute over passenger quota

Qantas Airways had asked the Hong Kong Supreme Court to undo a government decision of April 1995 limiting to 50 percent capacity the number of passengers that Qantas could pick up in Hong Kong on its onward flights to Bangkok and Singapore. It contended that its Bangkok and Singapore services were in compliance with current air-traffic agreements. Hong Kong argued that Qantas had abused a Hong Kong-Australia air-service agreement of 1991 by taking too many passengers on its onward flights within Asia. Australia responded to the Hong Kong restrictions by announcing that access of Cathay Pacific Airways to Australia would be put under review for the period after 30 June, whereupon Hong Kong threatened Qantas with a loss of Hong Kong landing rights. (IHT 16 and 22-06-95)

A settlement of the conflict was postponed when the two sides withdrew their threats of sanctions and agreed to review their mutual aviation permits by year-end. (IHT 27-06-95)

ALIENS

(*see also:* Immigration; Inter-state relations: general aspects at p. 435; Migrant workers)

Release of convicted spy in Iran

A German engineer who had been sentenced to death by an Iranian court after having been convicted of spying for Iraq during the 1980-1988 war, was pardoned and released after five years in prison. The release resulted from talks between German officials and the Iranian Foreign Minister during the latter's visit to Germany in mid-June 1994. (IHT 04-07-94)

Aliens barred from entry for foreign policy reasons

Thailand barred foreign activists from entering the country to attend human-rights conferences on Timor and Myanmar scheduled to coincide with the ASEAN Foreign Ministers' Conference in July 1994. (FEER 28-07-94 p. 23)

Deportation of undesired alien from Thailand

Thailand on 2 September 1994 detained and deported to Malaysia the (Malaysian) head of the Islamic sect 'Arqam', which was banned in Malaysia. (IHT 3/4-09-94) Upon arrival in Malaysia Mr. ABUYA ASHAARI MUHAMMAD was taken into police custody under the Malaysian Internal Security Act. (IHT 06-09-94)

Voting rights for aliens

The Japanese prime minister expressed support for the right of permanent foreign residents to vote in local elections. He said that since foreign residents live and pay taxes in Japan, they deserve to voice their opinion.

Meanwhile the Japanese Supreme Court ruled that the Constitution did not exclude the possibility of a right for foreign residents to vote in such elections. So far the Public Offices Election Law and the Local Government Law stipulate that only people of Japanese nationality are eligible to vote and run for office. (IHT 02-03-95)

Kazakhstan-Russia Treaty on the legal status of each other's citizens

The two countries concluded a treaty on 20 January 1995 on the legal status of citizens of one party "who reside permanently in the territory" of the other party.

The preamble refers to (1) the wish of the parties to offer their citizens who reside in the other party's territory a legal status "that is as close as possible to the legal status of the citizens of the other Party, in particular as regards civil, political, social, economic, labour, cultural and other rights", (2) the Kazakhstan-Russia Treaty on Friendship, Cooperation and Mutual Assistance of 25 May 1992 and (3) the Memorandum of 28 March 1994 on "basic principles for settling questions relating to the citizenship and legal status" of each other's citizens who reside in the territory of the other party.

The treaty, consisting of 16 articles, excludes simultaneous permanent residence in both countries for citizens of either party (Art. 1). The category of persons covered by the Treaty "shall enjoy the protection of the two Parties" (Art. 3 para. 2), and "shall enjoy the same rights and freedoms and be bound by the same obligations as citizens of the Party of residence" except various rights relating to political, representative, judicial and security functions (Art. 4). (UN doc. A/50/83)

Vietnamese in Germany

About 60,000 Vietnamese were living legally in Germany, among whom were the former 'boat people' who began arriving in West Germany in the early 1980s.

In the past decades possibly 100,000 Vietnamese were admitted by East Germany as students or contract workers. The arrangement terminated with German reunification, and the German government offered a bonus and free plane tickets home for those willing to go; more than 50,000 accepted the offer. However, at least 15,000 decided to stay, taking advantage of temporary residence permits valid for the duration of their contracts. Besides thousands slipped back to Germany as illegal aliens or as asylum seekers. Due to the tough new standards fewer than one percent would actually obtain asylum. The result was an estimated 40,000 illegal Vietnamese in Germany.

On 6 January 1995 the German and Vietnamese governments reached agreement, pledging early action on, inter alia, "Vietnamese citizens who stay in Germany without the legal right to do so". Germany promised to resume aid and provide more export-guarantees to German firms, and gave the green light to a Euro-Vietnamese cooperation agreement. This agreement called for "the orderly return of Vietnamese workers" about which different interpretations existed.

In April 1995 an agreement was reached between the two countries: Germany would provide $142 million in development aid and Vietnam would repatriate 40,000 Vietnamese over the next five years. (FEER 29-09-94 p. 30; 09-02-95 p. 28; IHT 12-01-95, 17/18-06-95)

Arrest of US citizen in China

A US citizen was arrested and detained in June 1995 when he entered the Chinese province of Xinjiang from Kazakhstan. The arrest took place for illegal entries made in 1994 and illegal activities during these stays. China refused to disclose the whereabouts of the detained person and the US accused China of denying US officials access to him as required under a relevant international agreement. (IHT 28, 29 and 30-06-95)

ARMS SALES AND SUPPLIES

US sale of combat aircraft to Asia

It was announced that Singapore was to buy 18 F-16 fighter aircraft from the US company Lockheed, to be delivered as of 1998.

The company stated that among its nine foreign customers currently waiting for execution of orders, five were Asian (Singapore, Thailand, Taiwan, South Korea and Pakistan). (IHT 11-07-94; FEER 21-07-94 p. 13)

US Patriot air defence system and warships for Taiwan

The Taiwanese defence ministry announced that Taiwan would purchase an air defence system based on the Patriot missile. The first delivery would be in 1996. (FEER 14-07-94 p. 13, 11-08-94 p. 13) It was later reported that Taiwan had acquired four modernized former US mine sweepers. (IHT 06-02-95)

US limits to arms sales to Indonesia

In order to convey a 'strong message' to Indonesia on human rights, the US Senate on 14 July 1994 voted to restrict small arms sales by way of an amendment to a foreign aid measure under consideration, unless the Secretary of State determines that there has been significant progress on human rights in East Timor. (IHT 16/17-07-94,FEER 28-07-94 p. 18) In 1994 the US Defense Department authorized weapons sales to Indonesia worth an estimated $10.7 million, in addition to an estimated $90 million in US arms licensed for sale by the State Department. (IHT 22-03-95)

Russian rockets for India

Russia agreed to sell seven cryogenic (low temperature fuel) rocket engines to India but would not transfer their technology. (FEER 04-08-94 p. 13)

Volume of arms sales to Third World countries

According to the (US) "Congressional Research Service" overall sales fell 22 percent in 1993, to $20.4 billion from $26.2 billion in 1992. The fall started with the end of the Cold War.

However, sales from the US rose to $14.8 billion in 1993 from $14.6 billion in 1992, its share rising from 56 percent to 73 percent. (IHT 03-08-94)

French sale of submarines and missiles to Pakistan

Pakistan signed an agreement with France on 21 September 1994 to buy three Agosta 90-B submarines including torpedoes and anti-ship missiles and transfer of technology. The deal included a French pledge not to sell the same submarines and weapons to India. (IHT 22-09-94)

Chinese weapons sale to Myanmar

It was reported by Jane's Defence Weekly that Myanmar had signed a (second) defence contract with China in November 1994, worth $400 million. A previous package was worth $1.2 billion. (IHT 01-12-94; FEER 01-12-94 p. 12)

Israeli supply to Asia

Israel began selling weapons to Asia in the 1950s but sales increased steeply when the arms manufacturers were confronted with domestic procurement cuts and shrinking traditional markets in Western Europe, the US and South America.

Most of the increase were accounted by sales to China and Southeast Asia. It was reported that China bought around $3 billion of Israeli arms over the last ten years. Ironically, Israeli arms exports had also made inroads into the Taiwan market by licensing the production of anti-ship and other missiles.

So far as other Asian countries are concerned, Singapore was being mentioned as a most faithful Israeli client. Singapore organizes its entire military strategy on the Israeli model. Besides, inter alia, the government-owned IAI was negotiating a $300 million sale of Kfir fighters to the Philippines and sold Arava reconnaissance aircraft to Thailand. (FEER 19-01-95 p. 27)

US arms for Cambodia

It was reported that the US would consider supplying weapons to Cambodia after its armed forces had been reformed. (IHT 30-01-95)

Russian submarines for China

It was reported that China had bought four patrol submarines from Russia in November 1994 and that the first one had already been delivered. (IHT 10-02-95; FEER 23-02-95 p. 13)

Polish tanks for Iran

Despite US objections Poland planned to go ahead with its sale of more than hundred T-72 tanks and to continue the already started deliveries. The sale appears to be driven more by domestic considerations than by foreign policy. (IHT 18-05-95)

South African arms sales to Malaysia

Malaysia concluded two deals with South Africa for the purchase of warfare equipment worth RM71.6 million and for the procurement of grenade launchers and grenades worth RM508,000. (Star 25-05-95)

ASIAN DEVELOPMENT BANK (ADB)

Need of increased financial support by newly rich Asian countries

Echoing a sentiment expressed by Bank officials and Japan, the US Assistant Treasury Secretary said at the annual meeting of the ADB that newly prosperous economies as Singapore, Taiwan, South Korea, should contribute more to finance future development bank initiatives. (IHT 03 and 04-05-95)

ASIAN-PACIFIC ECONOMIC COOPERATION forum (APEC)
(*see also:* Association of South East Asian Nations)

Regional trade liberalization

Trade ministers from Asia-Pacific countries met in Jakarta in early October 1994

to discuss regional trade liberalization in goods and services in preparation of the annual ministerial conference in November. The meeting considered a recommendation of the so-called Eminent Persons Group (EPG, *see infra* p. 392), comprising business leaders, economists and former officials. The recommendation contained a target for achieving free trade in 2020, by way of a phased introduction, taking account of the widely varying levels of development among APEC members. According to the proposed plan developed countries should eliminate trade barriers by 2010, newly industrialized economies by 2015 and developing countries by 2020.

It was reported that some countries, including Japan, China, South Korea and Malaysia were wary of accepting a fixed time-table, while Malaysia also asserted that the plan could allow powerful states to dictate economic terms to smaller countries. (IHT 06-10-94; FEER 15-09-94 p. 77) A Chinese foreign ministry statement said that China wanted more concrete assurances about its trade and economic status as part of the accord, although China approved of trade liberalization in the Asia-Pacific region as a long-term goal. (IHT 15/16 and 26-10-94) Later China said it could endorse the plan to liberalize trade by 2020 provided it was applied in a 'flexible' way and took account of differences between developed and developing countries. (IHT 15/16 and 26-10-94, 12/13-11-94)

In trying to implement the plans contained in the Bogor Declaration (*infra*) substantial differences between the members of APEC became apparent at a meeting among officials at Fukuoka in February 1995. The differences concerned the question how to liberalize import barriers and whether to extend the benefits to third states without reciprocal concessions. A second meeting was planned for April in Singapore. (IHT 17-03-95)

On 20 June 1995 the Japanese executive director of APEC accused the US of disrupting preparations for the annual summit meeting by backing out of the proposed scheme for a regional free-trade mechanism as adopted in the Bogor Declaration. It was said that the US preferred a short-term binding commitment to achieve free trade to a non-binding system spread out over a period of more than twenty years which would enable heavily protected East Asian economies to avoid taking real action to open their markets. The fundamental difference between the US and Asia centered on whether APEC should develop primarily as an organization for reducing trade barriers, or as a club for promoting regional growth through more diversified means. It was also said that the Asian partners were particularly unhappy with the US stress on reciprocal exchanges of trade concessions with non-members, preferring an open non-reciprocal system instead. (IHT 21 and 26-06-95; FEER 15-09-94 p. 77)

Investment Code

The 18 APEC states endorsed a common investment code on 11 November 1994. The code covers such issues as investment incentives, expropriation and compensation, repatriation and convertibility of profits, settlement of disputes, entry and residence of staff, and avoidance of double taxation. The next step would be for APEC members to incorporate the principles of the investment code into their domestic laws, while the final step would be to make them legally binding among the APEC members. (IHT 12/13-11-94)

Declaration of Common Resolve (Bogor Declaration)

The members of APEC committed themselves on 15 November 1994, with Malaysian reservations, to achieve free and open trade and investment no later than 2020 but no commitments were made to start rounds of negotiations on the cuts in trade barriers.

Among the features of the Declaration were:

- a distinction between industrialized economies which would achieve the goal no later than the year 2010 and developing economies no later than 2020;
- particular attention to be given to trade between APEC members and non-APEC developing countries to ensure that the latter would also benefit from the trade and investment liberalization in conformity with GATT/WTO provisions;
- APEC economies that are ready to initiate and implement a cooperative arrangement may proceed to do so while those not yet ready to participate may join at a later date.

(IHT 16-11-94; NST and Star 17-11-94)

ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN)
(*see also:* United Nations)

Attendance of the annual foreign ministers meeting by prospective members

The foreign minister of Myanmar attended the Foreign Ministers' Meeting in July 1994 as a guest of the host country (Thailand). For two years, plans by ASEAN to invite Myanmar had been thwarted by Malaysia and Indonesia who were inspired by the flight of members of the Muslim Rohingya community from Myanmar to Bangladesh.

The foreign ministers of Vietnam and Laos attended the meeting as observers, and the Cambodian foreign minister as a guest of ASEAN.

While all ASEAN members expressed their expectation of these four countries being included in a truly regional community of nations of Southeast Asia in the foreseeable future, the US and Australia recently expressed reservations about ASEAN's policy of 'constructive engagement' with Myanmar. (IHT 23/24-07-94; FEER 28-07-94 p. 28)

Vietnam would be accepted as member of ASEAN at the annual Foreign Ministers Conference in Brunei, July 1995. (IHT 16-06-95)

Relations with Vietnam

Two-way trade between ASEAN members and Vietnam rose more than ten times to more than $1.6 billion in 1992 from $163 million in 1989, the year Vietnam withdrew its troops from Cambodia. ASEAN thus raised its share of total Vietnamese trade to 32.4 percent in 1992, from 3.6 percent in 1989. While still behind Taiwan and Hong Kong, ASEAN's share of foreign investment commitments in Vietnam more than doubled to 15.5 percent in the three years to December 1993. (IHT 03-08-94)

ASEAN Free Trade Area (AFTA)

ASEAN economic ministers at their meeting at Chiang Mai in September 1994 approved changes in the AFTA-arrangement in order to expedite the free-trade area, by endorsing the reduction of tariffs to near zero five years ahead (10 years instead of 15) of the original target date of 2008. Tariffs above 20% must be reduced to 0-5% by 2003, and tariffs below 20% must fall to 0-5% by 2000. Some goods would be subject to a 'fast-track' schedule under which tariffs are to be reduced to 0-5% by 1998.

The ministers also endorsed a broadening of the scope of AFTA by extending the number of goods covered by including unprocessed agricultural products. Each country would retain the right, however, to keep some sensitive agricultural products out of AFTA.

The ministers agreed that a list of excluded goods, originally subject to a review after eight years, would be formally phased out over five years beginning 1996. (IHT 24/25-09-94; FEER 06-10-94 p. 15))

Attitude within APEC

ASEAN economic ministers at their meeting in Chiang Mai in September 1994 distanced themselves from the recommendations of APEC's Eminent Persons Group. They were of the opinion that the EPG proposals for an "Apec Concord on Investment Principles and Apec Dispute Mediation Services" could lead to "excessive institutionalization". The ministers recommended that the EPG be disbanded, and agreed that each ASEAN member would act independently from each other within APEC. (IHT 24/25-09-94; FEER 06-10-94 p. 15)

ASYLUM

East Timorese in US embassy

Twenty-nine East Timorese in Jakarta entered the US embassy compound on 12 November 1994 and refused to leave in spite of Indonesian assurances that there would be no arrests or retaliation as a result of their action. The occupiers made a number of demands, including US intervention in the issue of East Timor and obtaining political asylum. The US president who was on a visit in Indonesia said that the US had 'no problem' with the occupation and that he felt 'comfortable' with the Indonesian assurance that no retribution would be exercised.

The Portuguese prime minister said his government was willing to offer asylum and the Indonesian state secretary said Indonesia had no objections to anyone seeking asylum in another country. (IHT 15-11-94; UN doc. E/CN.4/1995/117 of 03-02-95) The offer was accepted by the dissidents on 22 November 1994 who, however, preferred to speak of 'repatriation' so as not to imply recognition of the Indonesian title. (IHT 23-11-94; FEER 01-12-94 p. 16)

Asylum in Australia

Hundreds of East Timorese, who were granted visitor visas to Australia by the Australian consulate at Bali, applied for asylum upon arrival. It was said that the Australian willingness to have the applications reviewed by the federal Refugee Review Tribunal might conflict with the Australian view that Indonesia should be regarded as the administrative authority in East Timor. (IHT 15/16-04-95)

BORDERS, BORDER DISPUTES AND BORDER INCIDENTS

(*see also:* Inter-state relations: general aspects, at p. 437; Joint development)

Applicable principles on maritime boundaries

It was reported that Indonesia and the Philippines had agreed on three principles in drawing up their maritime boundaries. These principles are: the applicability of the UN Convention on the Law of the Sea, the 'median line' principle, and the applicability of unspecified 'creative options'. (Indon. Times 28-07-94)

China - Vietnam

Having last met in Beijing in 1993 the two countries held a second round of talks in Hanoi in August 1994 on border issues and their overlapping claims in the South China Sea. (FEER 25-08-94 p. 13)

According to a joint communique issued on 22 November 1994 on the occasion of a visit by the Chinese president to Vietnam, China and Vietnam agreed not to escalate their territorial disputes nor resort to force and that they were willing to work for a peaceful settlement. It was also agreed to form an expert group to negotiate a settlement of their rival claims to the Spratly Islands. (IHT 23-11-94; FEER 01-12-94 p. 13)

Gulf of Thailand delineation

Thailand and Vietnam held talks early January 1995 on the delineation of their borders in the Gulf of Thailand where they have overlapping claims. (BP 13-12-94)

US helicopter strayed into North Korean air space

On 17 December 1994 a US helicopter "on a standard reconnaissance flight along the border" strayed into North Korean airspace and crashed about three miles north of the Demilitarized Zone. The Korean authorities said they shot down the helicopter, the US said it made an emergency landing. One of the two pilots was killed, the other was captured. (IHT 19 and 21-12-94) North Korea returned the body of the killed pilot on 22 December while the one who survived would be held until the completion of the investigation of the incident. (IHT 22, 23 and 29-12-94) On 28 December North Korea published a statement by the pilot to the effect that the incursion was a violation of international law. This was later followed by a written understanding between the US

and DPRK deputy foreign ministers on the incident. Under the arrangement the US acknowledged that there was 'no legal basis' for the helicopter to have been in DPRK air space and expressed sincere regret for the incident, agreeing to contacts in an 'appropriate forum' designed to prevent such incidents in the future. This referred to a North Korean demand that the Military Armistice Commission be bypassed and to its preference for a new entity consisting solely of North Korean and US military officials. (*see:* Korean War at p. 461) On 30 December 1994 the pilot was released. (IHT 30-12-94, 31-12-94/01-01-95)

Opening of Sino-Indian border passes

China and India concluded an agreement on 18 July 1994 for the opening of an ancient trade route through Shipkila pass on the border of Kinnaur District of the state of Himachel Pradesh. (BLD 1994 No.15)

The two countries later agreed to open other new passes along their Himalayan borders, including the Nathu La pass in Sikkim. [Indian rule over Sikkim has been disputed by China since India took over control in 1975, when a popular revolt led to the abdication of the Buddhist ruler. In December 1994 a left-leaning state government was elected, defeating a group widely regarded as closer to China.] (IHT 06-03-95)

Myanmarese intrusions into Thailand
(*see also:* Insurgents)

Myanmarese troops and members of an allied Karen guerilla faction crossed into Thailand and set fire to a Karen refugee camp in northwest Thailand on 25 April 1995. (IHT 27-04-95)

Malaysia-Thailand boundary line demarcation

It was announced on 26 May 1995 that the Malaysian government had almost completed the demarcation of the Thai-Malaysian boundary line, based on factors such as historical facts and maps. (NST 27-05-95)

BROADCASTING

BBC broadcasting from Thailand

Under an agreement between the Thai government and the BBC the latter would build a radio transmitter in central Thailand which would improve reception of the BBC world service from Beijing to Bombay. (FEER 28-07-94 p. 13)

Voice of America broadcasting from Sri Lanka

The Sri Lankan and US governments had resolved problems relating to the construction of a Voice of America relay station near Chilaw, on the country's western

coast. The construction had been suspended following protests by villagers in the area. (FEER 16-02-95 p. 13)

CAMBODIA

Khmer Rouge

In early July 1994 the Cambodian parliament voted unanimously to outlaw the Khmer Rouge by making it illegal to be a member of the organization. (IHT 09/10-07-94) The Khmer Rouge then proclaimed a "Provisional Government for National Solidarity and the National Salvation of Kampuchea" on 11 July 1994. It recognized King NORODOM SIHANOUK as "the true patriotic and honorable king of the Khmer nation". (IHT 12-07-94)

The Khmer Rouge appeared to have suffered a serious setback in February 1994 when government forces overran their northern base of Anlong Veng near the border with Thailand, but the base was recaptured two weeks later. In March 1994 the army seized Pailin, a gem-mining and timber centre where the Khmer Rouge had their headquarters. On 9 April 1994 the town was recaptured and in July the Khmer Rouge, having been formally outlawed by the Cambodian parliament, set up a 'provisional government' in an enclave near the border with Thailand.

On 26 July 1994 three tourists from Australia, France and Britain were abducted after a train hijacking, along with ten Cambodians and three ethnic Vietnamese. They were initially held in a Khmer Rouge village for a ransom of about $138,000 worth of gold but on 15 August the Khmer Rouge said that the three men would be freed only when their governments publicly pledged not to provide military aid to the central government. Several government and military officials were offering their mediation to achieve the release of the hostages for various amounts of money. On 5 September 1994 the King called on the government to consider two conditions put forward by the Khmer Rouge for securing the release of the hostages and easing the security risks for foreigners in Cambodia. The first was the repeal of the law which declared the Khmer Rouge outlawed. The second was the reopening of the Khmer Rouge office in Phnom Penh. In October rumors started to circulate according to which the hostages had been killed in September. These rumors were later confirmed by the government. (IHT 13/14-08, 18-08, 23-08, 24-08, 25-08, 06-09, 28-10-94)

Coup d'etat

It was reported that there was a coup attempt (*infra,* p. 432) led by a former deputy prime minister, Prince NORODOM CHAKRAPONG and a general. The two had earlier mounted an abortive secessionist movement in June 1993. (*see* 3 AsYIL 357) The prince was, as a result, sent into exile in Malaysia on 3 July 1994. In view of a forthcoming visit to Malaysia by the Cambodian co-premiers the Cambodian government requested that the Prince depart from Malaysia before the visit. The Prince left Malaysia for Thailand on 4 August and a few days later he was granted asylum in France. (FEER 14-07-94 p. 14-16; 28-07-94 p. 13; 18-08-94 p. 13)

Foreign assistance for retraining of the Cambodian army

It was reported that a consensus had emerged in ASEAN on the need of foreign military assistance to Cambodia. However, supply of arms and combat equipment might be opposed by China and Thailand, who would argue that it would inflame the situation, and that the factions in Cambodia should settle their political differences by negotiations. (IHT 28-07-94)

Almost simultaneously it was reported that the US was in fact already sending military trainers, money and (non-lethal) equipment to Cambodia. The supply of arms and ammunition was being considered but a final decision would have to await consultations with other countries involved in efforts to rebuild Cambodia. The Cambodian side openly emphasized the need for arms and ammunition. (IHT 29-07-94)

CHEMICALS AND CHEMICAL WEAPONS
(*see:* Nuclear capability, at p. 471)

CIVIL WAR

Cease-fire agreement in Tajikistan

As a result of consultations between the Tajik government and the Tajik opposition under UN auspices in Teheran, agreement was reached on 17 September 1994 on "a temporary cease-fire and the cessation of other hostile acts on the Tajik-Afghan border and within the country for the duration of the talks". In order to ensure the effective implementation of the agreement a joint commission was to be established as the main element of a monitoring mechanism. The two sides reaffirmed their commitment to resolve the conflict through political dialogue and agreed in a joint communique to hold a next round of inter-Tajik talks in Islamabad in the middle of October 1994. (S/1-994/1102 and S/1994/1080, with text of agreement and joint communique)

However, on 3 January 1995 the ministry of foreign affairs referred to "continuing attempts by detachments of the Tajik opposition to cross the border [from Afghanistan] illegally". It accused the opposition of "seeking to give world opinion a false picture of the activities of Russian border guards". It stated that "the activities of Russian border guards are restricted to the performance of tasks necessary for the safeguarding of the Tajik-Afghan border. ... The legal basis for the presence of Russian border troops in Tajikistan is the Agreement between the Russian Federation and the Republic of Tajikistan on the Legal Status of the Border Troops of the Russian Federation Situated in the Territory of the Republic of Tajikistan" which was signed in Moscow on 25 May 1993. (UN doc. S/1995/27 of 12-01-95) Besides, a border-security treaty was signed on 17 August 1994 between Russia and Tajikistan, Uzbekistan and Turkmenistan, formalizing the presence of Russian troops in all three states, thereby angering Pakistan, Iran and Afghanistan. (FEER 15-09-94 p. 17)

During a visit of the Tajik president to Iran in July 1995 negotiations were held between the president and Tajik opposition groups, resulting in a declaration. In it the

parties agreed on joint efforts to implement the understandings reached during the inter-Tajik peace talks (above). The parties also agreed to establish a Consultative Assembly of Tajik Peoples and to meet for a fifth round of inter-Tajik peace talks in August 1995. (UN doc. S/1995/639)

Afghanistan
(*see also:* 4 AsYIL 422)

A new faction in the civil war, the Taliban (Taleban) movement, aiming at the establishment of a strict Islamic state, was formed in September 1994 under the leadership of Mullah MOHAMMED OMAR. The movement was recruited from young Afghan refugees who had attended religious schools in Pakistan, most of them belonging to the Pashtun sub-tribe of Durrani. Although Pakistan publicly denied involvement, the movement seemed to be favorably viewed by Pakistan and Saudi Arabia.

In November the Taleban conquered the city of Kandahar, on 11 February 1995 it conquered Maidan Shahr, a major stronghold of the Islamic Party of GULBUDDIN HEKMATYAR (whose followers are mostly Pashtun of the Ghilzai sub-tribe). The latter's headquarters at Charasyab, 15 kilometres south of Kabul, was taken on 14 February (but lost again in March). The eastern province of Logar was equally abandoned by the Islamic Party. The conquered territories were mainly Pashtun areas bordering Pakistan. (IHT 06, 11/12, 15, 16, 21-02-95, 01 and 22-03-95; FEER 18-05-95 p. 24) It was reported in February that the Taleban had taken control of more than 40 percent of Afghanistan, in 9 or 10 of the 40 provinces. (IHT 17-02, 22-03-95) On 8 March 1995 the Taliban forces were reported to have started clashing with government troops. (IHT 09-03-95) In May 1995 government forces made several advances against the Taleban. They had taken over three regions in northern Nimroze Province and were surrounding its capital. They also had defeated Taleban forces in Farah Province in western Afghanistan and had forced the latter to withdraw to Nimroze and Helmand Province. (IHT 15-05-95) On 21 May 1995 government forces took a strategic position near Kabul, striking a new blow to the Taleban movement (IHT 22-05-95). These successes were repeated the following days. (IHT 23-05-95)

Assisted by the good offices of the UN Special Mission to Afghanistan the Afghan factions reached agreement in December 1994 on the composition of an interim mechanism of government and on the transfer of power by the president to a multi-party governing council on 20 February 1995. However, the advance of the Taleban forces and their refusal to participate in the arrangement disrupted the plan. (IHT 17-02 and 18/19-02-95, UN doc. A/50/737 of 08-11-95) First the transfer of power was postponed to 21 March, but on 16 March the president said that he would be "waiting for a reliable mechanism" before transferring power.

In the first half of 1995 the country was effectively controlled by three major military powers: first, the president and his commander, AHMAD SHAH MASSOUD, together with their ally, Governor ISMAEL KHAN of Herat province; second, General RASHID DOSTAM (DOSTUM), head of the National Islamic Movement of Afghanistan (NIMA), mainly in the northern part of the country (*see* 2 AsYIL 283); third, the Taleban in the south and south-eastern provinces. (UN doc. A/50/737 of 08-11-95)

COMPENSATION
(*see also:* Inter-state relations: general aspects, at p. 434)

Cambodia/Vietnam - US

The two countries concluded agreements with the US, on 6 October 1994 and 25 January 1995 respectively, concerning the settlement of mutual property claims arising from nationalization, expropriation or taking of, or other measures directed against, properties, rights and interests of the other side. Under the agreement Cambodia and Vietnam were to pay $6 million and $208,510,481 respectively, to the US in full and final settlement of the claims. The amounts were to be deducted from the assets of the two states that were blocked in the US and would be unblocked. (34 ILM (1995) 600 and 686)

DEBTS

China's foreign debt

At the end of 1994 China's foreign debt reached $100 billion, about fifty percent in dollars and 25 percent in yen. The debt-service ratio was below the 20 percent of annual export earnings. (IHT 18-01-95) The dollar-value of the yen-denominated debt had risen considerably as a result of the surging yen: from $10 billion at issue in 1979 to $16.8 billion.

On the occasion of the Japanese prime minister's visit to China in early May 1995 the Chinese prime minister asked Japan to ease China's debt-repayment schedule. China had repeatedly asked either for new loans to help repay the debt or a softening of terms. But Japan always replied that Japan could not make an exception for China. (IHT 04-05-95; FEER 23-03-95 p. 63)

Rescheduling of Russian debts

It was reported that China had agreed to reschedule a $306 million debt incurred by the Soviet Union in 1991. (IHT 28-06-95)

Auction of Indian debts

Russia announced its intention to auction off part of the Rs.360 billion ($11.4 billion) owed by India to Russia. The amount sold to bidders in any year would be about half India's annual repayments of Rs.30 billion. It was said that Russia promised India to ensure that the rupees would remain in the hands of Russian importers. (FEER 14-07-94 p. 18)

Debt management by poor states

On the initiative of Indonesia a meeting of poor indebted states was held in August 1994. According to World Bank figures, the world's 33 severely indebted low-income countries owed a total of $179 billion at the end of 1992. Among these three were Asian countries: Myanmar, Bhutan and Laos. According to the World Bank 61% of the $179 billion owed by severely indebted countries was in the form of bilateral loans, 24% was multilateral assistance and 15% was owed to private lenders.

A Non-alignment Movement (NAM) ad hoc advisory group of debt experts had concluded that what was required was a substantial cut in total stock debt instead of further rescheduling. The report by the Group's chairman GAMANI COREA proposed that the debts of 55-60 countries should be cut by roughly 70%, corresponding to the value of the countries' debt instruments in secondary financial markets. (FEER 15-09-94 p. 72)

Vietnam's debts to Russia

Among the legacy of the Soviet-Vietnamese alliance was a debt of 10 billion roubles for which no satisfactory solution has yet been found. The problems were how to include the value of the rent for the naval facilities at Cam Ranh Bay and how to calculate the current value of the debt. As to the former, Russia offered to pay $60 million a year, to be deducted from Vietnam's outstanding debt. Vietnam refused as it did not want the debt and the naval base linked. With regard to the debt Russia would like Vietnam to pay back the debt at $1 to the rouble, although the rouble had sunk to more than 4,000 roubles to $1. (FEER 16-03-95 p. 22)

DEVELOPMENT AID
(*see:* Economic cooperation and assistance)

DIPLOMATIC AND CONSULAR INVIOLABILITY

Shooting of foreign diplomat

An Iranian diplomat and his nine-year old son were among nine people killed in a shoot-out in Beijing on 20 September 1994 after an armed Chinese soldier ran amok. (FEER 29-09-94 p. 13)

Armed attack on US consular personnel

Masked gunmen ambushed a van of the US consulate in Karachi on 8 March 1995, killing two consulate staff members and wounding a third with automatic weapons. No group had yet taken responsibility. It was reported that policemen present at the scene did not pursue the attackers for fear of being killed. The US FBI sent agents to Pakistan and Karachi police sources revealed that the FBI would head the investigation.

(IHT 09-03-95) On 17 April 1995 police in Karachi shot a man considered a suspect in the killing. (IHT 18-04-95)

DIPLOMATIC PROTECTION

(*see also:* Aliens; Migrant workers)

Philippine intervention on behalf of Philippine national

A Filipino woman had been sentenced to death by the Singapore court in April 1994 for the murder in 1991 of another Filipino woman and a 4-year old Singaporean boy. The death penalty is mandatory for murder in Singapore. The Philippine government appealed for a delay of the execution, claiming that new evidence had surfaced, and asking for another review of the case. This appeal was rejected by the Singapore government after it had investigated the allegedly new evidence and had found it untrue. The Singaporean government said the woman had received a fair trial. She was executed on 17 March. (IHT 14, 16, 17 and 18/19-03-95)

The Philippine consul-general in Singapore was quoted as saying that the woman concerned rejected advice that she refrain from signing any confession and instead insisted that she had committed the murders. This statement was in essence repeated in the consul-general's testimony before the Philippine Senate, and the Philippine ambassador to Singapore too said she never heard the woman proclaim her innocence. (IHT 20 and 24-03-95)

The hanging sparked nation-wide anger in the Philippines, leading to the recall of the Philippine ambassador 'indefinitely' on 22 March 1995 and the appointment of a chargé d'affaires. This was reciprocated by the recall of the ambassador of Singapore for consultations. There were street protests, calls to boycott Singaporean companies and the burning of the Singaporean flag in the town of Davao. A diplomatic protest by Singapore and a demand that the flag-burners be prosecuted and similar acts be prevented were rejected with a reference to 'freedom of expression'. As a result of the strained relations, a visit by the prime minister of Singapore scheduled for April was postponed, a scheduled visit to Singapore of the Philippine chief of the armed forces was cancelled, and Philippine-Singapore joint naval exercises scheduled for July 1995 were indefinitely postponed.

A military transport plane was sent to Singapore to repatriate those among the 60,200 Filipinos working in Singapore who wanted to go home. Eighty-four maids took advantage of the offer.

The Philippine president established a special commission headed by a Supreme Court judge ("Gancayco Commission") to investigate the case and warned that, if the commission would conclude that a miscarriage of justice had taken place, he would not hesitate to cut off diplomatic relations. However, he also said that if the inquiry established the woman's guilt, Filipinos must have the grace to acknowledge before the world that their outrage had been misplaced. (IHT 23-03, 31-03-95)

A government medical examiner carried out an autopsy on the body of the victim and suggested that she might not have been killed by strangulation as the Singapore court had ruled. (IHT 31-03-95) The presidential commission finished its inquiry on 6

April 1995. It concluded that the medical examiner's finding tended to show that the convicted woman was "mistakenly blamed and hanged", and recommended reopening the double-murder case. The Singapore government reacted to the report by stating that the Commission findings were based on uncorroborated or hearsay testimonies but had ignored other crucial evidence.

The Philippine president thereupon proposed on 1 April 1995 an autopsy by a third party to resolve the conflicting autopsy reports by Philippine and Singaporean experts. The proposal was accepted by Singapore, suggesting eight forensic experts and three internationally recognized forensic research institutes. However, the two parties agreed to try to have the Singapore and Philippino forensic scientists settle their conflict of opinion before having recourse to third-party adjudication. (IHT 3, 7, 10, 11, 12 and 17-04-95) The joint autopsy which took place on 19 April failed to resolve the differences. The Singaporean experts stuck by their findings which were endorsed by US forensic experts who attended the new examination. (IHT 20-04-95) The two parties then agreed to ask the American FBI to conduct an autopsy. Singapore agreed to reopen the case if the results confirmed the findings of the Filipino experts, but if they confirmed the Singaporean findings, the Philippines would no longer pursue the case. (IHT 02-05-95; FEER 01-06-95 p. 38)

DIPLOMATIC AND CONSULAR RELATIONS

(*see also:* Inter-state relations: general aspects)

Mutual expulsion of Indian and Pakistani diplomats

In July 1994 an Indian diplomat was detained "while receiving highly sensitive documents from a Pakistani agent" and later expelled from Pakistan. While protesting against the "unlawful detention and brutal torturing" India reciprocated by expelling two Pakistani diplomats from India. (IHT 13-07-94)

Late August an Indian envoy was accused of spying in Pakistan and was expelled. This was again reciprocated by the expulsion of a Pakistani diplomat. (IHT 31-08-94)

After another round of expulsions of diplomats Pakistan on 26 December 1994 ordered India to close its consulate-general in Karachi, accusing it of 'sponsoring terrorism' in the city [involving members of the Muhajir National Movement of Muslims who migrated from India to Pakistan in 1947]. The Pakistani government said it had "evidence of Indian involvement in the planning, instigation and execution of acts of terrorism and violence in Karachi and of the propagation of disaffection and propaganda against the unity, territorial integrity and sovereignty of Pakistan". The Pakistani foreign minister said the police had arrested 14 people who claimed to have been recruited by India's secret service to create trouble in Karachi. (IHT 27-12-94) The consulate was closed on 4 January 1995. (IHT 05-01-95)

China - Latvia

China agreed to re-open its embassy in Latvia after Latvia agreed to close the Taiwanese consulate which was opened in 1992. Sino-Latvian relations were never officially broken off. (FEER 11-08-94 p. 13)

Argentine - Iranian relations

The Argentine minister for foreign Affairs said that even if Iranian diplomats were found to be involved in a bomb attack in Buenos Aires (*see* (Non-)Interference) Argentina would not sever diplomatic relations with Iran. (IHT 10-08-94)

Evacuation of South Korean diplomats from Algeria

South Korea ordered its diplomats to leave Algeria because of the violent situation in that country. (IHT 17-11-94)

Malaysia - Burkina Faso

It was announced on 4 January 1995 that the two countries had established diplomatic relations. (NST 05-01-95)

North Korea - Poland

In February 1995 North Korea ordered the Polish contingent in the Neutral Nations Supervisory Commission to leave the Panmunjon border area. (*see*: Korean War at p. 461) Poland responded by recalling its ambassador to North Korea and demanding the downsizing of the North Korean mission in Warsaw to half. North Korea thereupon recalled its ambassador on 5 April 1995. (IHT 06-04-95)

China - US

China announced on 17 June 1995 that it was recalling its ambassador in the US "in view of the current state of Chinese-US relations", apparently referring to the visit by the Taiwanese president to the US. (IHT 17/18-06-95)

DISARMAMENT AND ARMS CONTROL

Chinese stand on US ballistic missile defense system

China warned on 17 February 1995 that the US would "increase the danger of nuclear war" if it proceeded with a plan to develop an advanced ballistic missile defense system in Asia. This opposition stems from fears that it could block China's small force of nuclear-tipped strategic missiles by the potential for a first strike without fear of retaliation. (IHT 18/19-02-95)

DISSIDENTS
(*see also:* Asylum)

Dalai Lama visit to Japan

China criticized Japan for permitting the Dalai Lama to visit Japan. The Dalai Lama was invited by the Kurozumi Kyo, a religious group. (IHT 31-03-95)

DIVIDED STATES: CHINA
(*see also:* Arms sales and supplies; Diplomatic and consular relations; Inter-state relations: general aspects, at p. 442)

Taipei white paper

The Mainland Affairs Council in Taipei on 5 July 1994 released a policy paper on "Relations across the Taiwan Strait". In it the Taiwanese side stated that it "would no longer compete with Beijing for the right to represent China in the international arena". The document, inter alia, called on Beijing to recognize the political fact of China being a divided country under two separate governments. While affirming the principle of a single China including Taiwan, Taiwan should be acknowledged as a separate 'political entity'. Neither government should claim overall sovereignty since each had jurisdiction over only part of China. Prior to unification these two parts of China should have the right to participate alongside each other in the international community. (IHT 07-07-94; FEER 21-07-94 p. 20, 04-08-94 p. 30)

New intra-Chinese talks
(*see* 3 AsYIL 366)

On the occasion of a visit of the Chinese president to Indonesia the President's spokesman said on 18 November 1994 that China was willing to hold high-level reunification talks with Taiwan as long as they take place on an intra-Chinese basis. (IHT 19/20-11-94)

In his Lunar New Year speech the Chinese president said that the Taiwanese president was welcome to visit the mainland "in an appropriate capacity" and that he himself would like to visit Taiwan. He also called for a formal end to hostilities. There was an affirmation of respect for the rights of the Taiwanese people, but he also made clear his opposition to Taiwanese independence. (FEER 16-02-95 p. 14)

On 28 February 1995 the Chinese president called for a face-to-face meeting between leaders of the two sides (02-03-95) and on 9 April 1995 Taiwan officials said they expected a positive response from China over an offer to improve contacts and cooperation made by the Taiwan president. (IHT 10-04-95)

Negotiators from both sides met again in May 1995 in Taiwan in order to lay the groundwork for a second round of the highest-level meetings so far, projected for mid-July. However, on 16 June China decided to postpone such a meeting, and also preparatory talks scheduled for the end of June. (IHT 25-05 and 17/18-06-95)

Accord on repatriation of hijackers and illegal immigrants

Negotiators for the two sides reached agreement on both subjects on 7 August 1994. The breakthrough came when Beijing conceded Taipei's demand that it had the right to exclude some hijackers from repatriation if it determined that they had valid political or religious motives. Previously China had refused to acknowledge the jurisdiction of Taiwanese courts to make such a decision.

On the repatriation of illegal immigrants it was agreed that the Chinese authorities must arrange to take them back within 20 days. On failing to respond, the Taiwanese authorities would summarily ship the offenders back to a Chinese port. (IHT 08-08-94)

The agreement, which also covered a settlement on fishery disputes and a duty to notify each other of deaths or robberies involving visitors, was signed on 8 August 1994. (IHT 09-08-94)

Renewed talks between two top members of the quasi-official bodies of the mainland and Taiwan were held on 21-27 January 1995. On 22 January it was reported that agreement was reached on the return of hijackers, but the talks broke down over fishing disputes: the Beijing government refused to have such disputes mediated by whichever side was closest to the dispute site, because this would imply the existence of 'Taiwanese waters'. (IHT 14/15 and 23-01-95; FEER 16-02-95 p. 15)

Taiwan's Hong Kong-Macao Relations Bill

In view of Taiwan's bar to direct links with the mainland, Hong Kong's reversion to Chinese rule would make travelling or trading through Hong Kong illegal for Taiwanese. As a solution Taiwan's Hong Kong-Macao Relations Bill would grant the two territories special third-party status, setting them apart from the rest of China. (FEER 01-09-94 p. 22) (*see also infra* on 'offshore shipping centres')

Taiwan application for UN membership

The General (steering) Committee of the UN General Assembly for a second time rejected a Taiwanese application for UN membership. The Taiwan item was originally introduced in 1993 by seven Central-American states: Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. (IHT 23-09-94; FEER 06-10-94 p. 29)

In June 1995 Taiwan offered to set up a billion-dollar fund for developing countries on condition of admission as member of the UN. (IHT 28-06-95)

Conflict over attendance of officials at Asian Games

A problem arose when the Olympic Council of Asia invited the president of Taiwan to attend the Asian Games to be held in early October 1994 at Hiroshima, Japan. After Chinese protests the invitation was withdrawn on the grounds that no political figures would be invited. Instead the Taiwanese vice-prime minister as part of a mission representing Taipei's bid to hold the 2002 Asian Games would come to the Games. Although China kept criticizing Japan for allowing the attendance of a high-

level Taiwanese politician and cancelled the attendance of a Chinese State Councillor it did not carry out its threat to boycott the Games. (IHT 28-09-94, 01/02-10-94)

Erroneous shelling from coastal island

Taiwan forces at Xiaojinmen Island fired a dozen or more artillery shells into a village on the southern coast of mainland China on 14 November 1994. A statement from the Taiwanese side failed to fully explain how the incident occurred, but deep regret was expressed and a promise was made for the compensation of the injured. (IHT 16-11-94; FEER 24-11-94 p. 13)

Relaxation of Taiwanese bans by way of 'offshore shipping centre'

On 1 March 1995 it was announced that Taiwan would lift more curbs on contacts by permitting mainland officials to visit the island on a case-by-case basis. It would also raise the status of the Straits Exchange Foundation which represents Taiwan in intra-Chinese talks, and allow Taiwan banks to open representative offices on the mainland.

The government in Taiwan granted approval to a plan which would allow foreign-registered ships (although Taiwanese-owned) to carry cargoes between the mainland and the port of Kaohsiung for transshipment to other countries or from other countries. Kaohsiung would be designated 'offshore shipping centre' for these purposes. The offshore transshipment center plan was confirmed and put into force on 4 May 1995. (IHT 7/8-01 and 05-05-95; FEER 02-02-95 p. 29)

Joint oil exploration

It was reported that Chinese officials would visit Taipei in August 1995 to attend a seminar on joint oil exploration. The officials had held two previous similar meetings in Singapore. (IHT 24-04-95)

Taiwan attitude towards double nationality

Although under the applicable law in Taiwan Chinese nationals are not barred from simultaneously holding another country's nationality, the Election and Recall Law was amended so that dual citizens are not required to renounce their foreign citizenship before taking the oath of public office. A general law dating from 1929 already barred Chinese government officials from holding foreign citizenship. (FEER 18-05-95 p. 28)

Feasibility of Hong Kong formula for Taiwan

The question whether the Hong Kong formula of 'One country, two systems' could be used for Taiwan, was answered in the negative by the chairman of the [Taiwan] Mainland Affairs Council. "Hong Kong's situation is totally different from Taiwan. Hong Kong is a colony - period. Taiwan is the Republic of China. The Republic of China is a sovereign state." He said that under the Hong Kong formula the government

in Beijing would have ultimate control, and despite the safeguards being built in, that government would prevail in any dispute. (IHT 19-06-95)

Mainland-Taiwan relations after Hong Kong's return to Chinese rule

China announced a 7-point plan for relations between Taiwan and Hong Kong after the latter's return to Chinese rule in 1997. The plan indicates that little will change. It contains, inter alia, the following: (1) Taiwanese capital and people will be welcome and their rights will be protected in accordance with Hong Kong law. Entry and exit will be governed by Hong Kong law; (2) Air and sea traffic will continue unfettered, "based on the principle of mutual benefit"; (3) Non-governmental groups in Hong Kong and Taiwan may continue contacts "on the basis of non-subordination, non-interference and mutual respect"; (4) Taiwanese organizations and staff will be able to stay on after 1997, provided they do not "engage in activities which would damage Hong Kong's stability and prosperity". (IHT 24/25-06-95)

Equation of persons from Hong Kong and Taiwan with Chinese nationals

The Beijing municipal education department ordered the Beijing International School to reject dependents of Taiwanese and Hong Kong executives based in China as pupils. These children were claimed to be Chinese nationals and as such barred from attending foreign-backed schools. (FEER 29-06-95 p. 26)

DIVIDED STATES: KOREA
(*see also:* Emergency aid)

Summit meeting

As a sequel of the CARTER-KIM IL SUNG-talks a first North-South summit meeting was set for 25-27 July 1994 in Pyongyang. It was intended for the easing of tensions over North Korea's refusal to allow full inspections of its nuclear facilities. (IHT 2/3-07-94) The meeting was, however, postponed indefinitely because of the death of the North Korean President on 8 July 1994. (IHT 11 and 12-07-94)

In January 1995 South Korea offered to re-open government-level talks, but these were rejected by the North. (IHT 28/29-01-95)

Ban on joining in mourning in North Korea

On 14 July 1994 North Korea invited South Koreans to the North to take part in mourning rites but this was rejected by South Korea which repeated its stand that the government alone could handle contacts with North Korea. (IHT 16/17-07-94)

German-style reunification

In apparent contradiction to earlier expressions of South Korean policy the Deputy Premier and Unification Minister confirmed on 8 August 1994 that South Korea would immediately accept a German-style formula for reunification. (IHT 09-08-94)

Lift of ban on direct trade and investment

South Korea on 7 November 1994 lifted a ban on direct trade with and investment in North Korea. The South Korean president said that the two countries should adopt a framework agreement to accelerate trade and investment and that the South would begin the process by allowing business people to visit the North. He also said that South Korea would back an application by North Korea to join APEC. South Korean conglomerates said that North Korea had earlier invited them to discuss investment matters. (IHT 08-11-94) On 10 November, however, North Korea rejected the South Korean move. (IHT 11-11-94)

It was reported in December 1994 that the South Korean Sangyong group had agreed with North Korea to produce and export cement, and to take part in projects to build free-trade zones in Rajin and Sonbong in North Korea. (IHT 19-12-94) (cf. Tumen River development area, *infra* p. 456)

The first investment approval by South Korea was issued in May 1995, for the production of garments and other light-industry goods. (IHT 18-05-95)

Cancelation of South Korean-US manoeuvres

For the second year in succession the two countries agreed to cancel joint military 'Team Spirit' manoeuvres, in order to placate North Korea which characterizes these exercises as rehearsals for a nuclear assault. (IHT 27-02-95)

Intrusion of territorial waters

A South Korean trawler was fired on and seized by a North Korean patrol boat after it entered the North Korean territorial waters on its way back to South Korea from China where it had been held a few days for fishing illegally in Chinese waters. A South Korean defence ministry spokesman said that according to preliminary investigation a malfunction of the ship's compass might be to blame for the incident.

South Korea had accused North Korea of having seized more than 3,500 South Korean fishermen since the war and of still holding more than 400. (IHT 31-05, 01-06-95)

EAST ASIA ECONOMIC CAUCUS
(*see:* 1 AsYIL 289, 2 AsYIL 305, 4 AsYIL 432)

State of affairs

Originally being a Malaysian initiative, the EAEC proposal had been pushed by

ASEAN countries as a whole since their 1992 summit in Singapore.

During the ASEAN Ministerial Meeting at Bangkok in July 1994 Japan, China and South Korea had not yet decided to participate in the projected Caucus although China supported the idea right from the beginning. Nine of the eleven prospective members met to discuss the plan. Nobody explicitly disagreed with the idea of having a caucus, and there was agreement to continue developing the concept, and for the nine foreign ministers to meet informally for discussions. (IHT 26-07-94; FEER 15-09-94 p. 21)

In August 1994 the Japanese prime minister said during a visit to Malaysia that it was necessary to convince the US and other countries concerned that the EAEC would be an open trading system (Star 28-08 and 30-08-94), in September he said that Japan would require some time to convince its friends of the EAEC's objectives (NST 03-09-94) and in December 1994 it was reported that the Keidanren (Japan Federation of Economic Organizations) was considering supporting the idea. (IHT 08-12-94)

ECONOMIC COOPERATION AND ASSISTANCE

(*see also:* Aliens)

Development aid for the Philippines

Donor governments meeting in Paris under the auspices of the World Bank pledged $5.6 billion in official development assistance to the Philippines through the end of 1995. (FEER 04-08-94 p. 63)

US development aid to Asia

In fiscal 1995 the entire Asian region from Afghanistan to Indonesia was budgeted to receive $526 million in economic assistance, 3.4% less than in fiscal 1994. With food aid and Peace Corps volunteers excluded, this left a total of $316 million for the region which contains more than half the world's poor.

For the fiscal year starting in October 1995 the US allocated $282 million for development aid to East Asia and the Pacific. This was 2.65 percent of the $10.5 billion US foreign aid budget. The Assistant Secretary of State for the region said this was a fitting proportion "given the dynamic economies of the region".

The US provides virtually no aid to countries like Thailand and Malaysia on the assumption that they have graduated beyond assistance. By contrast, such countries still receive considerable Japanese aid in the form of concessional loans as they are as it were in Japan's backyard so that the aid serves as a form of insurance. (FEER 18-08-94 p. 18; IHT 16-03-95)

Japan - Vietnam

On the occasion of a the first visit by a Japanese prime minister to Vietnam in August 1994 the two countries signed five agreements on aid worth more than $73 million and an agreement allowing Japanese peace corps workers to teach in Vietnam.

Japan is the largest aid donor and trading partner. Aid and loans were resumed in 1992 after a 14-year suspension following the Vietnamese intervention in Cambodia. (IHT 27/28-08-94)

Cooperation between Malaysia and Balkan states

Malaysia, Bosnia-Herzegovina and Croatia agreed to work together towards the development and reconstruction of the war-torn Balkan states. Trade agreements with both countries were signed on 26 October 1994; two Malaysians were invited to sit on the governing board of the Bosnian agency for reconstruction and development; Malaysia would, inter alia, offer training in foreign relations and economy and management courses under the Malaysian Technical Co-operation Programme. (Star 27-10-94)

Multilateral aid to Vietnam

At a meeting of about 30 countries and international organizations sponsored by the World Bank Vietnam was promised $2 billion in new grants and loans for 1995. These pledges came in addition to $1.8 billion promised in 1993. The aid was promised by Japan, South Korea, Australia, Canada, Singapore and ten Western European countries. The US attended as an observer but made no financial commitment. (IHT 17-11-94)

Japan - Myanmar

Japan decided to resume official development assistance to Myanmar. It would probably offer 1-2 billion yen in grants annually from 1995 for humanitarian purposes.

Japan was Myanmar's largest donor when it cut off official aid in 1988 after the takeover of the government by the military. (FEER 17-11-94 p. 13)

Japan - China

Japan in December 1994 pledged to lend 580 billion yen to China from fiscal 1996 to 1998. That would make China the biggest recipient of Japanese development loans, ahead of Indonesia. (FEER 12-01-95 p. 13) The loan is part of a six-year aid programme. China is the only country that gets multi-year aid from Japan rather than aid for specific projects. The formula was adopted after the Peace and Friendship Treaty of 1978.

In 1992 Japan adopted an Official Development Aid charter (*see* 4 AsYIL 560) which directs reviewing the aid towards countries that cause concern in four areas: human rights, the environment, arms exports and the development of weapons of mass destruction. It was said that this requirement was adopted under the pressure of the US. Although China might not meet the tests Japan did not draw any consequence regarding the aid. (FEER 26-01-95 p. 25)

In May 1995 it was reported that Japan would cut its aid to China as a gesture of displeasure with the Chinese nuclear test conducted on 15 May. (FEER 01-06-95 p. 13)

Sino-US energy agreements

While the two countries entered last-ditch talks to avert a trade war (*see*: International trade) they prepared for the signing of energy deals worth up to $8 billion. (IHT 13-02-95)

Central Asian Development bank

Kazakhstan, Uzbekistan and Kyrgyzstan signed a series of agreements on political and economic cooperation, including the formation of a Central Asian development bank. (IHT 13-02-95)

South Korea - Vietnam

South Korea would sign an agreement on 22 March 1995 to lend $50 million to Vietnam, the first South Korean governmental loan to that country. (IHT 21-03-95)

South Korea applies for OECD membership

The Republic of Korea on 29 March 1995 formally applied to join the Organisation for Economic Cooperation and Development. South Korea would have to reaffirm its commitment to the free market during the application procedure. (IHT 30-03-95)

Japanese loans to Iran

Japan announced it would delay the disbursement of a 45 billion yen project loan to Iran following a US imposition of a trade embargo. There would, however, be no formal suspension of economic relations. Iran supplies 9.7% of Japan's oil needs. (FEER 11-05-95 p. 13)

Japan's position as aid donor

Japan was the world's largest aid donor for the fourth straight year in the calendar year 1994. The amount granted by way of development aid was $13.24 billion. The target of foreign aid over the five years to 1997 was $70 billion. (IHT 30-06-95)

EMERGENCY AID

Food shortage in North Korea

North Korea asked Japan for emergency supplies of rice. In recent years North Korea has been increasingly open in admitting that it does not produce sufficient rice to feed its population. South Korean sources said that rice production totalled about 1.5 million tons in 1994, about 40 percent below subsistence levels. Japanese officials initially said it would be 'difficult' to provide rice to North Korea until the two coun-

tries normalize their relations. Japan itself was currently a rice importer. Later there were indications that Japan might help by sending surplus rice. (IHT 27/28 and 29-05-95) It would be prepared to give at least 300,000 tons, provided that South Korea would not object.

The latter already expressed willingness to help. A private South Korean shipping company said on 19 June 1995 that it had prepared vessels under a verbal agreement with the government to ship 50,000 tons of rice to North Korea. An agreement between North and South Korea on the supply of 150,000 tons of rice was signed on 21 June. The rice was expected to be provided without Republic of Korea labels. It was the first time that North Korea accepted rice from South Korea. (IHT 20, 21 and 22-06-95)

After this North-South transaction had taken place Japan decided to also provide rice to North Korea, but it was reported that the DPRK-Japanese talks stalled. One reason, among others, was Japan's request that North Korea promise not to sell the rice abroad or use it for the military. (IHT 23, 26 and 29-06-95)

On 30 June 1995 South Korea announced that it was suspending the rice deliveries because a South Korean ship had been forced to raise a North Korean flag when in port. South Korea demanded a formal apology. (IHT 30-06-95)

ENVIRONMENT POLLUTION AND PROTECTION

(*see also:* Inter-state relations: general aspects, at p. 437)

Cases of transboundary pollution

Forest fires in Indonesia that started in August 1994 caused smog to descend over Singapore and much of Malaysia. Indonesia and Singapore agreed on 29 September 1994 to coordinate action against future forest fires, and officials from Malaysia and Singapore were to meet in early October to discuss the problem.

Other transborder pollution problems occurred also elsewhere in Asia. Japan was being increasingly affected by acid rain caused by sulphur and nitrogen fumes from burning coal in China, and Vietnam was concerned that Thailand will draw excessive amounts of water from the Mekong River in the dry season, thus increasing intrusion of salt water from the sea into the Mekong delta region of Southern Vietnam. (IHT 30-09-94)

Indonesia-Malaysia biodiversity park

The two countries on 7 October 1994 launched a transfrontier nature reserve: the Lanjak-Entimau/Bentuang-Karimun Biodiversity Conservation Area, comprising the Lanjak-Entimau Wildlife Sanctuary in Sarawak and the Bentuang-Karimun National Park in West Kalimantan. The project is possibly the largest tract of tropical rainforest in the world dedicated to total protection and biodiversity conservation, and is sponsored by the International Tropical Timber Organisation (ITTO). (Star 28-10-94)

Global warming

A report entitled "Issues and Options in China's Greenhouse Gas Emissions Control" was issued on 29 March 1995 by the World Bank, the UNDP and China's National Environmental Protection Agency. The report predicted a sea-level rise of up to 70 centimetres off Shanghai and 60 centimetres off the Pearl River delta region by 2050, threatening 92,000 square kilometres of land and displace 76 million people. The inundated areas would include 14 cities and counties in the Pearl River delta and 34 cities and counties in Eastern China.

China's main contribution to global warming is its 76 percent dependency on coal as an energy source, causing it to account for 10 percent of the world's carbon dioxide emissions. China's demand for the fuel would even triple to 3.1 billion tons by 2020.

Meanwhile, a study published by the East-West Center at Hawaii and coinciding with the UN global climate conference at Berlin in April, 1995, forecast that the Asia-Pacific region in 2010 will be the source of nearly half the global greenhouse gas emissions.

At the Berlin conference a group of developing countries, including China and India, backed a proposal enabling them to avoid any new commitments on cutting greenhouse gas emissions while richer countries would be asked to make more cuts.

At the 1992 Earth Summit a number of industrialized countries pledged to cut emissions to 1990 levels by the year 2000. The European Union indicated at Berlin that it would be prepared to cut emissions by further 10 percent between 2000 and 2010. On the other hand, the US, being the biggest producer of carbon dioxide, refused to commit to any further reduction next century. The US was supported by other leading carbon dioxide producers, including Japan. (IHT 31-03 and 05-04-95)

Implementation of the Montreal Protocol 1987

Malaysia would have phased out 693 tonnes (out of 1,500 tonnes phased out by all developing countries) of ozone-depleting substances (ODS) by May 1995 under the UNDP's Montreal Protocol. Malaysia was currently the second largest recipient of UNDP funds after China to finance phasing-out projects by local industries. (NST 08-04-95)

Caspian Sea

Five littoral states of the Caspian Sea, Russia, Kazakhstan, Azerbaijan, Turkmenistan and Iran on 23 April 1995 launched a UN-backed effort to protect the Caspian Sea from pollution, oil projects and illegal fishing, and decided to draw up an environmental action plan. (IHT 24-04-95)

ASEAN Co-operation Plan on Transboundary Pollution

The Plan was adopted on 18 June 1995. It was prepared in connection with the haze that engulfed Malaysia, Indonesia and Singapore from August to October 1994. The Plan addresses three major areas of transboundary pollution: atmospheric, ship-

borne and the movements of toxic and hazardous wastes, and spells out the strategies to prevent, manage and combat the three areas of pollution. It also identifies the areas of cooperation each participating country could concentrate on and the mechanism to monitor the implementation of the plan.

Atmospheric pollution is given more emphasis mainly because haze is the region's main problem, with forest fires, particularly in Indonesia, identified as a major contributing factor. (NST 15-06, 17-06, 18-06-95)

Sino-Indian Protocol on Tiger Conservation

The Protocol was signed on 2 March 1995. Its Article IV says that the two countries will "encourage on an experimental basis captive breeding activities with a view to release the species into the wild". The agreement calls upon the two states to "crack down on the illegal activities of poaching of tiger, smuggling and selling tiger, tiger bones and other parts of tiger as well as derivatives". The two countries agreed to establish bilateral research and training programmes and exchange technologies and research data for "the management of the tiger and its habitat".

This was a remarkable change in Chinese policy. China stayed away when the Global Tiger Forum, held in India in 1994, drew up an action plan.

Eighty percent of Asia's estimated 5,000 surviving tigers are in India, all belonging to the Royal Bengal sub-species. Conservationists believe there are about 400 each of the Siberian, Indonesian and Sumatran sub-species, and about 100 of the South China sub-species. (FEER 08-06-95 p. 26)

ESPIONAGE

Japan

Australian news reports alleged that Japan had mounted a high-tech spying operation to gather information from the Australian embassy at Jakarta. The report was denied by the Japanese. (IHT 26-05-95)

Australia

According to Australian television of 26 May 1995 Australia installed eavesdropping devices into the Chinese embassy in Canberra during the construction of the embassy in the late 1980s, on behalf of a US-led spying effort. The information was transmitted to a receiver at the rear of the British High Commission and relayed to the US National Security Agency. (IHT 27/28-05-95)

According to Australian news reports Australia mounted widespread and systematic spying against the Japanese embassy in Canberra. It was alleged that surveillance and eavesdropping had also been conducted at other embassies, including those of Indonesia, Iraq, Malaysia and Russia. (IHT 30-05-95)

EXCLUSIVE ECONOMIC ZONE
(*see:* Territorial claims and disputes)

FISHERIES
(*see also:* Territorial waters)

Fishery incident in Vietnamese waters

Chinese fishermen caught while fishing illegally in Vietnamese waters fired shots at a Vietnamese patrol boat on 3 July 1994. The incident occurred about five kilometres southeast of Ma Chau island in the Tonkin Gulf off Vietnam's Quang Ninh province. (FEER 14-07-94 p. 13)

Illegal fishing in Malaysian waters

A magistrate's court in Ipoh imposed a fine of RM1 million on the captain of an Indonesian fishing boat and RM500,000 on each of his four crew members on 22 September 1994 for illegally fishing in Malaysian waters about 34 nautical miles west of Pangkor Island. The court further ordered the confiscation of the fishing boat, equipment and catch.

On 1 April 1995 a magistrate's court in Kuala Terengganu fined the captains of two Thai fishing boats RM500,000 each, in default three months imprisonment, for encroaching into Malaysian waters. Ten of their crew were fined RM20,000 each, in default two months imprisonment, while two who were underaged were let off with a warning and ordered to be deported. The fishing boats and equipment were ordered to be confiscated.

On 9 April 1995 marine police detained three foreign fishing boats and 90 fishermen for encroaching into Malaysian waters about 70 nautical miles north of Pangkor Island. Some 2,800 kg. of fish found on board were seized.

Fourteen Thai fishermen in two fishing boats were detained in two separate incidents off Bachok, Kelantan on 5 May 1995. It was reported that the fishermen would be charged under section 15(1)(a) of the Fisheries Act 1985 which carries a maximum fine of RM1 million or six months imprisonment or both upon conviction. The boats and equipment would also be liable to confiscation. (NST 23-09-94, 11-04-95; Star 02-04 and 06-05-95)

Russo-Japanese fisheries pact

Japan and Russia agreed to negotiate a fisheries pact that would allow Japanese fishing boats operate safely near the disputed 'Northern Territories' (referring to four disputed islands northeast of Hokkaido). (FEER 08-12-94 p. 13)

Release of detained Thai fishermen

India released 51 Thai fishermen in December 1994. They were caught fishing in waters off the coast of Orissa state. (BP 16-12-94)

Thai-Vietnamese Joint Committee on Fisheries

The Thai-Vietnamese Joint Committee on Fisheries and Order at Sea, established by an agreement which entered into force on 10 November 1994, held its first meeting in Phuket on 10-11 March 1995. It was decided that nationals of both states have free access to fishery resources in the area of the Gulf of Thailand which is claimed by both states, and of which both states agreed to undertake joint assessment and management. The meeting also agreed in principle to establish joint patrols in the Gulf of Thailand.

Despite these arrangements several Thai fishing vessels were arrested by the Vietnamese in April and May 1995 (as were other Thai fishing boats by Malaysia and Myanmar). These resulted in Thai demands for their release and compensation, and in fire exchanges between Thai and Vietnamese naval vessels. As to the 31 May incident, Thailand said that it occurred 213 kilometres east of the southern Thai coastal town of Songkhla, which would put it within Thailand's exclusive economic zone. The Vietnamese said only that the incident occurred within its southwestern territorial waters.

On 7 June 1995 the Vietnamese authorities decided to release all the Thai fishing vessels and crew without any condition. (KK; FEER 15-06-95 p. 16)

[*Note:* In view of the forfeiture of foreign fishing vessels and the imprisonment of foreign fishermen by some states, on the offence of violating fisheries laws and regulations in the exclusive economic zone Thailand issued a statement on the matter on 3 May 1993. The statement recalled that such forfeiture and imprisonment are in breach of Art. 73, paragraphs 2 and 3, of the 1982 Convention on the Law of the Sea, and accordingly Thailand registered a strong protest through the UN Secretary General as the depositary of the Convention. (UN doc. A/48/936, annex)]

FOREIGN INVESTMENT AND TRANSNATIONAL CONTRACTS
(*see also:* Joint development; Oil and gas)

Liberalization of Taiwan regulations

The (Taiwan) Central Bank of China announced that existing curbs on foreign investment in local securities and bond markets would be lifted, allowing a free choice of any security and eliminating a 10 percent ceiling on bond investments. The ceiling was intended to prevent large inflows of offshore funds seeking to gain from the relatively high interest rates, thus affecting the bank's ability to conduct monetary policy. (IHT 18-07-94)

Investment in the field of aircraft-production

It was announced on 8 August 1994 that Boeing Co. would start a series of projects in China, from component manufacture to jet servicing. In 1993 one-seventh of the aircraft production by Boeing in the US was delivered to China. (IHT 09-08-94)

Malaysian investment guarantee agreements

Malaysia concluded the following investment guarantee agreements in the past year: Namibia (5 August 1994), Argentina (6 August 1994), Jordan (2 October 1994), Bangladesh (12 October 1994), Spain (4 April 1995). It was agreed with Turkey to sign a similar agreement shortly. (NST 15-08, 08-09, 03-10, 13-10-94, 05-04-95; Star 16-08 and 30-09-94)

Malaysian government contracts with British firms

Malaysia on 7 September 1994 lifted a ban on awarding government contracts to British firms. The ban was imposed on 25 February 1994 after British media reports alleged that senior Malaysian politicians were taking bribes for awarding contracts to British business. Malaysia had also objected to allegations that there be links between a British loan for the Pergau Dam in Kelantan, Malaysia, and the Malaysian government's purchase of British defence hardware worth 1 billion pounds Sterling in 1988.

In recent months Britain sent at least nine trade missions to Malaysia in attempting to persuade the Malaysian government to end the ban. (IHT 08-09-94)

Indonesian natural gas exploration
(*see also:* 3 AsYIL, 381)

An agreement on the exploration and exploitation of one of the world's biggest gas fields was signed on 16 November 1994 by Exxon Corp., the Indonesian government and Pertamina, the Indonesian state oil company. The project is estimated to cost up to $40 billion. The gas field, called D-Alpha Block, is located about 1,200 kilometres north of Jakarta and 225 kilometres northeast of the Indonesian Natuna Island in the South China Sea. The field extends 25 kilometres on one direction and 15 kilometres in another, and is estimated to contain 210 trillion cubic feet of gas, of which only 45 trillion cubic feet is considered recoverable because of its heavy mixture with carbon dioxide which is expensive to separate. The first deliveries were unlikely to take place before 2003.

The project is owned 50-50 by Pertamina and Esso Exploration and Production Natuna Inc. This is an exception of usual practice whereby Pertamina takes a 60 percent share. (IHT 11 and 17-11-94; NRC 12-11-94; FEER 17-11-94 p. 69)

Vietnamese iron ore mining

It was reported that Krupp of Germany, Lonrho PLC of Britain and a third, undisclosed South African company were close to signing a $1.3 billion contract with Vietnam Steel Corp. to mine iron ore in northern Vietnam. The proposed mining site is estimated to contain 300 million tons of commercially viable ore. The investment of $1.3 billion would be required over a period of 30 years. (IHT 17-11-94)

Foreign access to Chinese oil market

It was reported that China had started discouraging foreign investments for new oil refineries. While construction of new refineries would be a waste because many of the existing refineries were underused, it was said that the policy could stem from a basic reluctance to open the domestic market to foreigners. (IHT 01-12-94)

Protection of overseas Chinese foreign investment

It was reported that China was considering legislation to protect investments by overseas Chinese. Eighty percent of foreign investment has been by ethnic Chinese living overseas and Chinese with foreign citizenships. (IHT 29-12-94)

Sihanoukville region development program

On 2 January 1995 the Cambodian government signed an agreement with a Malaysian company, Ariston Sdn.Bhd., which would undertake a $1 billion development programme for the Sihanoukville region. The agreement would constitute the largest single investment to date in Cambodia. (NST 03-01-95)

Expansion of European Toyota production

Toyota Motor Corp. announced that it would double its production in the UK by building a second factory there. The new plant would eventually bring Toyota's British production to 200,000 cars a year. Toyota was facing the prospect of a strong yen cutting into profits from exports from Japan. (IHT 17-03-95)

Japanese participation in China telecommunication

It was reported that Japanese companies and government agencies will join in the upgrading of telecommunications in the Yangtze River area in China, and thereby invest 467 billion yen ($5.2 billion). The project would connect the cities of Shanghai, Nanjing and Hangzhou. A financing method called "build, lease and transfer" was being considered. (IHT 21-03-95)

Korean investments in China

According to the Korean Foreign Trade Association South Korean firms had invested $1.7 billion in China in 1994. China accounted for almost 17% of South Korea's direct foreign investment. (FEER 30-03-95 p. 73)

Raising of foreign ownership limit in Korea

The ceiling on foreign ownership of local stocks would be raised on 1 July 1995 from 12% to 15%. The limit on state-owned firms would increase from 8 to 10%. (FEER 18-05 95 p. 99)

Japanese investments in Asia

Japanese direct investment in the rest of Asia rose 47 percent in the past fiscal year ending 31 March 1995, as a result of the increased shift of production overseas because of the appreciation of the yen. Asia overtook Europe as the second-biggest recipient behind North America. (IHT 17-05-95)

Malaysian investment in South Africa

Malaysia, Australia and South Africa signed a memorandum of understanding on 19 May 1995 for a housing programme to be implemented in South Africa. Under the memorandum, a Malaysian-led consortium would embark on a pilot project for the building of about 600 low-cost houses. (NST 26-05-95)

Review of Indo-US investment agreement: the Enron case

The newly elected government of the Indian state of Maharashtra started an inquiry into a $2.8 billion agreement for the building of a power station, concluded in 1994 between the Texas-based Enron Corp. and the previous (Congress Party) state government. The 2,015 megawatt-plant would be built by a US consortium on India's west coast.

The investigation concerned the question of how the contract was awarded to Enron and the new plant's costs to the state. A major source of opposition to the project was a guarantee given by the Indian federal government to Enron on fixed returns for foreign investors in power projects. Reports of 28 June 1995, which were denied by the review panel chairman, said that the panel had recommended the cancelation of the project without compensation. The same reports mentioned violation of the Indian Electricity Act and the Electricity Distribution Act as grounds for the cancelation. The state government would take a decision in July 1995. (IHT 06 and 29-06-95)

Malaysian rejection of Indonesian-Malaysian corporate deal

One year after the conclusion of an agreement linking the Indonesian timber enterprise P.T. Barito Pacific Timber with the Malaysian Construction and Supplies

House Bhd the deal, already approved by the Malaysian Foreign Investment Committee and the ministry of foreign trade and industry, was rejected by the Securities Commission. (IHT 29-06-95)

Investment climate in Asian countries

A survey carried out by the East-West Center in Hawaii among international companies interested in investing in power plants and coal mines presented a rating of 13 Asian economies according to their investment climate. It placed China next to last, just ahead of Vietnam. India was fifth from bottom, ahead of China because of its western-style legal system and clearer terms for private investors. The survey found that Australia, Indonesia, Thailand, Malaysia and Taiwan had the best overall investment conditions. (IHT 30-06-95)

GENERAL AGREEMENT ON TARIFFS AND TRADE
(*see also:* World Trade Organization)

The issue of China's re-entry

The 18th round of talks on China's re-entry started in late July 1994. One of the main issues was the US insistence that China not be admitted with developing country status. This status included special provisions in areas such as farm products and the protection of infant industries. Other US demands were: more access for US service industries, the removal of non-tariff trade barriers, and the closure of 26 factories producing pirated compact discs for export. (IHT 28-07-94) In December 1994 the talks were postponed till February 1995. (IHT 23-12-94)

GROUP OF 77

Communique of the Group of 77 and China

The Chairmen/Coordinators of the Chapters of the Group in Geneva, Nairobi, New York, Paris, Rome, Vienna and Washington D.C. adopted a communique in 1995 in which the commitment to the objectives of the Group was reaffirmed. (UN doc. TD/B/41(2)/13)

HONG KONG
(*see also:* Divided states: China; Judicial assistance)

Dispute over electoral reforms shelved

The British Minister for Hong Kong Affairs visited China in July 1994. He was the highest-ranking British foreign affairs official to visit China in a year and the visit

marked a shelving of the dispute over electoral reforms in the colony. (IHT 08-07-94)

Transfer of military sites

After seven years of talks China and the UK reached agreement about the transfer of military sites. The two parties agreed on 30 June 1994 that 14 out of 39 military properties in Hong Kong would be handed over to the Chinese armed forces, while the others would be sold and used for eventual commercial development when the British forces leave in 1997. As part of the deal Hong Kong would build a new naval base to replace the existing facility. (IHT 01-07-94)

The airport issue

It was announced that China and the United Kingdom had reached basic agreement on the financing of the projected new airport. China agreed with a fourth British financing proposal, based on $7.8 billion government equity and $23 billion of debt. (IHT 10-08-94) Agreement on a general formula for the financing was reached on 3 November 1994 and an 'agreed minute' was signed a day later. (IHT 04-11-94)

On 29 March 1995 agreement was reached on forming a body to borrow the necessary funds. The points of controversy included the name of the airport managing body and the nationality of the senior executive. (IHT 30-03-95)

Disbanding of Hong Kong legislature and its replacement by a provisional legislature

The Standing Committee of the Chinese National People's Congress voted on 31 August 1994 to disband Hong Kong's legislature and other elected institutions when the colony reverts to Chinese rule in 1997. The proposal to disband was submitted in March 1994 by legislators from Guangdong Province. (IHT 01-09-94) Consequently provision had to be made for its replacement on 1 July 1997 by a provisional legislature, in anticipation of the first legislature in accordance with the provisions of the Basic Law. The provisional legislative council would be formed by a selection committee. The idea of a provisional Legco was first raised in early October 1994 by the Preliminary Working Committee, an advisory body appointed by the Chinese government. (The PWC is the precursor of the Preparatory Committee which under an NPC decision is due to be established in 1996). (IHT 8/9-10-94; FEER 24-11-94 p. 26; 08-12-94 p. 32)

Award of government contracts

China accused the Hong Kong authorities that they awarded a major stake in a giant container terminal project to the Jardine Matheson corporation in return for political backing of the Governor's program of electoral changes. (IHT 15-09-94)

Status of Hong Kong residents
(*see:* 1 AsYIL 302; 3 AsYIL 387)

According to an oft-quoted estimate the number of foreign passport-holders in Hong Kong was 400,000 in a total population of 6 million. Besides there were those who did not yet have a foreign passport but had the right to enter another country in the future, like the households who will be granted full-fledged British passports under the British Nationality Scheme (*see:* 1 AsYIL 302).

Among those with British affiliation a distinction had to be made between persons with a full-fledged British passport, a British National Overseas (BNO) passport and those who are British Dependent Territories Citizens (BDTC), the two latter categories not being eligible for the right of abode in the United Kingdom.

Against this backdrop the Preliminary Working Committee had been discussing the political rights of ethnic Chinese with foreign passports after the take-over in 1997. The Basic Law allows persons who will be Hong Kong citizens still to use a British National Overseas passport as a travel document abroad. It also prescribes that, apart from the chief executive, senior civil servants and top judges must be Chinese Hong Kong residents without a right of abode overseas. However, it does not specify nationality requirements for most civil servants, and the Law also allows up to 20% of the membership of the Legislative Council to be filled by non-Chinese or Hong Kong Chinese with a right to abode overseas. (FEER 29-09-94 p. 20; 15-06-95 p. 21)

Final Court of Appeal
(*See:* 2 AsYIL 320)

In 1991 agreement was reached between China and the UK to create a Final Court of Appeal as the ultimate court for Hong Kong, replacing the Privy Council as the highest tier of the judicial system in Hong Kong. The court would have final adjudication over all cases, except those relating to defence and foreign affairs.

It was reported in late February 1995 that the UK was unilaterally preparing the establishment of the Court in 1996. (IHT 28-02-95) Until June 1995 it was the policy of the colonial government to have the new court established before 1997. (IHT 09-06-95) Agreement was finally reached on 9 June 1995 after China offered a compromise. The agreement largely mirrored earlier proposals. Under the agreement the court will function from the re-establishment of Chinese rule in 1997. China dropped its concerns about the court's competence to examine constitutional questions, and agreed to limit the government's post-verdict remedial actions on the findings of the court to criminal cases only. However, the agreement specified that acts of state, such as defence and foreign affairs, would fall outside the jurisdiction of the court. (FEER 13-10-94 p. 30; 22-06-95 p. 20; IHT 10/11-06-95)

Incursions in territorial waters

Chinese patrol boats had captured persons suspected of smuggling in the waters between Hong Kong and the mainland. The Governor ordered the police and the British navy to get tough on marauding Chinese boats, accusing the latter of illegally entering

Hong Kong waters. This was denied by the Chinese side who said that it was not unusual for vessels from either side to inadvertently enter the other's territory.

Hong Kong called for the release of the men, while the Chinese side said that the detainees and their boats would be released only if investigations showed they were not involved in illegal activities in Chinese waters. (IHT 31-03-95)

US warnings

In the boldest US warnings yet to China over the treatment of the territory after its reversion to Chinese rule, the US consul-general and the Assistant Secretary of State for East Asia expressed US apprehensions over excessive control of Hong Kong's economic and social freedoms. (IHT 26-05-95)

Status of civil servants after 1997

China declared that Hong Kong civil servants were welcome to continue serving through the transition under existing conditions, and pledged not to place mainland Chinese officials in their ranks. The termination of expatriate privileges was mentioned as one of the few changes envisioned by China for the Hong Kong civil service. (IHT 26-06-95)

HOT PURSUIT

Cambodian forces on Thai territory

Cambodian forces, straying into Thai territory in hot pursuit of Khmer Rouge rebels, killed two Thai soldiers on 28 February 1995. Thereupon Thai forces hit back and killed a number of Cambodian soldiers. (FEER 16-03-95 p. 13)

Myanmar forces on Thai territory

Forces of the Democratic Kayin Buddhist Army together with government Myanmar troops made incursions into Thai territory in trying to force Karen refugees across the Thai border back into Myanmar. As a result the Thai army warned Myanmar it would retaliate and on 5 May 1995 Thai forces indeed launched a cross-border attack on Myanmar guerrillas on the west bank of the Salween River opposite the Thai village of Mac Sam Leap. (IHT 04 and 05-05-95)

IMMIGRATION AND EMIGRATION

(*see also:* Aliens)

Vietnamese Immigration Law

An immigration law was passed by the Cambodian parliament in August 1994.

(IHT 27/28-08-94) (*see* also: Minorities)

Illegal immigrants in Malaysia

There were several reports of Indonesian illegal immigrants whose boats capsized resulting in those who managed to get ashore being arrested. (NST 14-11-94, 13-04-95; Star 13-04-95)

The Malaysian Immigration Department detained nearly 50,000 foreigners in 1994 for various offences such as illegal entry, overstaying and failure to abide by the conditions in the immigration passes. Of those detained, 28,378 were Indonesians, 10,993 were Bangladeshi, 3,319 were Myanmar nationals, 2,701 Filipinos and 1, 129 Thais. Those detained were deported to their countries of origin. (NST 06-03-95)

Admittance of illegal aliens

The Philippine president signed the Alien Social Integration Act on 24 February 1995, granting about 100,000 to 500,000 illegal aliens, mostly Chinese and Indians, the right to remain in the Philippines. The Act covers foreigners who entered the country before 30 June 1992. (IHT 25/26-02-95)

Chinese illegal immigrants in Japan

In 1993 the number of Chinese caught attempting to enter Japan illegally was 5,227, an increase of 51% from 1992. As of the end of 1993 there were around 36,300 Chinese nationals living illegally in Japan. (FEER 04-08-94 p. 20)

INSURGENTS

Offer of Myanmarese warlord to surrender

U KHUN SA, the 'Golden Triangle' opium warlord, who declared independence for a Shan state in northeastern Myanmar, on 16 July 1994 offered to surrender in exchange for a withdrawal of the Myanmar military forces from the territory concerned. (FEER 28-07-94 p. 13) In January 1995 it was reported that the Myanmar government was on the verge of a major offensive against the so-called Shan or Mong Tai army. (IHT 28/29-01-95) KUN SA was accused by the government to hide his drug trafficking operations by claiming himself to be a liberation fighter by seeking independence for the Shan minority and forming the Shan State National Congress in December 1993. (IHT 03-04-95)

Bodo insurgence in India

An insurgence broke out among the Bodo in the Assam region of India. In February 1993 the federal government, the government of Assam state and several

representatives of the Bodos signed an accord giving the group limited political and administrative autonomy and establishing a Bodoland Autonomous Council. But the area kept being plagued by sporadic bloodshed. The accord collapsed and tension increased between the Bodos and the much larger population of Muslim immigrants who had fled Bangladesh and Hindus from other parts of India or from Bangladesh. This majority feared that a Bodo minority administration would subject them to discrimination. From July 1994 rebels from the Bodo Security Force burned villages and attacked villagers. The Bodo militants reportedly withdrew to neighbouring Bhutan when pressed by the army.

The Bodo offensive is part of a widespread tribal agitation in northeast India ever since a group of non-indigenous politicians allowed a large influx of foreigners into the area. It was said that the Bodo militants had established links with other underground organizations such as a faction of the National Socialist Council of Nagaland, and that there was a move to internationalize the issue. (FEER 01-09-94 p. 26)

Tamil insurgence in Sri Lanka

The conflict existed since 1972 and had taken 34,000 lives so far. [Part of] the Hindu Tamil minority demanded a homeland in the north and east of the country, and accused the majority Buddhist Sinhalese of discrimination in jobs and education. Tamils make up 18 percent of the population of 17 million. The Liberation Tigers of Tamil Eelam have been involved since July 1983. They started attacking Muslims and Sinhalese civilians in 1990, but ceased doing so after 1992, to concentrate instead on politicians and army personnel. On 26 May 1995, however, they killed tens of people in an attack on a fishing village.

Sri Lanka lifted an economic embargo on Tamil guerilla-held territory on 31 August 1994 and called for peace talks. The Tamil rebel leader accepted the government offer for unconditional peace talks on 3 September. (IHT 01 and 05-09-94, 27/28-05-95)

Government officials and Tamil separatist rebels ended their first round of peace talks in Jaffna on 14 October 1994. Among the rebels' requests were a cease-fire, safe passage for travellers and the easing of economic hardships. (IHT 15/16-10-94) The talks were suspended by the government when the rebel movement was implicated in the bombing of the opposition presidential candidate on 24 October 1994, but were resumed in early January 1995. (IHT 03-01-95) On 3 January agreement was reached to cease hostilities as a prelude to a formal cease-fire agreement. (IHT 04-01-95) The agreement included a halt in offensive operations on both sides, a neutral zone separating the warring forces and six international observer teams to monitor the 'no-man's land'. The truce became effective on 8 January 1995 and would last till 22 January. (IHT 7/8-01-95)

On 6 March 1995 the government announced that the leader of the rebels had rejected a presidential offer to invite "a foreign person under the patronage of a foreign government" as a mediator to open substantive political talks between the government and the rebels. He preferred direct talks between the parties. (IHT 07-03-95)

In April the rebels decided that the government had not sufficiently met their demands for further peace talks, and broke the truce by sinking two government

gunboats. The security forces thereupon reimposed an embargo against the rebel-held territories. (IHT 20-04-95)

On 17 May 1995 five Tamil parties, among which former militant groups, held talks with the president of Sri Lanka to find a way to end the country's ethnic conflict. The meeting was not attended by the moderate Tamil United Liberation Front who refused to sit together with former militants.

Bougainville insurgence
(*see:* 1 AsYIL 308)

The rebellion began in late 1988. A peace accord was reached in 1991 but came to nought. In 1994 new talks were started on 27 August with a timetable for a ceasefire. The PNG government and the leaders of the Bougainville Revolutionary Army set an agenda involving the possible creation of a South Pacific peacekeeping force to oversee the ceasefire, normalization of communications, amnesty and compensation, as well as the holding of a pan-Bougainville peace conference before the end of the year. A cease-fire accord was signed on 8 September 1994 in Honaria, Solomon Islands, and it was agreed to hold a conference before 10 October.

One of the focal points of the conflict had been the Panguna copper mine on Bougainville Island, which was controlled by the Australian mining firm CRA. The mine used to provide about 20% of PNG's government revenue and 44% of export earnings. It was closed by the secessionist rebels in 1989. (IHT 09-09-94; FEER 08-09-94 p. 60; 15-09-94 p. 21)

Indian support for Sri Lankan government fight against insurgents

The Indian responded favourably to Sri Lankan government calls by establishing a naval quarantine around the guerilla stronghold at Jaffna: the Indian forces enforced an embargo across the Palk Strait which separates the two countries at India's southeastern tip. According to newspaper reports the operation had even extended further into the Indian Ocean in an effort to seal off the northeastern coast of Sri Lanka and thus to prevent the insurgents from being supplied with weapons and fuel. (IHT 20-06-95)

Peace talks with Communist insurgents in the Philippines

The Philippine president in a statement released on 16 October 1994 expressed regret that preliminary talks between a government panel and exiled leaders of the National Democratic Front in the Netherlands had broken down, and urged the rebel leaders to resume the talks. (IHT 17-10-94)

The failure of the talks found its origin in a 1989 document drafted by the Communist Party of the Philippines (CPP) chief JOSE MARIA SISON who is in self-exile in the Netherlands. In the document the communist-led National Democratic Front (NDF) was described as "a belligerent force in the civil war and not a mere insurgent force". It continued by stating: "It cannot negotiate with the reactionary government if not on an equal footing under international law". Accordingly the NDF negotiators

demanded that the draft agreement would allow it to issue safety and immunity guarantees to government officials entering rebel-held areas. This was rejected by the government as it would implicitly acknowledge a status of belligerency under international law. In fact the communist New People's Army had shrunk considerably as had the CPP's active membership, and what remained of the territories controlled by them were pockets in the mountainous Bicol area of southern Luzon, the Vsayas island of Samar and the three southwestern provinces in Mindanao. (FEER 27-10-94 p. 13; 10-11-94 p. 20)

New negotiations were announced in May 1995, to be held in Brussels in June but these were later postponed indefinitely by the NDF after the arrest of a ranking guerilla leader. (IHT 13/14 and 22-05-95) The talks were actually resumed on 26 June 1995 with a NDF demand for the release of the arrested commander in order to allow him to join the talks. According to the NDF he was covered by an agreement to protect members of the negotiating teams from arrest or capture. The government denied this as his name was not received in time, and suspended the talks. (IHT 27 and 28-06-95)

Muslim insurgence in the Philippines

There are two Muslim insurgent organizations, the Moro National Liberation Front (MNLF) led by NUR MISUARI, and the Moro Islamic Liberation Front (MILF), led by SALAMAT HASHIM, which split from the MNLF in 1978. The latter has a standing army, the Bangsa Moro Islamic Armed Forces and acts as a shadow government in many Muslim-majority areas of seven provinces of Mindanao.

So far the Philippine government had directed most of its attention to and held peace talks with the MNLF whose territory was confined largely to the Sulu archipelago. The MNLF had signed the so-called Tripoli Agreement of 1976, made under the auspices of the Organization of Islamic Conference. Under this agreement the Philippine government had committed itself to grant autonomy to 13 provinces and nine cities with a Muslim majority, covering nearly all of central Mindanao as well as Palawan Island. While the MNLF insisted on implementation of the agreement, the government held the view that autonomy had already been granted when the Autonomous Region for Muslim Mindanao was established in 1990, consisting of the four provinces of Sulu, Tawi-Tawi, Maguindanao and Lanao del Sur, plus Marawi City. (FEER 23-02-95 p. 22-28)

Talks started again on 19 June 1995 in Davao between the government and the MNLF. During these talks the insurgents demanded control over the entire southern part of the Philippines, including Palawan, Mindanao and nearby islands. This would be in accordance with the Tripoli agreement. There had been a cease-fire in force since late 1993.

A settlement of the Muslim insurgence was seen as the answer to the extremist Islamic movements, such as the break-away insurgent faction 'Abu Sayyaf'. In contradistinction to the MNLF, Abu Sayyaf aims at the establishment of an independent Islamic state in the Philippine southern islands. (IHT 21-06-95)

A sixth round of discussions was planned for 27-29 July in General Santos City. (IHT 24/25-06-95)

Kayin (Karen) and Karenni in Myanmar

During the talks between representatives of the government of Myanmar and the UN Secretary-General (*see* Human rights) reference was made to a rift among the Karenni National Progressive Party and a schism in the Karen National Union and the establishment of a rival force under the name of the Democratic Kayin Buddhist Organization in December 1994. (UN doc. A/50/782)

On 26 January 1995 the Myanmar army overran the jungle headquarters of one of the Karen rebel groups at Manerplaw, which was also the rallying point for the All Burma Students' Democratic Front and other opponent groupings. It was followed by the fall of other bases along the Thai-Myanmarese border. (IHT 28/29, 30 and 31-01-95)

The Democratic Kayin Buddhist Army, together with government troops, later tried to force Karen refugees across the Thai border back to Myanmar into government-held territory. (IHT 15-02-95, 02-05-95) As a result of these incursions into Thai territory the Thai army announced it would move thousands of Karen refugees from the frontier to new sites 10 kilometres inside Thai territory. (IHT 04 and 05-05-95) In June it was reported that the Karen National Union expressed its desire to continue peace talks with the government. (IHT 13-06-95)

Members of the Karenni National Progressive Party on 21 March 1995 responded to a government call for reconciliation and turned over a great many weapons in a formal ceremony in the capital of Kayah state, northeast of Yangon. With this event fourteen of the sixteen major ethnic insurgent groups had come to terms with the government. (IHT 22-03-95)

INTELLECTUAL PROPERTY

Thailand - US

The US secretary of state said his country would remove Thailand from a 'priority watch list' of countries considered to be guilty of intellectual property violations, following the Thai Parliament's approval of a new copyright law. (FEER 01-12-94 p. 81)

[*Note:* The act took effect on 21 March 1995. It does not explicitly state that using pirated software is an infringement of copyright. It exempts software from copyright protection if its use doesn't "unreasonably prejudice the lawful rights of the owner". The law allows for a maximum fine of 800,000 baht and a maximum jail term of four years. (FEER 15-06-95 p. 66)]

China - US

The US announced the launching of an investigation into allegations of patents and copyright piracy in China and on 30 June 1994 threatened to apply trade sanctions for such piracy allegedly covering $800 million in lost sales annually. (IHT 01-07-94)

[On 17 January 1992 China and the US signed a Memorandum of Understanding on the Protection of Intellectual Property. 34 ILM 676 (1995)]

It set two deadlines for China to comply with bilateral agreements on trade issues or face sanctions: 30 December for the curbing of violations of US copyrights and patents, and 31 December for adherence to a 1992 market-access agreement. (IHT 14 and 17/18-12-94) Prime targets for punitive tariffs by the US included shoes, toys, sporting goods, clothing, radios and suitcases made in China. (IHT 29-12-94)

On 30 December US sources referred to preparations for trade sanctions, immediately followed by Chinese threats for counter-retaliatory measures. On New Year's Eve the US issued a target list of $2.8 billion in Chinese products and identified about $1 billion worth of punitive, 100 percent tariffs. Actual sanctions would not go into effect until 4 February 1995, after a 30-day comment period, giving a chance to US importers to argue that sanctions in particular areas would cause extensive harm to US business and consumers. (IHT 31-12-94/01-01-95)

The talks were resumed on 18 January 1995 with China staunchly defending its protection of copyrights, patents and trademarks and the US insisting that China must act more decisively against major pirates of American products. (IHT 18 and 19-01-95) The US Trade Representative acknowledged a few days before the expiry of the negotiation period that a 'preliminary accord' was reached in some areas but insufficient to satisfy the US demands. (IHT 03-02-95)

On 4 February 1995 the US announced its sanctions, the largest trade sanctions in US history, to take effect on 26 February. This was immediately countered by an announcement of similar Chinese sanctions as of 26 February. These counter-measures were justified by reference to "sovereignty and national dignity". China also suspended imports of certain items and called off talks with US car producers. (IHT 06-02-95) Yet both parties decided to resume talks. (IHT 07-02-95)

The US wanted China to strengthen enforcement of laws and regulations protecting copyrights, patents and trademarks, in particular by closing down 29 factories that produce pirated compact discs. US business estimated a loss of at least $1 billion a year to Chinese piracy. China maintains that it already made great progress. It announced 8 February 1995 that it had executed 12 people for producing fake goods in the past two years and vowed a tougher line against production of counterfeits. It accused the US of being unreasonable and of meddling in China's internal affairs. (IHT 09-02-95)

China and the US finally reached agreement which was signed on 26 February 1995 and which included a 20-page, single-spaced enforcement plan. Under the agreement China would inspect within three months 29 compact and laser disk factories and destroy pirated goods and equipment used to produce them. The accord also provided greater access for US recording and film to the Chinese market, and assurances about stiffer penalties for producers of pirated goods. (IHT 27-02-95)

It was reported in early June 1995 that six out of the seven compact disk factories had reopened. According to an official of the Chinese National Copyright Administration, the plants had indeed reopened but under the supervision of government officials. The official said that the intent of the agreement was not to close the plants forever, but to impose stiff fines and suspend production temporarily. (IHT 02-06-95)

Amendment of the Indian Patents Act

On joining the World Trade Organization India was required to amend its Patents Act of 1970 (*see* 3 AsYIL 394), so that it allows patents not only for processes but also for products in the agricultural, chemical and pharmaceutical fields. (IHT 03-01-95; FEER 12-01-95 p. 81)

Tokyo High Court decision on scope of first-sale doctrine

The Tokyo High Court took a decision in a case involving Jap-Auto Products Inc. and the German company BBS Inc. Contrary to the historically accepted geographical scope of the first-sale doctrine which is limited to the country which granted the patent, the court ruled in case of a German product covered by German and Japanese patents, that a Japanese company could import the products in Germany and sell them at a higher price in Japan without violating the Japanese patent. Competitors could thus circumvent patents in their own country by importing the products concerned, produced cheaper in another country under a local patent. (IHT 18-04-95)

Resolution of copyright cases in China

On 18 May 1995 a Beijing court ordered three local publishers to pay $27,360 to Walt Disney for unauthorized use of its cartoon characters.

The following week the US publishing concerns Prentice-Hall Inc. and Harcourt Brace won a court-mediated cash settlement and an apology from the Chinese state publisher Anhui Science and Technology Press who admitted pirating their works. The Association of American Publishers had filed suit in 1994 on behalf of the two publishers before the [new] intellectual property protection chamber of the Intermediate People's Court of Beijing.

It was said that courts often rejected claims based on what a plaintiff's property is worth outside China as such large amounts were inappropriate for Chinese to pay.

Furthermore local individuals often lack the resources required to start a court case, as the advance court fees are set proportionate to the claimed damages. Besides, bringing suit might imply the risk that the authentic products may also become tainted as possibly fake. (IHT 27/28-05-95; FEER 22-06-95 p. 80)

INTER-STATE RELATIONS: GENERAL ASPECTS

Iran - US

It was reported that the head of the US Central Intelligence Agency told the US Congress in 1992 that Iran was spending $2 billion a year on arms, could pose a threat to the US and its allies in the Gulf within three to five years, and have a nuclear weapon by 2000. In 1993 his successor told Congress that Iran would need 8 to 10 years to build a nuclear weapon unless it had extensive outside help. In 1994 US Ministry of Defense officials said that Iran spent only about $800 million on arms in 1993

and had made much less progress on its nuclear weapons program than expected. (IHT 06-07-94)

The US president made an announcement on 14 March 1995 on the issue of an executive order preventing an American oil company, through its subsidiary, from "entering into contracts for the financing or the overall supervision and management of the development of petroleum resources in Iran". The announcement was prompted by the announcement of an agreement between the Iranian government and Conoco Iran N.V., a Dutch affiliate of the Houston-based Conoco Inc. which is owned by E.I. Dupont de Nemours & Company. The President would act for national security reasons under the International Emergency Economic Powers Act. Yet it appeared likely that the development of the oil fields would proceed, since two French oil companies (Elf Aquitaine and Total) and Royal Dutch/Shell had competed with Conoco for the project.

The US sought to isolate Iran economically and diplomatically because Iran allegedly supports terrorist groups, undermines peace efforts in the Middle East, seeks to dominate the Gulf region and endeavours to acquire nuclear weapons. Yet transactions relating to Iranian oil were allowed as long as they take place by foreign subsidiaries outside the US. (IHT 15 and 16-03-95, 22-06-95)

On 8 May 1995 the president of the US issued an executive order prescribing a total ban on US trade with and investment in Iran, taking effect in July 1995. Prior to this total boycott US companies were still allowed, through their foreign subsidiaries, to purchase Iranian oil (about 20 percent of the production at $3 billion to $4 billion) provided it was sold outside the US. However, even under the new executive order fully independent subsidiaries not controlled by US-based executives would not be affected. Under the ban Iran was not permitted to buy any US goods. (IHT 02-05 and 09-05-95) Since the announcement of the imminent order on 1 May fear of hyperinflation led to panic buying of US currency resulting in the rial losing more than a third of its value against the dollar. (IHT 10-05-95)

It was widely believed that it was primarily pressure from the US Congress that induced the president to take recourse to the tough policy option. Under a bill sponsored in the Congress US markets would be closed to most foreign corporations doing business with Iran. (IHT 03-05-95)

In a rare statement addressed to the US the Iranian president on 13 April 1995 called on the US to reconsider its policies on Iran. He explained US pressures to be partly based on Iran's rejection of Arab-Israeli peace efforts, qualified the US moves to isolate Iran as illegal and warned that they would lead to regional instability. (IHT 14-04-95)

In an interview with an American broadcasting company the Iranian president later said that the US missed a chance to improve relations by banning the Conoco-deal. "My suggestion to your government is not to do these immature things. ... We are not asking the United States to have relations with us. What we are asking the United States is to stop its hostility against us". (IHT 17-05-95)

A month after the US decree Iran had found other buyers for the 500,000 barrels of oil previously bought by US clients.

Relations between Asian Muslim states and Israel

In June 1994 the brother of the king of Malaysia who is a businessman went to Israel for a private visit, but his schedule included meetings with the prime minister and the foreign minister. As this involved a violation of Malaysian law, the prince might face action by the Malaysian authorities upon return.

In the same month the Maldives for the first time allowed Israelis to visit the country, while Bangladeshi MPs met with senior Israeli officials when passing through Israel. (FEER 07-07-94 p. 28, 04-08-94 p. 13)

The Malaysian prime minister said that Malaysian recognition of Israel would be conditional upon the Palestinians and Arab countries 'being satisfied' with the implementation of their peace agreements with Israel. (FEER 13-10-94 p. 13)

Efforts to establish diplomatic relations met with another setback following Israel's negative vote against the UN General Assembly resolution granting the right to self-determination to Palestinians. However, Malaysian nationals were allowed to visit Jerusalem for religious purposes for not more than 14 days. (NST 10 and 20-11-94; Star 10-11 and 15-12-94)

China - Germany

The first European response to the US emphasis on Asia was by way of a visit by the German Chancellor to China in October 1993, ensuing a return visit by the Chinese Premier in July 1994 and the signing of $3.5 billion worth of contracts with German companies. (IHT 07-07-94) The latter visit was, however, marred by a number of human rights demonstrations. (IHT 08 and 9/10-07-94)

China - North Korea

At an official gathering in Pyongyang the Chinese ambassador stressed the importance of Sino-Korean cooperation under the 1961 Sino-North Korean Treaty of Friendship and Mutual Assistance. Under this treaty the two countries are committed to offering one another immediate military and other assistance in the event of an attack on either by a third state. (IHT 09/10-07-94)

Vietnam - US

Vietnam gave new assurances of cooperation in determining the fate of missing US military personnel from the Vietnam War, but it was reported that these assurances were not considered satisfactory enough to justify a visit by the US Secretary of State who would be in Thailand in July 1994. (IHT 08-07-94)

After an agreement in principle signed in May 1994, the two countries finally decided on 28 January 1995 on the actual establishment of diplomatic relations through the opening of liaison offices.

The agreement also settled questions about compensation for diplomatic properties seized at the end of the Vietnam War in 1975. Vietnam would return or compensate for 36 US properties, and the US would turn over the former South Vietnamese

embassy in Washington and unfreeze Vietnamese assets. (FEER 10-11-94 p. 12; 09-02-95 p. 14; IHT 27-01-95) (*see:* Compensation)

The Vietnamese prime minister on 25 April 1995 called for normal diplomatic ties as well as full economic and commercial relations. The US had made a full accounting of still more than 2,000 US service men the determining factor for the pace of normalizing relations. (IHT 26-04-95)

Myanmar - US

It was reported that Myanmar officials had offered the US to bring down the drug baron KHUN SA against a lift of the US arms embargo. Myanmar is the source of most of the world's opium, and KHUN SA had been indicted on narcotic charges in the US in 1990. It was said that the Myanmar army needed arms and ammunition to destroy KHUN SA's stronghold and that the arms provided by China were not suitable for the mountainous terrain. Responding to these reports U KHUN SA, who is also head of the Shan State Restoration Council and commanding the Mong Tai Army, offered to surrender in exchange for a military pull-out from the northern part of the country and an independent Shan state.

In its annual report on drug trafficking the US State Department was critical of peace settlements between the Myanmar government and the ethnic groups of the Wa and the Kokang since they would permit the groups concerned to continue harvesting opium. (IHT 16/17 and 18-07-94)

The US sent a deputy Assistant Secretary of State to Myanmar in October 1994 to discuss human rights, democracy and the fight against narcotics. He delivered a message consisting of two visions of future relations. One would be increased cooperation with Myanmar based on positive movements on human rights, democratization and anti-narcotics activities. The other would be increased isolation if the Myanmar government failed to move forward in these three areas.

The US withdrew its ambassador from Myanmar in 1989 after the military takeover of the government in 1988. (FEER 10-11-94 p. 13)

India - Russia

The Indian prime minister visited Russia early July 1994. A path-breaking achievement of the visit was a joint declaration on protecting the interests of 'pluralistic' states, referring to threats to countries such as India and Russia from ethnic and religious sub-nationalism. The declaration stated, inter alia, that India and Russia had already exercised their right of self-determination. (FEER 14-07-94 p. 18)

Cambodia - Thailand

The outlawing of the Khmer Rouge (*see supra* p. 395) implied that the guerillas and their leaders should not be allowed to leave the country, including access to Thailand. The Cambodian government said it would ask other countries not to allow the Khmer Rouge to enter their territory and not to recognize other passports than those

of the royal government. Thailand assured that it would abide by the new law. (FEER 21-07-94 p. 21)

On 2 July 1994 there was a coup attempt in Cambodia (*see supra* p. 395) led by a former interior minister, General SIN SONG, and there was suspicion of Thai involvement. The general was arrested but escaped two months later to Thailand. He was sentenced in his absence on 28 October 1994 to a prison term of twenty years. Nine Thais were sentenced on the same day to suspended prison terms of three to five years and were released for return to Thailand. (FEER 17-11-94 p. 16)

China - US

(*see also:* Unrecognized entities at p. 506)

On 27 August 1994 the US Commerce Secretary came to China on a mission to improve the prospects of US firms competing for business in China. It was the first visit by a US cabinet minister since the separation of the MFN-issue and human rights. (IHT 29-08-94)

For its part China pledged to resume the dialogue with the US over its human rights policy, which collapsed in February 1994. The US Commerce Secretary said he had raised US concerns "in ways that allow us to have some chance of success at achieving our goals. ... I haven't tried to bludgeon them about it. I haven't approached them with arrogance, but with concern, deep concern." (IHT 31-08-94)

On 7 September 1994 the US announced a change in Taiwan policy, reaffirming the US position that there is only 'one China', but loosening some of the strictures that had prevented US officials from carrying out direct talks with Taiwanese officials on trade and economic issues. For the first time since 1979 the most senior US official in Taiwan visited the Taiwan president to brief him on the policy change.

When the US announced changes in its Taiwan policy involving loosening some restrictions in contacts, China reacted by saying that the expansion of US official ties with Taiwan "seriously violated the three joint communiques signed between China and the US" and would seriously and adversely affect Sino-US relations. (IHT 09-and 12-09-94)

China cancelled a planned visit by the US Transportation Secretary in January 1995 as a protest against the latter's trip to Taiwan in December 1994. This visit was considered to be in violation of the 1978 Sino-US agreement on the establishment of diplomatic relations. (IHT 14-12-94, 16-12-94)

In February 1995 the US Defense Secretary announced that the US was committed to maintaining "a stable forward presence in the [Asian] region, at the existing level of about 100,000 troops, for the foreseeable future". In order to avoid creating the perception that it was thereby trying to contain China much as it did the Soviet Union, the US adhered to a policy of 'constructive engagement' and accordingly started a program of exchanging information about the respective defence policies with China. (FEER 13-04-95 p. 30)

In response to the US decision of 20 May 1995 to allow the Taiwanese president to visit the US (*see:* Unrecognized entities, at p. 504) China issued a denunciation on 23 May 1995 and demanded that the US reverse its decision. The Chinese statement equated the pending US visit by the Taiwanese president with his travels to various countries under the guise of 'private visits' and 'vacations' (see 4 AsYIL 430). In a later statement China accused the US of harming bilateral relations and of violating the communiques [of 1971 and 1978] establishing diplomatic relations. While the US maintained that since the visit was of a strictly private character it did not violate the US pledge to recognize only 'one China', China contends that any visit by the Taiwanese president would undermine the reunification efforts and interfere with Chinese sovereignty. (IHT 24 and 27/28-05-95)

On 26 May China cancelled a trip to the US by its defence minister. Earlier it cancelled a visit by a member of the State Council and cut short a visit by the air force commander. (IHT 27/28-05-95) On 28 May it suspended talks with the US on the control of missile technology and cooperation on nuclear energy, and put off a projected visit to China by the director of the US Arms Control and Disarmament Agency. This marked a setback for slowly warming military ties which had been the closest area of cooperation for the two countries. (IHT 29-05-95) China also recalled its ambassador in the US and announced that he would not return to his post for the time being. The Foreign ministry spokesman said: "The basis of bilateral relations has been shaken. This is no trivial matter". (IHT 22-06-95)

Trying to patch up its relations with China, the US reaffirmed its policy of recognizing only 'one China' (IHT 14-06-95) and proposed high-level talks to salvage the deteriorating ties. This was rejected by China on grounds that "[t]o this day, the US side has not taken any concrete moves to eliminate the pernicious effect created by LEE TENG-HUI's US visit". (IHT 23-06-95)

Japan – South East Asia

When in Singapore during his tour to the Philippines, Vietnam, Malaysia and Singapore the Japanese prime minister laid a wreath at the Memorial to the Civilian Victims of the Japanese Occupation and thus became the first Japanese leader to honour Singaporeans killed during the Japanese occupation.

In Malaysia he was told by the Malaysian prime minister that Japan should stop apologizing for World War II and start act as a world leader in keeping the peace. The Malaysian prime minister also rejected calls for compensation from Japan for events that occurred during the war." If you start seeking compensation for things that happened 50 years ago, what about 100 years ago or 200 years ago? It could turn into demands for compensation from colonial powers." (IHT 29-08-94)

On ending his four-nation tour the Japanese prime minister pledged to expand ties with Japan's Asian neighbours and renounced ever again threatening them militarily. He acknowledged that Japan's aggression had caused "unbearable suffering and sorrow to many people in the region." (IHT 30-08, 01-09-94)

Japan - Asia

It was reported that Japan was being attacked by East Asian states for failing to earn their trust and thus being accepted as a representative of the region. For example, it was being reproached by Malaysia for refusing to join other East Asian countries in the East Asian Economic Caucus which was strongly opposed by the US and Australia. The Malaysian prime minister said: "The only Asian country with the ability to help fellow Asian countries refuses to do so but instead demands to know why America is not included." And on 8 November 1994 the Malaysian international trade and industry minister said: "We just need a straight answer from Japan. Does Japan want to be a member of East Asia? If it doesn't, it should say so." And at the meeting of the UN General Assembly in October 1994 not a single Asian country expressed support for Japan's bid to become a permanent member of the UN Security Council. (IHT 10-11-94)

Thailand - US

Thailand requested the renegotiation of a 28-year-old 1967 Treaty of Amity which dealt exclusively with economic matters. Under the treaty US companies are granted equal rights to Thai companies and the right to 100% ownership of their Thai subsidiaries. These privileges are not accorded to other foreign companies. Fiduciary functions are exempted from the privilege.

Early April 1995 the government was advised to bar the US-owned Universal Insurance from establishing full branches in Thailand because the firm is almost entirely foreign-owned, while a 1992 insurance law restricts foreign ownership in the sector to 25%. There was US suspicion that the case might be used to push for renegotiation of the 1967 treaty. (FEER 19-01-95 p. 20; 04-05-95 p. 72)

North Korea - US
(*see also:* Border incidents at p. 395)

In the talks on the elaboration of the August agreement in principle (*see infra* p. 471), the two countries also dealt with the establishment of liaison offices in each other's capitals. (IHT 14-09-94; FEER 29-09-94 p. 22)

There was a great deal of mistrust between the parties (IHT 15-09-94) and at one time the US deployed an aircraft carrier group off the Korean coast, comprising an aircraft carrier, three cruisers, a frigate and two logistics ships by way of sending "a very strong message" and to influence the current diplomatic efforts. (IHT 23-09-94) The naval exercises were denounced by North Korea as a 'war gamble' that could complicate negotiations. (IHT 24/25-09-94)

A Framework Agreement was reached by the two states and signed in Geneva on 21 October (*see:* Selected Documents), providing for a three-phase plan, whereby nuclear dismantling would proceed step by step with reactor replacement, giving both sides leverage against reneging. (*see also:* Nuclear capability at p. 471)

Under the agreement North Korea would freeze its nuclear reprocessing program, meaning not refuelling, and shutting down, a five-megawatt graphite reactor, and

stopping the construction of two 50-megawatt and 200-megawatt plants, resulting in a complete dismantling of the program in about ten years. The agreement also provided for a resumption of international inspections of the North Korean nuclear installations.

In exchange the US would arrange for its allies to provide North Korea with two modern, 1,000 megawatt light-water nuclear reactors worth around $4 billion. The reactors would operate on imported uranium, facilitating some control over the North Korean nuclear program. The US would also provide for interim energy supply for North Korea until the reactors would be completed, which would take at least five years.

At the end of stage one, with construction of the first light-water reactor well under way but before key nuclear components have been supplied, North Korea would allow international inspection of the two installations suspected of harboring nuclear wastes from plutonium production.

In stage two, as construction proceeds on the two new reactors, North Korea would allow the estimated 8,000 plutonium-laden spent fuel rods which were removed from its research reactor in May 1994 to be transferred to another country.

In stage three, as the second replacement reactor nears completion, North Korea would dismantle all its old graphite reactors and reprocessing plant. This dismantling of nuclear installations is more than the NPT requires.

Also under the agreement the two countries would exchange diplomatic liaison offices and there would be a resumption of the North-South dialogue. The agreement also contained a US pledge not to use nuclear weapons against North Korea. (IHT 19, 20, 21, 22/23, 26 and 28-10-94, 03-11-94)

In a letter of 26 October 1994 to the North Korean leader the US president committed himself "to use the full powers of my office" to provide the light-water reactors for North Korea if the project would not be completed beyond the control of the latter. (IHT 27-10-94)

North Korea declared on 1 November 1994 that it had stopped the building of two nuclear reactors and shut down the 5-megawatt reactor. On the other hand South Korea and the US started their annual 'Foal Eagle' military exercise (but not the 'Team Spirit' exercise which would involve the participation of US forces which are not normally stationed in South Korea), giving cause to a North Korean response that it would hinder the carrying out of the accord. (02-11-94)

On 9 January 1995 North Korea announced it would lift restrictions on trade and financial transactions with the US as part of the framework agreement. The decision would also allow the entry of US ships into North-Korean ports and the opening of telecommunications services between the two countries. (IHT 10-01-95)

South Korea - US

The South Korean foreign minister visited the US early September 1994 to convey South Korean worries about increasing US contacts with North Korea which might diminish the effects of the US-South Korean alliance. It was expected that the South Korean emissary would emphasize two issues:(1) opening liaison offices in Washington and Pyongyang and any improvement in the US-North Korean relations must be done in parallel with improvements in relations between South and North Korea; (2) persua-

de the US not to sign a peace treaty with North Korea with the exclusion of South Korea. (IHT 07-09-94)

China - Russia

The Chinese president arrived in Russia for a visit and talks on 2 September 1994. It was the first visit by a Chinese president in 37 years. A Declaration was signed at the end of the talks. In it the two countries agreed not to aim nuclear missiles at each other, never to use force against each other, and to sharply limit the number of troops stationed along their border. Each would also stay out of organizations that threatened the other and would prevent ideology from obstructing bilateral relations. The two presidents also signed economic agreements and an accord on the western section of the 4,400-kilometre Sino-Russian border. (IHT 3/4 and 05-09-94, BR 12/18-09-94 p. 18; FEER 15-09-94 p. 13)

Iran - France

The President of Iran in an interview published on 12 September 1992 urged France to withdraw its support of the Algerian government. He said that the French backing could be compared to the US support of the late shah in Iran. (IHT 13-09-94)

Vietnam - Eastern Europe

Vietnam started to re-establish economic relationships with Eastern Europe. In August 1994 agreements on investment promotion and protection were signed with Hungary, Romania and Poland, on avoidance of double taxation with Hungary and Poland, and on trade with the Czech Republic. (IHT 24/25-09-94)

South Korea - Japan

A meeting of delegates from China, Russia, Japan and South Korea in Seoul in September 1994 to discuss a plan for pollution control in the above sea (Northwest Pacific Action Plan) met with difficulties when the South Korean media protested against the use of the term 'Sea of Japan' when referring to the sea concerned. While the sea is known in Japan as Nihon Kai or Sea of Japan, it is referred to in Korea as the Tonghae or the East Sea. In the end it was agreed to describe the affected waters only by their latitude and longitude. (IHT 26-09-94)

Iran - Iraq

The deputy head of the foreign affairs sub-committee of the Iranian parliament said that Iran has a strategic interest in having Iraq re-emerge as a regional power. (IHT 04-10-94)

India - Pakistan

News reports referred to an Indian six-point memorandum put to Pakistan in January 1994. Five of the points were proposals to stabilize territorial flashpoints and the like. One contained nuclear security proposals: no first use of nuclear 'capability' and agreement not to target population centres with nuclear weapons in any conflict. Pakistan rejected the memorandum on ground that it did not address central issues such as the future of Kashmir, and because the nuclear proposals were exactly what a conventionally superior power would propose to a weaker one to remove the latter's main means of deterrent. (FEER 06-10-94 p. 18)

In the Indo-Pakistan conflict each side accuses the other side's intelligence service's role in destabilizing the opposite party. Indian intelligence officials charge that the (Pakistan) Inter-Services Intelligence (ISI) agency had been channelling funds to the National Socialist Council of Nagaland in northeast India through Bangladesh, and that the ISI was running training camps for Indian rebels in a number of locations in Bangladesh. Pakistan denied this, but officials acknowledged privately that the ISI was active in Kashmir. (FEER 20-10-94 p. 34)

China - Israel

The Chinese vice-prime minister paid a four-day visit to Israel. He was the highest-ranking Chinese official to visit Israel since the two countries established diplomatic relations in 1992. (FEER 13-10-94 p. 13)

Asia - Europe

The European Commission on 13 July 1994 called for a radical overhaul of economic and political relations with Asia to avoid being sidelined. These relations had been strained over linkages made between trade and aid to human rights and labour and environmental standards. The Commission said it was urging businesses and governments in the EU member countries to mobilize their forces to open markets, increase investment opportunities for European companies and involve Asia more closely in international economic institutions. (IHT 14-07-94)

The significant change in policy also appeared during the annual meeting with ASEAN when a new approach to Myanmar was outlined, shifting the European position away from ostracism and closer to the ASEAN policy of constructive engagement. The president of the European Council of Ministers said that Europe was prepared to follow ASEAN's lead and hold talks with the Myanmar military on ending repression and restoring democratic rule. (IHT 27-07-94)

With regard to the possible emergence of an American-Asian trade alliance in APEC the EU initially took a negative attitude but later had no objections provided Asia would remain committed to a policy of 'open regionalism', extending trade concessions within APEC to others without discrimination.

A meeting of EU and ASEAN foreign ministers took place in Kalsruhe on 24-25 September 1994. The meeting resulted in a 'Karlsruhe Declaration', highlighting

ASEAN's claim of being a 'gateway' to the Asia-Pacific region and describing Euro-ASEAN cooperation as a "central element in relations between Europe and the Asia-Pacific".

The EU discarded its earlier confrontational approach in dealing with the region but trade relations were likely to remain difficult. Among other things, the European Commission had proposed to terminate tariff concessions for Singapore, Brunei, Thailand, Indonesia and Malaysia, and had threatened to impose anti-dumping duties. The EU appeared reluctant to open the European markets in 1995 for Asian textiles despite commitments to phasing out textile import quotas in the Uruguay Round: from 1995 importing countries would be obliged to phase out quotas on 16% of their textile and clothing imports. This would be the first stage of a decade-long, four-stage phase-out of the Multifibre Arrangement (MFA). Being free to choose the categories of goods to liberalize at each stage, the EU planned to select items which are already exempt from MFA quotas for the first round of liberalization. The EU was also pressing for international discussions on introducing a 'labour clause' within the World Trade Organization, thus facilitating the EU and the US to shut out competitive Asian exports. Besides, Japanese requests for a bigger quota for their car exports to Europe were turned down. (FEER 06-10-94 p. 15; 13-10-94 p. 72)

In October 1994 the World Economic Forum organized a meeting of Asian and European political and business leaders at Singapore, after a first such meeting in Hong Kong in 1993. The meeting agreed on a wide-ranging program to build closer relations. The proposals included a call for regular gatherings of East Asian and European heads of government similar to the informal summit meetings of leaders from the APEC countries. Besides there were far-reaching proposals on trade and investment liberalization. The proposals said it was essential that European countries make a commitment to control the spreading use of anti-dumping measures.

During the meeting the Malaysian prime minister said that before a genuine partnership of equals could be built with East Asia most of Europe had to get rid of an attitude that "some will call incredible arrogance". Reflecting resentment among many East Asian governments at attempts by the EU to link human rights standards to trade or aid, he said that no Asian country had demanded that European states reform themselves. A former French prime minister found the statement unacceptable and said that Asian descriptions of the European Union as a highly protected fortress were belied by East Asia's large and growing trade surplus with Europe. (IHT 14 and 15/16-10-94)

The idea for a Euro-Asian summit meeting was advanced for the first time by the Prime Minister of Singapore on a visit to France in October 1994. (IHT 09-12-94) At a meeting in Singapore of senior officials of the EU and ASEAN it was agreed on 4 May 1995 to hold an East Asia-Europe summit meeting in Thailand in early 1996.

Meanwhile European leaders at a meeting at Essen, Germany, in December 1994, had endorsed a new strategy for dealing with Asia. IHT 05-05-95)

South Korea - China

Early November 1994 the Chinese prime minister, the highest-ranking Chinese official so far, visited South Korea. The two states concluded three agreements: on

direct air links and on a joint-venture airplane project, and a memorandum of understanding on cooperation in nuclear power generation. (IHT 01-11-94)

Vietnam - Cambodia

Cambodia accused Vietnam of preventing Phnom Penh-bound cargo ships from proceeding up the Mekong River, in violation of international law. The blockade might be in retaliation of a new Cambodian immigration law which could be the basis for the expulsion of ethnic Vietnamese. (FEER 17-11-94 p. 13) (*see:* Minorities at p. 470)

Japan - Israel

On the occasion of the first visit of the Israeli Prime Minister to Japan in December 1994 agreements were signed on expanding cultural and scientific exchanges.

Japan long observed the Arab boycott on Israel, but had become receptive to investment and trade recently. The first Japanese economic mission to Israel was sent in August 1993. (IHT 13-12-94)

Thailand - Myanmar

An initiative of 1988 led to the decision to build a bridge across the Moei River which separates Thai and Myanmar territory. The bridge reflected a significant warming in Thai-Myanmar relations and highlights Thailand's policy of 'constructive engagement' with Myanmar.

A memorandum of understanding to build the bridge was signed in January 1990 and the bridge would be completed some time in 1996. (FEER 03-11-94 p. 16)

China - Myanmar - India

Cross-border trade between Yunnan Province and Myanmar had swollen in the last ten years from about $15 million annually to around $800 million.

Out of concern for China being allowed to carry out monitoring activities along the Myanmar Indian Ocean coast, India made several diplomatic representations to Myanmar in 1993 and 1994.

In August 1994 Indian coastguards intercepted what appeared to be a Chinese survey vessel that had strayed into Indian waters near the Andaman islands. At the same time three fishing vessels with Chinese crew were also detained at Port Blair on the Andamans, but were later released. (FEER 22-12-94 p. 23)

The Chinese prime minister paid a visit to Myanmar in late December, being the fourth foreign head of government to visit Myanmar since the introduction of military rule in 1988. Among the topics of discussion were border and economic issues. (IHT 27 and 28-12-94)

Iran - Norway

Following the recall of the Iranian ambassador to Norway (*see infra:* Jurisdiction), Norway downgraded its diplomatic relations with Iran by way of protest against the death edict on the author SALMAN RUSHDIE. The Norwegian ambassador to Iran who was recalled for consultations on 16 January 1995 would remain in Oslo "for an indefinite period". (IHT 01-02-95)

Iran responded by threatening Norway with an economic boycott by "fully implement[ing] the economic restrictions it introduced several months ago" unless Norway would refrain from 'anti-Islamic' policies. (IHT 03-02-95)

Iran - Sweden and Denmark

Sweden cancelled its invitation to an Iranian deputy foreign minister who was on a tour of Scandinavia, under pressure of Norway. (*see supra*) The minister's visit to Denmark, however, would take place as planned. (IHT 4/5-02-95)

China/Thailand - Laos

China established full diplomatic relations with Laos in 1987 after the waning of Vietnamese and Russian influence, and since then Chinese aid and influence had been increasing regularly. Laos, with a population of 4.4 million, is attractive for China as a land bridge between China and Thailand and as a gateway to Southeast Asia generally. However, Thailand remained the most important economic partner of Laos, accounting for more than half of its imports and exports, while China only buys 5% of Laotian exports and supplies only 11% of its imports. (FEER 09-02-95 p. 18)

Intra-Asian diplomatic contacts

Asian diplomats in Washington, D.C. had begun bi-monthly informal meetings to discuss matters of common interest. ASEAN diplomats had been meeting regularly for several years, but meetings were now taking place on a wider, regional, basis. (FEER 16-02-95 p. 12)

Japan - North Korea

The three governing parties of Japan and the (North) Korean Workers' Party signed a declaration on 30 March 1995 urging their governments to revive efforts to normalize diplomatic relations.

Japan and North Korea began talks on normalizing relations in early 1991 but the talks broke down after the eighth round in late 1992, when North Korea rejected a Japanese demand for information about a Japanese woman allegedly abducted by North Korean agents. (IHT 31-03-95)

Nepal - India

The Nepalese prime minister on 11 April 1995 pressed India to change a treaty between the two countries that, inter alia, prohibited arms deals by Nepal with other countries. He demanded the right to import arms from China, as "it is the right of every country to import arms which are cheaper". (IHT 12-04-95)

Vietnam - South Korea

The leader of the Vietnamese Communist Party paid his first visit to South Korea and took the opportunity to call for closer ties between the two countries. Three years after establishing diplomatic relations, South Korea had become Vietnam's third-largest trading partner and investor. (IHT 13-04-95)

Japan - Iran

It was reported that Japan had delayed a $500 million loan to Iran because it was opposed by the US. (IHT 14-04-95)

Iran - India

The president of Iran paid a state visit to India in April 1995, being the first trip by an Iranian head of state to India since the 1979 revolution. (IHT 18-04-95) On this occasion Iranian officials called for a "regional axis of China, India and Iran to combat Western hegemonism". The Iranian president signed a tripartite agreement with India and Turkmenistan, giving India access to trade through the Iranian port of Bandar Abbas that has a rail link with Ashkhabad. This gave India direct access to Central Asia, bypassing Pakistan and Afghanistan. (FEER 15-06-95 p. 32)

China - Czech Republic

China refused to sign a student-exchange agreement to protest the visit of the Taiwanese prime minister to the Czech Republic. The latter was granted a meeting with the Czech president on 21 June 1995. (IHT 21 and 22-06-95)

Sri Lanka - South Korea

It was reported that Sri Lanka withdrew its candidature for the Asian seat on the UN Security Council in favour of South Korea, allegedly in exchange of a substantial infusion of aid and investment from the latter and the prospect of 10,000 jobs for Sri Lankans in South Korea. (FEER 08-06-95 p. 27)

Sri Lanka - Israel

Sri Lanka decided to restore diplomatic relations with Israel after breaking them off in 1990, apparently because of its heavy dependence on Arab oil. The relations were previously severed in 1970 to be restored in 1984. (FEER 08-06-95 p. 27)

(NON-)INTERFERENCE

(*see also:* Inter-state relations: general aspects, at p. 438; Iraq-Kuwait War)

Chinese accusation of US interference

China on 2 February 1995 accused the US of using "the excuse of human rights" to meddle in China's internal affairs. The statement was in response to the annual report on human rights violations by the US State Department, in which China was described as an authoritarian state with a record of "wide-spread and well-documented human rights abuses". (IHT 03-02-95)

INTERNATIONAL CRIMINAL LAW

Japanese comments on the ILC-draft statute for an international criminal court

Early November 1994 the Japanese government submitted its comments on the draft statute. As a whole Japan found the draft inadequate in terms of substantive as well as procedural law. There should be a better adjustment and coordination of the draft statute and the Draft Code of Crimes against the Peace and Security of Mankind.

With regard to the substantive law great emphasis is laid on the principle of nullum crimen sine lege, which implies a precise determination, by written rules, of the constituent elements of the crimes falling under the jurisdiction of the Court, the punishments to be imposed, the factors which constitute a defence, and the factors for aggravating or mitigating a sentence.

Under these criteria Art. 20 of the draft statute is considered inadequate. As to genocide under the Genocide Convention it is said that the definition in that convention does not provide unequivocally nor precisely the constituent elements of the crime either. The same applies to Art. 33 which includes national law among the laws to be applied without elaborating which national law is referred to, nor in what cases it should take place.

With regard to penalties the comments consider it imperative that statutory penalties be fixed for each crime. Art. 4 of the draft statute does not fulfill these requirements, and the reference to penalties provided for by the national law of the state involved suffers of the same deficiencies as in Art. 33.

Because of the international character of the court and the particularly serious character of the crimes involved, resulting in the expected pressure of world opinion to exact punishment, there should be stipulated very strict safeguards to ensure a fair and impartial trial. Yet the provisions of the draft statute concerning the investigative

and trial procedures, rules of evidence, appeal, review and execution of sentences, etc. are most elementary and inadequate. Inter alia, the issue of subpoenas and warrants for the purpose of gathering evidence should be regulated in the statute itself instead of simply empowering the Presidency to take such compulsory measures, as provided in Art. 26 of the draft statute.

Generally, Japan is of the opinion that the procedures to be followed by the court should be regulated in detail in the statute itself (i.e. by treaty) instead of in the Rules of the Court. While it is true that under Art. 19 of the draft statute the initial Rules of the Court and 'important amendments' of the rules are to be submitted to a conference of states parties for approval, yet the draft statute does not provide for the procedure for approval and, moreover, the procedure for the amendment of rules which the Court does not consider important is also inadequate.

The Japanese comments also contained critical remarks on, inter alia, the provisions concerning obligatory transfer of criminal jurisdiction by a state to the Court which may conflict with constitutional provisions on exercise of jurisdiction, the mandatory application of an absolute prohibition of double jeopardy, and the rule of "aut dedere aut punire". (UN doc. A/C.6/49/3 of 10-11-94)

INTERNATIONAL MONETARY FUND

North-South conflict on creation of SDRs

During the annual IMF-World Bank meeting in October 1994 a sharp conflict arose over the proposal made by the IMF managing director to create over $50 billion of Special Drawing Rights. The G-7 states (US, Canada, UK, Germany, France, Italy and Japan) rejected the idea on grounds that with the growth of global capital markets, the developing countries no longer needed to rely on a big expansion of SDRs. A US-British compromise proposal would allow the IMF to create $23.4 billion of SDRs which would be allotted mostly to the Eastern European countries. This was voted down by the opposing bloc of developing states, resulting in no creation of SDRs at all. It was the first time since the North-South polemics of the 1970s that the poorer states were able to block the wishes of the developed states. (IHT 03 and 04-10-94)

Consequences of increased economic power of Asian states

When the IMF endeavoured to set up a $50 billion package to bail out Mexico it turned, for the first time, also to some Asian states with reserves totalling at least four months of imports. These requests are likely to occur more often in the future and the question was that in return they would have to be offered a greater say in running the Fund.

One way would be by raising the region's share of the Fund's capital and thus its voting rights. At present South Korea, China, Singapore, Malaysia and Thailand hold a mere 4.1% of the total votes, and India and Indonesia 3.1%. It took Japan and Germany eight years to increase their share in 1992.

Another way would be to increase the number of countries that participate in the $29.4 billion General Arrangements to Borrow, a pool of pledged money that can be drawn upon in times of crisis. So far only the G-10 plus Switzerland and Saudi Arabia take part in the arrangement. (FEER 04-05-95 p. 61)

INTERNATIONAL TRADE

(see also:) Inter-state relations: general aspects

US fruit imports in China

After two years of negotiations since May 1992 an agreement was reached in June 1994, ending a Chinese ban on American fruit and allowing the import of apples from Washington state. The Chinese quarantine law of 1992 bans fruit from 73 countries considered to be a 'medfly' risk. (IHT 16/17-07-94)

US quota on textile imports from China

The US slashed its quota on Chinese textile imports as of 1 July 1994 in retaliation for an estimated $2 billion of Chinese textiles allegedly incorrectly labeled as originating from elsewhere. China protested against the measures, qualifying them as a violation of an agreement reached in January 1994 (*see* 4 AsYIL 473). According to US figures Chinese textile and clothing imports to the US in 1993 was valued $7.2 billion. In May 1995 another cut in quotas was announced (IHT 23/24-07-94; FEER 18-05-95 p. 99)

Apart from genuine imports from China, Chinese factories also do preliminary stitching on much of the clothing imported from Hong Kong, Singapore and other Asian countries. The US apparel industry wanted to have these garments be counted against the Chinese quota. Since the mid-1980s a series of customs decisions held that a garment's origin was based on where its fabric was cut. Before that, the origin was based on where a garment was sewn and assembled. Since then labour rates had risen in places like Hong Kong, so that fabrics were cut there employing high-speed laser technology, for assembly in China. This caused the US clothing industry to demand to change the rule back to the 'sewing and assembly' standard. (*see infra,* p. 451) (IHT 13/14-08-94)

Japanese-US trade dispute

The framework agreement reached in July 1993 (4 AsYIL 468) provided for negotiations on a variety of sectors of trade. Yet during the following year no single deal was concluded on any of the five Japanese markets: automobiles, auto parts, insurance, and government procurement of telecommunications and medical equipment. A deadline was repeatedly moved back, accompanied by US threats of trade sanctions if no results were reached. At the end of July 1994 the US threatened to impose trade sanctions if there was no agreement by the end of September. The 60-day "consultation and negotiation period" was authorized under US trade laws.

The failure of the negotiations so far had resulted in an appreciation of the yen, on the one hand reducing the Japanese trade surplus by pricing the Japanese goods out of the markets, but on the other hand leaving the Japanese investors unwilling to make new investments. The reaching of a trade agreement was widely seen as a means to depreciate the yen, leading to sale of yen and new investments abroad.

There were in fact two issues: first, how to ensure improved market access for American telecoms and medical-equipment suppliers; second, how to measure the result of the changes.

Telecommunications and medical technology were among the priority areas mentioned in the 1993 framework agreement. The US argued that the foreign share of Japan's public and private telecoms market was currently 5% compared with a foreign share of 25% of the markets of other rich countries. In the case of medical equipment, US manufacturers accounted for nearly 40% of the market in the EU, but less than half that in the Japanese market. According to the Japanese, however, the foreign share of the US market for officially procured telecoms and medical equipment is even smaller (0.07%) than it was in Japan (0.6%). By contrast, foreign firms accounted for a 38.5% slice of Japanese government purchases of medical equipment in 1991, against 1.5% in the US.

The US was insisting on quantitative and qualitative benchmarks while the Japanese side dismissed such proposals as amounting to managed trade. Since the 1970s Japan and the US had negotiated 12 bilateral trade agreements on government procurement but results were said to have been minimal. (IHT 25-07, 01-08 and 29-08-94; FEER 11-08-94 p. 69)

On 13 September the Japanese side emphasized that "there are no prospects" for agreement on all aspects of the dispute by the deadline. The insurance sector where the US had not made demands for objective indicators was likely to be the first sector in which an agreement could be reached. (IHT 14-09-94)

On 1 October the two sides reached agreement in principle on opening the Japanese market in three sectors: government procurement of telecommunications and medical equipment, insurance (34 ILM 661), and flat glass. Final agreement on Japanese imports of flat-glass was reached on 12 December 1994. No numerical targets were set but a variety of objective criteria would be used to assess improvements in market access and foreign efforts made. A multi-tiered formula was used to evaluate whether there has been 'a significant increase' in access of foreign products and services. The agreement did not include any means to enforce, should penetration of the Japanese market not significantly increase.

No agreement was reached in the field of automobiles and motorcar-parts. As a result the US listed Japan under section 301 of its trade law (*see* 2 AsYIL 334, 4 AsYIL 469), beginning a process that could result in sanctions within 12 months. (IHT 03-10-94, 13-12-94; FEER 13-10-94 p. 18) The only operative agreement between the two countries regarding automobiles dated from 1992, when Japan pledged to buy $19 billion worth of US auto-parts over a period ending 31 March 1995. (*see* 2 AsYIL 337) (IHT 18/19-03-95)

The negotiations on motorcars were resumed on 27 March 1995 with the US seeking agreement in three areas: providing more dealerships for US cars, boosting purchases of US-made parts (for new cars), and expanding sales of US replacement

parts by a relaxation of inspection regulations. (IHT 25/26-03-95) The US demanded that Japanese carmakers renew and increase so-called 'voluntary plans' for increased purchases as made in 1992.

Japan agreed to reassure Japanese car dealers that they are free to sell competing automobiles but refused to oblige Japanese car manufacturers to allow their dealers to sell competing foreign cars. Japan also denied the US allegation that the share of foreign cars in the Japanese car market is abnormally small, referring to the fact that the market share of European cars in Japan was larger than in the US. At the market for cars with engines larger than 2,000 cc 28% consists of imported cars, although it was admitted that only 20% of the cars sold in Japan belonged to this category.

As to components, accounting for 80% of the value of worldwide car sales, foreign car-parts took only 2.6% of the Japanese market, compared with 32.5% of the US market in 1994. However, purchases by Japanese car manufacturers of (foreign made) components rose from $2.5 billion in 1986 to $20 billion in 1994, although more than 90% of it concerned purchases by Japanese car plants in the US.

Finally, with regard to replacement parts, most vehicle inspections in Japan are performed at government-designated garages which are usually tied to Japanese manufacturers and accordingly use their parts. Japan refused to have inspections performed by more garages because of safety reasons.

As the positions of the two sides remained far apart, the Japanese trade officials threatened that if the US would impose trade sanctions, Japan would appeal to the WTO. (IHT 31-03-95) While the Japanese accused the US of trying to force them to accept numerical targets for US exports, the US contended that Japan's system of closed markets and its huge $66 billion trade surplus with the US had to be resolved. Automobiles and car parts make up nearly 60 percent of the US trade deficit with Japan. (IHT 6/7-05-95; FEER 18-05-95 p. 97)

It was reported that while US officials conceded that unilateral tariffs would violate WTO rules, the US was preparing a counter-complaint in case Japan would take action at the WTO. The counter-complaint would allege that excess regulation and collusion among Japanese car manufacturers discriminate against the sale of foreign-made cars and car-parts. The complaint would rely on the WTO "nullification and impairment" clause. It would argue that anti-competitive features of Japan's domestic market essentially have 'nullified' the benefits of the tariff reductions to which Japan committed itself by joining the trade organization and the former GATT.
[The nullification and impairment argument was used by the US under the GATT to overturn European soybean subsidies, and invoked by the EU in 1983 to challenge collusion in the Japanese car industry] (IHT 10-05 and 13/14-05-95) As to the alleged illegality of unilateral recourse to sanctions the US Trade Representative said that there was agreement "that we'd all use the WTO's dispute settlement mechanism, but for those items not covered we'd preserve our own trade laws". (IHT 22-05-95)

According to news reports a few days later it was expected that the dispute would be settled by direct concessions from Japanese car companies rather than from the Japanese government. These concessions could consist of increasing imports of car-parts produced by Japanese subsidiaries in the US. (IHT 13/14-05-95)

A target list of Japanese luxury cars for US punitive sanctions was issued on 16 May 1995, which would nearly double their prices. The sanctions would not take effect

before the lapse of a 30-day comment period. The tariffs would wipe out Japanese exports to the US of luxury cars, but would comprise less than 2.2 percent of the value of total worldwide Japanese exports. (IHT 17-05-95) The intended US sanctions were criticized by the EU as being illegal because it would be discriminatory action in breach of the most-favoured nation obligation.

On 17 May Japan asked the US for consultations in accordance with WTO rules to try to solve the dispute, qualifying it "a case of urgency" so that it could demand a WTO panel to be established within 20 days after seeking consultations, instead of the 60 days for normal disputes. The US agreed to the consultations but rejected the urgency classification, proposing the talks to be held in the second half of June 1995. (IHT 18 and 27/28-05-95)

The EU warned that it would bring a complaint to the WTO if the US secured a car deal with Japan that was discriminatory to European manufacturers (IHT 25-05-95), and on 31 May 1995 the EU formally asked to be included in the upcoming consultations between the US and Japan, claiming it had "a substantial trade interest" in strict observance of the WTO regulations. (IHT 01-06-95) The EU request was rejected by the US. (IHT 08-06-95)

In June it was reported that there were signs of both countries edging toward a breakthrough as a Japanese newspaper reported that Toyota was preparing to increase the percentage of locally made car-parts to be used at its US factories. All publicly discussed proposals were similarly focused on increases in the 'local content' of cars made in Japanese factories in the US. Acceptance of such plans by the US would imply a withdrawal of its primary objectives, viz. the purchase of more American parts for cars made in Japan. One major question was whether the [Japanese] ministry of international trade and industry (MITI) would stop Japanese companies from issuing parts-purchasing plans because the US tended to view such plans previously as binding targets.

The US Undersecretary for International Trade said on 21 June 1995 that if the Japanese government was not prepared to meet US demands, the US was ready to accept remedial actions on the part of individual Japanese companies. He also emphasized that the US was not seeking to impose numerical quotas on Japanese imports. (IHT 22-06-95)

On 28 June 1995 the two sides reached agreement. The Japanese minister for international trade and industry said that Japan had been able to 'maintain its basic principles', i.e. its opposition to fixed numerical targets for foreign cars and car parts imports into Japan. As soon as the accord was reached major motor manufacturers in Japan announced 'voluntary' plans to increase production and investment in the US and use more US spare parts in vehicles assembled in the US. According to the agreement the plans "are not commitments and are not subject to the trade remedy laws of either country." Similar targets were also set on access for US cars to Japanese car dealerships. With regard to access for foreign car parts manufacturers to the Japanese repair market Japan merely agreed to further deregulate its car repair sector. All these plans and intentions made economic sense against the backdrop of the surge of the yen against the dollar.

Immediately after its conclusion the agreement became the object of contradictory interpretations. In view of the failure in getting Japan agree to binding numerical

targets, the US started unilaterally to set figures which were alleged to be consequential to the agreement and, at least partly, extrapolated from it. (IHT 29 and 30-06-95)

Japanese-US semiconductor trade agreement

The two parties agreed to continue the existing agreement (1 AsYIL 321) for its full five-year term, ending in July 1996. Although Japan contends that the agreement goes no further than noting the US industry's 'expectation' that foreign share of the Japanese market would exceed 20 percent, there was Japanese criticism that the agreement virtually guaranteed foreign producers a share of the domestic market, and there were calls from Japanese producers to end the agreement. (IHT 28-07-94)

Automobile import in Korea

Although South Korea recently removed a number of legal barriers to foreign cars, Western producers kept complaining about the difficulties they had to overcome to penetrate the market. According to them, similar to the Japanese market the problem was not so much formal barriers but rather non-tariff barriers, such as perceived pressure to 'buy Korean' and dealer networks controlled by South Korean car producers.

In June 1994 the government announced a plan to improve the access by Western companies. Tariffs would be cut from 10 to 8 percent, and a surtax on luxury cars would be abolished. Restrictions on floor space at sales outlets would be eliminated and Western car producers would be permitted to advertise on television during prime time. Yet the measures were dismissed as inadequate by the Western companies. The bigger problem was said to be the fact that distribution of Western cars took place through independent dealerships which are small and scarce, in contradistinction to Korean car companies which own wide-spread dealer networks. (IHT 20/21-08-94)

In May 1995 South Korea was reported to be preparing an overhaul of its trade regulations out of concern that the US trade dispute with Japan would lead to increased efforts by the US to pry open the South Korean automobile market. (IHT 13/14-05-95)

China – Japan

Japan considered measures to control imports of Chinese textiles that undercut domestic producers. China denounced the Japanese plans, warning that the move would harm trade ties and that China would be forced to retaliate since the textile exports were an important device to balance its large trade deficit with Japan. Japan-China trade was worth $20 billion in the first half of 1994, and the forecast for the whole year was $45 billion to $50 billion. It was not clear how much of the exported textiles were made by Japanese companies operating in China. (IHT 30-09-94)

EC anti-dumping duties on Asian TV sets

The European Commission on 30 September announced the imposition of anti-dumping duties on TV sets made in Malaysia, China, Korea, Thailand and Singapore,

ranging from 5 to 30 percent. The Commission was responding to a complaint made two years ago by European manufacturers. The market share of the five Asian countries increased from 9.9 to 19.6 percent in 1991-1992 while the European industry share declined from 36 to 28 percent. Units of Thomson and Philips would be among the Asian companies to suffer from the measure. (IHT 01/02-10-94)

Annual quota of Japanese car imports in Europe
(*see:* 1 AsYIL 322; 3 AsYIL 408; 4 AsYIL 470)

Japan and the EU reached agreement on an increase of Japanese car imports into the European Union for the year 1994, under a 1991 agreement on the matter. The estimated increase in European car demand for 1994 was 4.4 percent, but the Japanese were allowed a 1.3 percent increase. (IHT 1/2-10- 94) Yet, the European Automobile Manufacturers Association complained about the agreement because of its mainly political importance while the improvements in sales was not likely to last. (IHT 04-10-94)

In February 1995 it was reported that the two parties had as yet been unable to reach agreement on the volume of Japanese car exports to Europe in 1995. They had failed to reach agreement on both the outlook for the European automobile market and whether to include three new EU members, Austria, Sweden and Finland. (IHT 18/19-02-95)

On 31 March 1995 agreement was reached on expansion of the Japanese share in the European market by 1.7 percent in 1995. On a forecast of market growth of 4.3 percent the maximum Japanese share would be 8.3 percent. But like 1994, actual imports were expected to remain well below the theoretical limit because of the eroding competitiveness of Japanese cars. The scope of the accord would be enlarged by including the three new EU members Sweden, Finland and Austria. All three were included in the 'unrestricted' category of 10 countries to which a group allotment applies. (IHT 01/02-04-95)

US world trade implementing legislation

A number of amendments which were to be introduced in the US law on world trade caused concern with Asian exporters. As to anti-dumping, it would become easier to act. Profit that a company is deemed to have earned on imports from a foreign affiliate would be deducted from the export price; US firms could claim this lower price to amount to dumping, or the selling of goods below 'fair value'. A second area of contention were the country-of-origin rules in the garment trade. The bill proposed that for quota purposes, garment exports to the US would be deemed to originate where they are assembled, not where they are cut – a provision that targets Hong Kong and China. Third, the bill called for the generalized system of preferences to expire on 31 July 1995. Malaysia, Thailand, the Philippines, Indonesia and India would be affected. (FEER 13-10-94 p. 71)

China - US

An agreement was signed on 12 March 1995, easing access to China's markets to US products in exchange for increased US support for China's bid to enter the WTO. (IHT 11/12 and 13-03-95) The US concession would consist of recognizing that while for certain purposes China should be considered a developed country, it was to be considered a developing country for other purposes. This would imply that China would be granted extra time before it would be required to phase out certain tariffs and protective trade restrictions. (IHT 15-03-95)

Barely several weeks later the US through its Undersecretary of Commerce for international trade warned China that unless it lowered its trade barriers the US would withdraw its backing for Chinese membership in the WTO. Other means to achieve the goal were applying pressure on China to conclude deals with American companies and barring China from the US market if its products were government-subsidized.China was said to be especially protectionist in the energy, financial services and industrial equipment sectors. (IHT 10-04-95)

US most-favoured nation treatment for China

The US president on 2 June 1995 renewed most-favoured nation status for China for another year though emphasizing that he still found China's record on human rights unacceptable. Senior US officials said that the only legal criterion left affecting renewal is freedom of emigration. China welcomed the renewal but warned that the time had come for the annual review to be scrapped. (IHT 3/4 and 5-06-95)

Indonesia - US

It was reported that a shift had taken place in the US policy toward Indonesia. The new relationship was said to fall into a pattern similar to that developed toward China since May 1994: US commercial and strategic interests would be given priority over concerns about democracy and human rights. The US had identified Indonesia, China, India and South Korea as the four 'big emerging markets' in Asia, likely to absorb large amounts of US exports.

Trade between the US and Indonesia amounted to $8.2 billion in 1993, with a large surplus for Indonesia. Cumulative investments in Indonesia since 1967 amounted to only $8.5 billion, but these do not include projects in the oil, gas and financial sectors. (IHT 11-11-94)

Japan - Europe

There was a significant narrowing of the European chronic trade deficit with Japan in 1993 ($26.3 billion) as compared with 1992 ($31.2 billion), and a continuing decline in 1994.

The EU pushed for more industrial cooperation between European and Japanese manufacturers and tried to persuade Japan to accept mutual recognition of standards for medical and other equipment. The European side also claimed that Japanese importers

take 'discriminatory' decisions in favour of American goods because they believe their government wants them to concentrate on purchasing American products. (FEER 11-08-94 p. 68)

Japan rejected the major European trade demands, such as joining the monitoring process agreed under the Japan-US agreement of October 1994 (*see supra*) but offered a series of smaller concessions, such as setting up "a system of parallel monitoring". Another demand that was rejected concerned the cutting of the Japanese current-account surplus from the present 3.1 percent to 2.0 percent of gross domestic product in 1995.

It was said by the European side that the minor agreements had vindicated Europe's non-confrontational or 'persistent but diplomatic' pressure, in contrast to the US 'aggressive and unilateral' approach. (IHT 21-11-94; FEER 29-06-95 p. 70)

Indian textile agreements

India concluded textile agreements with the European Union and the US on 31 December 1994, significantly increasing or removing import quotas for Indian textiles.

The US and the European Union together buy more than two-thirds of India's textile exports. Textiles account for more than a quarter of India's exports. For its part India would ease its tariffs on certain goods in stages over three to seven years and remove all yarns and fibers from its restricted list of imports. (IHT 03-01-95; FEER 12-01-95 p. 81; 02-02-95 p. 52)

Dumping of Chinese exports

The Chinese Ministry of Foreign Trade and Economic Cooperation (MOFTEC) had recorded 37 cases in 1994 in which Chinese exports were investigated or fined in anti-dumping cases. Fifteen of the cases took place in the US, nine in Europe and five in Mexico. (IHT 06-01-95)

India – US

The US Commerce Secretary, leading a US trade and investment mission to India in January 1995, announced that the mission had concluded deals worth $5.5 billion. Contracts worth another $1.5 billion were expected to be signed during the last stop of the mission, in Bombay. (IHT 19-01-95)

EU quotas on textile and garment imports from China

A Sino-EU agreement of 1988 set quotas on Chinese exports of cotton and synthetic textiles as well as clothing. This agreement as well as the existing agreement on silk was modified in order to meet demands from European textile producers for stricter controls. As to the silk accord the EU argued that since China was not a GATT member nor a founding member of the WTO, the EU was entitled to fix unilateral limits on the silk imports. However, the quota set by the EU Commission in 1994 gave rise to serious protests from the European importers and retailers, so that the EU finally agreed to negotiate with China. China acknowledged that a negotiated settlement

would ensure guaranteed access to the EU market and under a new agreement of 20 January 1995 the EU increased considerably its quota for silk, ramie and linen to 38,000 tonnes, more than double last year's quota. In exchange, China committed itself to take tougher action against international textile fraud such as using bases overseas to avoid the quotas. (FEER 02-02-95 p. 52)

Economic cooperation among Indian Ocean countries

It was reported that Australia planned calling a meeting of 38 Indian Ocean rim countries to investigate possibilities of expanding trade, investment and economic cooperation. (IHT 21-03-95)

Indonesia - Malaysia

A historic deal was concluded on 23 February 1995 worth more than RM572 million, involving the purchase by Malaysia of 6 Indonesian-made CN-235 transport aircraft in return for Indonesia's purchase of 1,500 Proton cars and 20 SME MD3-160 high training aircraft. The package also included the servicing and overhaul of Indonesian military aircraft. Indonesia's purchase of the MD3-160 aircraft was the first overseas sale of the Malaysian-made aircraft. Following the historic deal Indonesia agreed to waive the crippling 200 percent duty on completely-built-up units on the Proton cars. The Indonesian government also endorsed the move by Proton to set up an assembly plant in Indonesia within two years. This would be the second such plant for Proton outside Malaysia after the Philippines. Indonesia also offered to help Malaysia to develop its aerospace industry, including on-the-job training for Malaysians. (NST 23 and 24-02-95)

Illegal Afghanistan-Pakistan trade
(cf. Karachi High Court 9 Sep. 1992, 3 AsYIL 206)

Under applicable international conventions Afghanistan is allowed to import goods duty-free through the Pakistani port of Karachi. In practice, however, many goods are smuggled back into Pakistan, chiefly to the border cities of Peshawar, Chaman and Quetta ("turn-around goods'), making it tough for Pakistani producers and sellers of legal goods to compete against the cheap, illegal imports.

In reverse direction Pakistani foodstuffs are being smuggled into Afghanistan where they fetch far higher prices, producing shortages in Pakistan.

In February 1995 Pakistan banned 15 items from duty-free export to Afghanistan, but the Afghan president accused Pakistan of trying to destroy the Afghan economy. (FEER 11-05-95 p. 59)

IRAQ-KUWAIT WAR

Easing sanctions against Iraq

China welcomed Iraq's announced recognition of Kuwait and called on the international community on 11 November 1994 to consider the gradual lifting of sanctions against Iraq. China had abstained from almost all Security Council votes regarding the Gulf War, bound by its long-standing opposition to international interference in any country's internal affairs. (IHT 12/13-11-94)

JAPAN'S MILITARY ROLE

Participation in Rwanda peace-keeping

In the first international deployment of Japanese forces under Japanese command since World War II 470 members of the Armed Self-Defence Forces arrived in Zaire on 23 September 1994 to serve in the refugee camps. Unlike Japanese participation in peace-keeping in Cambodia and Mozambique when Japanese military were under the orders of UN officials, the mission to Rwanda would coordinate with the UN force but it would have its own independent command. (IHT 24/25-09-94)

JOINT DEVELOPMENT AND JOINT VENTURES
(*see also:* Foreign investment; Military cooperation; Oil and gas)

Military joint venture

India assured Russia a central place in India's defence purchases. Several Russian defence-industry agencies would form a joint venture with Hindustan Aeronautics to set up a workshop in India to overhaul Russian aircraft used by Indian and other regional armed forces. The term of a $830 million credit line would be extended to allow India to buy Russian equipment. (FEER 14-07-94 p. 18)

Completion of new Iranian petrochemical plant

The biggest Iranian petrochemical plant so far was opened in early August 1994, making Iran the second-largest producer of petrochemicals in the Middle East. The project started as a joint venture with the Japanese Mitsui & Co. which invested $1.5 billion. The uncompleted plant was repeatedly bombed and wrecked during the Iran-Iraq War. This and a changing petrochemical market led the Japanese to withdraw from the partnership, paying $132 million compensation. The plant was completed with the assistance of Technip, a subsidiary of Société Nationale Elf Aquitaine and a French credit line of $850 million. (IHT 03-08-94)

Growth triangles

The idea of a 'Northern Triangle', floated in 1991 (*see* 1 AsYIL 329) began taking shape in 1994, incorporating the North Sumatra provinces, the Malaysian states of Kedah, Perlis, Perak and Penang, and the five southern Thai provinces of Narathiwat, Pattani, Yala, Satun and Songkhla. (Indonesia-Malaysia-Thailand Growth Triangle: IMT-GT) It was intended to be more loosely structured with only 'terms of reference' as a framework, in contradistinction to a formal trilateral agreement for the Singapore-Johore-Riau zone.

The IMT-GT Ministerial Meeting in Penang adopted on 16 December 1994 an open sky policy whereby national carriers of the three countries can fly anywhere they wish within the IMT-GT with limited government intervention. This was regarded a historic achievement. The meeting also agreed to the extension of the Malaysian-Thai border hours. (Star 22-08-94, NST 17-12-94)

The endeavours ran into problems, however, when Thailand refused in May 1995 to give preferential treatment to a Malaysian-led consortium bidding for a power project in Satun province. (FEER 15-06-95 p. 12)

More to the east an "East Asean Growth Area" is in the making (*see* 4 AsYIL 479), encompassing North Sulawesi, Sabah and Mindanao, while apparently the idea of a fourth growth triangle is being developed covering Kalimantan, East Malaysia and Brunei. (FEER 28-07-94 p. 30) Malaysia had been assigned to initiate moves to explore areas of cooperation in capital and financial services in the Brunei-Indonesia-Malaysia-Philippines East Asean Growth Area (BIMP-EAGA). (NST 20-05-95)

Greater Mekong Subregion

All regional governments supported the plans for an infrastructural network conceived by the Asian Development Bank to link the economies of Myanmar, Laos, Thailand, Cambodia, Vietnam and southwestern China, constituting the 'Greater Mekong Subregion'. At a meeting in Hanoi in April 1994 the six countries agreed to cooperate and to conduct feasibility studies for 76 projects, mostly in the transport, power, telecoms and tourism sectors. The western part of the subregion including southern China, Myanmar, Laos and Thailand is also referred to as the Northern Growth Quadrangle. (FEER 01-12-94 p. 63; 22-12-94 p. 24)

Trans-Asean gas pipeline

The participating governments in the Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT) agreed in principle to a trans-Asean pipeline with the basis being provided by the Malaysian pipeline network. The project was first proposed in January 1994. (Star 16-12-94)

Gulf of Thailand

The Cambodian foreign minister on 14 December 1994 urged Thailand to start joint development of marine areas in the Gulf of Thailand even before a settlement was reached on the overlapping Thai and Cambodian territorial claims.

Thailand and Cambodia last discussed sea boundaries in 1970, when talks broke down over the interpretation of a Franco-Siamese Treaty of 1907 establishing these boundaries. (BP 15-12-94)

Tumen River development area

It was reported that Russian and Chinese reservations at the meeting of the Program Management Committee in July 1994 had derailed the previously agreed Tumen River Area Development Corporation. (*see* 4 AsYIL 477) The Corporation was to be run by the three riparian countries (China, North Korea, Russia) to lease land and attract foreign investment. The Russian reservation was related to its own current economic difficulties.

As a result the original Tumen River Area Development project involving an industrial and processing zone at the mouth of the Tumen River centred on a new port city was shelved. It was supplanted by a revamped project, called the Tumen River Economic Development Area, spreading over a much larger area of about 10,000 kilometres, encompassing the area between Hunchun (China), Chongjin (North Korea) and Vostochnyy port (Nakhodka, Russia) but focused on more modest objectives, from removing cross-border impediments and facilitating air travel to promoting investment in telephone lines, and essentially involving coordinating development rather than imposing a grandmaster plan. A Trilateral Coordination Committee was established. (FEER 10-11-94 p. 46; JP 25-06-95)

JUDICIAL ASSISTANCE

Indonesian-Australian extradition treaty

After having concluded three extradition treaties with Malaysia (1974), the Philippines (1976) and Thailand (1978), Indonesia had signed its fourth treaty with Australia in April 1992. Parliamentary approval was given on 12 October 1994. (JP 13-10-94)

Cambodian request for extradition from Thailand

Cambodia made a request to Thailand for the return of a general who was involved in a coup d'état (*see supra* p. 433) and had escaped to Thailand, to serve his sentence. There was no extradition treaty between the two countries. (FEER 17-11-94 p. 16)

Philippine-US extradition treaty

An extradition and mutual legal assistance treaty was signed by the two countries during a stop-over by the US president en route to the APEC summit in Jakarta in November 1994. (FEER 24-11-94 p. 13)

Hong Kong-Malaysia extradition treaty

Malaysia and Hong Kong signed an extradition treaty on 11 January 1995 which will remain in force after the reversion of Hong Kong to China. The agreement was the fourth such agreement to be signed by Hong Kong. Previously Britain concluded the treaties on behalf of Hong Kong. Prior to the agreement with Malaysia, Hong Kong concluded extradition treaties with the Netherlands, Canada and Australia. (Star 12-01-95)

Sino-Italian agreement

An agreement between the two countries on judicial assistance in civil matters entered into force on 1 January 1995. (BLD 1995)

Extradition of national

A Thai court decided to allow the extradition of a former MP to the US on drug-trafficking charges after the cabinet had decided to comply with the US request. (FEER 09-02-95 p. 13)

Rendition of accused person by Pakistan and the Philippines to US

A man who was accused by the US of having participated in the bombing of the New York World Trade Center on 26 February 1993, was arrested in Pakistan in a raid joined by US agents. The Pakistani government set aside procedures that would have delayed for weeks or months. It immediately turned over the man to the US FBI which flew him to the US aboard a military aircraft. (IHT 10 and 14-02-95)

Sino-Indonesian agreement on legal assistance

The two countries signed a memorandum of understanding on 11 January 1995 on the exchange of experiences and information in the legal field. (JP 12-01-95)

Punishment in excess of extradition conditions

In a corruption case China sentenced a person to death after his extradition by Thailand. In the extradition process, however, Thailand received assurance that the man would face a maximum 15-year prison sentence. (FEER 11-05-95 p. 13)

Indian request for extradition from Sri Lanka

India called on Sri Lanka to extradite a number of Tamil separatists, all of whom wanted in connection with the assassination of RAJIV GANDHI. The request was made in spite of the fact that there was no extradition treaty in force between India and Sri Lanka. (FEER 15-06-95 p. 13)

JURISDICTION
(*see also:* Military cooperation, at p. 465)

Russian territorial waters around the (disputed) southern Kuril Islands

Russian border troops shot and killed two crewmen on a Chinese fishing boat which ignored orders to stop. The ship was detained and escorted to Shikotan Island. (IHT 14-09-94)

Death edict against Salman Rushdie

It was reported that the Iranian ambassador to Norway was recalled for "failing to act in accordance with Iran's principled foreign policy stand" with regard to the death edict against the author Rushdie. Iran rejects any change in the edict issued by the Ayatollah KHOMEINI but denies being involved in efforts to carry it out. (IHT 11-01-95)

At a meeting between senior Iranian diplomats and EU representatives the Europeans had formally pressed for an Iranian commitment to end pursuits of Mr. Rushdie by Iranian agents in Europe. After a positive response appeared to be forthcoming Iran on 22 June 1995 affirmed it would not make any such express commitment. It seemed that there was some disagreement between the Iranian foreign ministry and the more militant surroundings of the Spiritual Guide of Iran. (IHT 23-06-95)

Overlapping Japanese and US exclusive economic zone

The US Coast Guard on 12 May 1995 seized two Japanese fishing boats in the Pacific Ocean for illegal fishing in US waters. The boats were spotted fishing 52 kilometres inside the US exclusive economic zone near the Northern Mariana Islands. The Japanese foreign ministry confirmed that the boats were boarded and seized southeast of the Japanese island of Minami Iwo Jima. Both states maintain a 200-nautical mile-exclusive economic zone that includes the area concerned. (IHT 15-05-95)

KOREAN WAR

China leaves armistice commission

China announced on 2 September 1994 that it was withdrawing from the Military Armistice Commission that had been overseeing the armistice since 1953 *(see infra)*. In a statement the Chinese deputy foreign minister said the withdrawal effectively rendered the Commission inoperative but that the armistice agreement remained in force. The South Korean government was informed of the withdrawal in advance.

The Commission consisted of North Korea, China and the UN Command, dominated by the US. South Korea as such was not a party to the armistice agreement and consequently not separately represented in the Commission. Ever since a South Korean had replaced an American general as representative of the 'UN Command' on 25 March 1991 (*see,* however, *infra*) North Korea had considered the Commission to have ceased to function and sought its elimination.

Earlier in 1994 North Korea established a separate office at Panmunjom (the Panmunjom Mission of the Korean People's Army) and pulled its delegation out of the Commission. It said it wanted to scrap the armistice and instead negotiate a formal peace treaty, but only with the US. China said it agreed with North Korea that a new agreement to protect the peace on the peninsula was required. (IHT 3/4-09-94)

North Korean call for a new peace mechanism

The Korean Armistice Agreement was signed on 27 July 1953 with the objective of ensuring "a complete cessation of hostile activities and all acts of armed force in Korea in order to cease conflicts".

In a letter from the North Korean representative to the UN addressed to the Security Council the US was accused of having violated the armistice agreement frequently by, inter alia, concluding the Mutual Defense Assistance Treaty with South Korea, and the introduction into Korea of large quantities of sophisticated weapons including nuclear weapons. It was said that the US thus had abrogated sub-paragraphs 13C and 13D of the Armistice Agreement on stopping the introduction of reinforcing military personnel and combat materials into Korea.

The letter recalled that North Korea, through a statement of 28 April 1994 of its ministry of foreign affairs, had proposed to the US that negotiations be held "for the establishment of a new peace arrangement which will replace the obsolete armistice mechanism, with a view to converting the armistice agreement into a peace agreement". (UN doc. S/1994/1092; S/1995/187; S/1995/461; FEER 15-09-94 p. 13)

[*Note:* UNGA res. 3390 B (XXX) called for the dissolution of the United Nations Command and the replacement of the Armistice Agreement with a peace agreement.]

The US insisted that any talks towards a new peace arrangement should first be held by North and South Korea. During his visit to Seoul in October 1994 the Chinese prime minister spoke of involving 'all concerned parties', referring to the two Koreas and China and the US: the two-plus-two formula. South Korea indicated it may accept this formula, but on condition that the peace treaty be first negotiated by the two Koreas while the two 'outsiders' would only 'endorse' the arrangement. Russia

proposed to include Japan and Russia in the talks: the two-plus-four formula. (FEER 24-11-94 p. 34; 29-12-94/05-01-95 p. 15)

In line with its policy to scrap the armistice agreement and replace it with a peace treaty, North Korea on 28 February 1995 expelled the Polish members of the Neutral Nations Supervisory Commission from the Demilitarized Zone. Poland and Czechoslovakia had represented North Korea in the Neutral Nations Supervisory Commission whose task it was to oversee the armistice agreement. In 1993 Czechoslovakia already withdrew its delegation from North Korea, also under pressure of North Korea that did not permit the Czech Republic take over the duties of Czechoslovakia on the Commission. North Korea said that neither country was an ally anymore. (IHT 01-03-95)

According to North Korea, as a result of the US abrogation of sub-paragraphs 13C and 13D (above) of the Armistice Agreement, paragraphs 41 and 41, charging the Neutral Nations Supervisory Commission with the supervision of the ban on the introduction of military reinforcements, lost their legal effect so that the NNSC existed only in name.

On 3 May 1995 North Korea closed the only north-south border crossing to cease fire monitors, effectively banning neutral monitors from entering North Korean territory. (IHT 04 and 05-05-95; UN doc. S/1995/187)

On the anniversary of the start of the Korean War on 25 June 1995 North Korea warned of a danger of renewed hostilities unless the armistice is replaced with a peace treaty. (IHT 26-06-95)

Membership of Armistice Commission

The post of senior UN delegate at the Armistice Commission would again be filled by a US general. In 1991 a South Korean general was appointed, resulting in the boycott of the Commission by the North Koreans. (FEER 04-05-95 p. 13)

LABOUR

Review of labour practices in Indonesia
(*see:* 4 AsYIL 480)

The US Trade Representative's Office (USTR) had resumed its review of labour practices in Indonesia and intended to send an investigating team before August 1994. (FEER 01-09-94 p. 12)

The International Confederation of Free Trade Unions (ICFTU) condemned Indonesia's record on workers' rights, accusing the government of systematically crushing union activity. (FEER 20-10-94 p. 13)

LOANS
(*see:* Economic cooperation and assistance)

MIGRANT WORKERS
(*see also:* Aliens; Diplomatic protection)

Thai workers in Libya

Libya pledged during a visit by the Thai deputy foreign minister that it would stop discriminating against Thai workers. A ban on Thai workers was introduced in 1993 because Thailand had taken action against three Thai companies after these were accused by the US of helping Libya with the building of an alleged chemical weapons plant in violation of international sanctions. (FEER 06-10-94 p. 13)

Recruitment in Malaysia

It was reported that Malaysia planned to recruit 50,000 Bangladeshi workers, doctors and nurses annually. There were already about 100,000 Bangladeshi employed in Malaysia, mostly in construction and plantation projects. The country needed about 1.3 million additional foreign workers. (FEER 13-10-94 p. 79)

Filipino workers in Malaysia

The Philippines filed a diplomatic protest with the Malaysian government over a round-up and detention of 307 Filipino workers in Kuala Lumpur on 22 October 1994. The Malaysian authorities claimed that the Filipinos had false working documents and passports, but 210 were released immediately. (FEER 10-11-94 p. 13)

Foreign workers in Korea

It was reported that among South Korea's estimated 85,000 foreign workers, about 55,000 were in the country illegally. The other 30,000 worked under a government-sponsored technical-training program instituted to cope with the acute labour shortage. The program allowed 20,000 foreigners into the country in 1994. They are normally allowed to remain for two years.

Vietnamese workers in Lebanon

In February 1995 the Vietnamese government ordered an investigation into the unfavourable condition of Vietnamese women sent to work in hotels in Lebanon but ending up as maids in private houses. As a result the labour-export service company arranged for the repatriation of all workers concerned. (IHT 17-05-95)

Philippine migrant workers

Millions of Filipinos have fanned out across the world. The president set off the exodus in 1974 when, facing economic disaster, the Filipinos were urged to go abroad to earn hard currency and reduce unemployment. According to government figures an

amount of $2.6 billion was sent into the country by workers abroad in the first eleven months of 1994. (FEER 30-03-95 p. 43)

A Philippine panel, set up by the president and led by a former Supreme Court judge, went on a 17-nation tour to investigate the conditions of Philippine migrant workers. The tour came in the aftermath of the conviction and execution of a Philippine maid in Singapore (*see:* Diplomatic protection). There are about 4 million Filippinos working overseas. (IHT 16-06-95)

Vietnamese migrant workers in Germany
(*see:* Aliens)

Asian migrant workers in Israel

Israel admitted about 5,000 farm workers from Thailand into the country since April 1994 to replace Palestinians from Gaza and the West Bank. The Thais are granted non-renewable two-year visas.

It was reported that the Philippine foreign minister tried to secure a quota for Filipinos during his visit to Israel in June 1994 but that the Israeli reply was negative because private employers decide themselves who to hire. An estimated 2,500 Filipinos are already working in Israel as domestic helpers. (FEER 28-07-94 p. 80)

On the occasion of the visit to China by the finance minister several economic agreements were signed, among which one on the import of several thousand Chinese guest labourers into Israel. (FEER 25-05-95 p. 29)

MILITARY ALLIANCES

Malaysian-Philippine cooperation

The two countries concluded a defence cooperation agreement. (BLD 10-10-1994 No. 20)

The scope of the Philippine-US 1951 mutual defence pact

With regard to speculations on US commitment to come to the aid of the Philippines in case of a Sino-Philippine dispute over the Spratly islands, it was reported that various US officials declined to answer 'hypothetical' questions as whether the US would intervene in case of an armed conflict between China and the Philippines over the islands. (IHT 06-06-95)

US commitment to defend freedom of navigation

The US Assistant Secretary of Defense said that the US "would be prepared to defend freedom of navigation" in the South China Sea because any interference would "infringe an important American interest as it would also infringe an important

Japanese interest, since Japan is heavily dependent upon sea lines of communication for so many of its imports."

Under the Japan-US security treaty Japan is limited to securing the safety of its shipping through maritime surveillance and naval escort operations only as far as 1,000 nautical miles from the Japanese home islands, a radius that does not reach the South China Sea.

It was said that the focus of the Japanese-US alliance was being shifted from defence of Japanese territory to maintenance of international peace and security. The US Assistant Secretary indicated that the 'redefinition' would include establishment of a forum involving the US, Japan, China, Russia and North and South Korea to deal with security problems in Northeast Asia. (IHT 23-06-95)

MILITARY COOPERATION

(*see also:* Regional security)

Australia - Indonesia

In early August 1994 Australia offered to expand military training for Indonesia, despite a US Congress ban on small-arms sales to Indonesia the previous month (*see supra,* p. 388) and an earlier US decision no longer to provide military training or education to the Indonesian armed forces (*see,* however, *infra* p. 467). The Australian Defence Minister said that Australia and Indonesia were also considering a joint venture to produce military armaments and equipment. (IHT 04-08-94; FEER 11-08-94 p. 13)

In the context of a regular defence operation the two countries stage three to four naval exercises each year. In early August 1994 joint naval patrol manoeuvres were staged in the Timor Sea. (FEER 18-08-94 p. 13)

Exchange of military attaches

Malaysia and China agreed on 14 September 1994 to exchange military attachés to enhance cooperation, facilitate a faster flow of information and expedite planning of common programs and activities. (NST 15-09-94)

Five Power Defence Arrangement

Twenty-nine warships and 34 aircraft from Australia, Britain, Malaysia, New Zealand and Singapore held manoeuvres in the South China Sea in September 1994. They belong to the Five Power Defence Arrangement (FPDA) established in 1971 to help protect Malaysia and Singapore from external threats. The alliance requires its members to consult one another in the event of an attack on either country.

The defence ministers meeting in Singapore were adamant that the group was not an anachronism, considered the extension of air defence cover to East Malaysia and decided to invite Brunei to join. They were also adamant that their decisions had nothing to do with the issue of rival claims on the Spratly Islands. (IHT 23-09-94)

Malaysia-Philippines memorandum of understanding

A memorandum of understanding was signed on 26 September 1994, aimed at providing the means and opportunities for greater interaction between the armed forces and defence agencies of the two countries. (NST 27-09-94)

Sino-US military cooperation

The commander of US forces in the Pacific said that the US planned to intensify military contacts with China, including the holding of joint exercises, as part of a strategy to gain Chinese support for new security arrangements in the Asia-Pacific region. This would mark a major thaw in military ties which were frozen by the US in 1989.

The formal resumption of the ties began in November 1993 with a visit to China by the US Assistant Secretary of Defense, and by the former commander of US forces in the Pacific in July 1994. In August 1994 the deputy chief of the Chinese armed forces general staff visited the US and the US Secretary of Defense visited China in October 1994, for the first time since 1989. (IHT 04-10, 17-10, 19-10 and 20-10-94) This visit was followed by further talks between arms negotiators in early November. (IHT 01-11-94)

The talks in October 1994 dealt with six issues: North Korea, the halt of long-range missile exports by China, the spread of nuclear weapons, human rights, defence conversion and the need to make the Chinese military more transparent. Both sides affirmed commitments to a nuclear-free Korean Peninsula, the end of missile exports and nuclear non-proliferation.

An accord was signed on 17 October 1994 on the creation of a Joint Defense Conversion Commission and providing for US assistance to help the Chinese military make more civilian products than they were already currently making. China would be provided with technology for 'environmentally safe vehicles' and for air-traffic control for civilian flights. This meant a turnabout from recent US policy of considering import sanctions on civilian goods made by US military enterprises. (IHT 18-10-94) It was also reported that the two countries agreed to hold broad strategic consultations, reviving ties that were frozen after the 1989 incident. (FEER 27-10-94 p. 13)

Later in November it was reported that the director of the US Defense Intelligence Agency visited China, being the highest level known contact by a US intelligence official since 1989. At that time the US and China were cooperating on a number of intelligence operations, including the monitoring of ballistic missile tests in the Soviet Union and covert operations in Afghanistan. (IHT 09-11-94)

As reported in February 1995 a US missile cruiser made a friendly visit to China at Qingdao in March 1995. It was the third US warship to visit China since the founding of the People's Republic in 1949, the second being at Shanghai in May 1989, shortly before martial law was declared during the anti-government demonstrations. (IHT 24-02, 24-03-95)

Rejection of US supply ships in South East Asia

Thailand, Indonesia, Malaysia and the Philippines rejected a plan for US military supply ships to be based in Southeast Asia for possible use in emergencies. The arrangement would involve "civilian ships offshore with prepositioned equipment" and would enable US military reinforcements to be quickly flown to a crisis in either the Middle East or in Northeast Asia. The material could also be used for peacetime disaster relief. The US already had 'equipment afloat ships' anchored at the Diego Garcia atoll in the Indian Ocean and in Guam, and wanted to extend the network to include Southeast Asia.

It was expected that Singapore and Brunei would be equally reluctant to agree to the plan, the latter particularly after its decision in 1992 to have the US military base closed. Indonesian officials said that while Indonesia agreed that a US presence in Asia was necessary, it should not take the form of military bases. The countries concerned were also worried that an arrangement as proposed might raise suspicions in China. (IHT 08-11-94; FEER 10-11-94 p. 13; 01-12-94 p. 13; 19-01-95 p. 20) Consequently the US started considering the placing of floating arsenals, i.e. equipment on ships, anchored off its bases in Guam and Diego Garcia. (IHT 21-03-95)

Japan-US joint manoeuvres

US and Japanese forces started joint exercises on 8 November 1994 which were the largest between the two states in their 34 years of security alliance. The exercises were planned a year ago and named 'Keen Edge 1995'. (IHT 08-11-94)

Use of Vietnamese naval base

Upon utterances from US naval officers about the feasibility of the use of the Cam Ranh Bay naval base by the US navy the Chinese foreign ministry rejected the idea: "We are opposed to any foreign country establishing a military base or stationing troops on foreign soil." (IHT 19/20-11-94)

Rejection of Philippine-US logistical agreement

Contrary to original plans the Philippine government rejected a draft Acquisition and Cross-Servicing Agreement. The agreement was designed to facilitate port calls by US Navy ships and would allow the US military to buy goods and services up to $12 million a year in the Philippines. In view of objections raised by nationalist circles the Philippine government sent the draft back to the Mutual Defense Board for revision. Certain provisions, such as one for 'storage services' could be interpreted as violating the constitution which prohibits "foreign military bases, troops or facilities". (IHT 23-11-94)

Sino-Indian combined defence manoeuvres

India and China agreed to hold joint military exercises in summer 1995 along the border in the Himalayan region of Ladakh. (IHT 17/18-12-94)

Revival of Pakistan-US Military Group

Pakistan and the US agreed to revive the Pakistan-US Military Group to hold regular discussions on security matters and issues like joint military training, military education programs and peace-keeping roles.

The forum was set up in 1984 at the peak of the war in Afghanistan, but was abandoned because of Pakistan's nuclear program. (IHT 12-01-95)

Indo-US cooperation agreement

During his visit to India in January 1995, the US Defense Secretary signed an agreement on policy discussions, intelligence exchanges, joint military training and exercises, and defence production and research. (FEER 26-01-95 p. 15)

It was later reported that the US and Indian navies held joint training exercises off the Indian west coast in mid-May 1995. (FEER 01-06-95 p. 12)

Malaysia-Singapore cooperation

The two countries signed a memorandum on joint ventures in the production, supply and marketing of military hardware. They also agreed to set up a joint peace-keeping force to join UN operations. (FEER 02-02-95 p. 13)

Cambodian military training in Indonesia

The Indonesian military was training Cambodian soldiers at its special warfare centre near Bandung, as part of non-lethal aid to Cambodia. (FEER 16-02-95 p. 12)

US military presence in Asia

The US "East Asia Strategy Report" which was released on 27 February 1995 disclosed that the US had no plans to make further troop cuts in Asia. These troops were cut back from 135,000 in 1990 to 100,000 in 1994, but the report said that cutbacks resulting from the end of the Cold War had finished. (IHT 28-02-95) Besides South Korea (37,000) the US has military forces in Japan, Guam, Saipan, Singapore, Diego Garcia and Hawaii.

The Indonesian Foreign Ministry said that Indonesia does not want a US military presence nor any foreign military base in the region but admits that the US presence could balance China's military power. (IHT 01-03-95)

South Korea - Israel

South Korea and Israel agreed to exchange army attaches for the first time since opening diplomatic relations in 1962. (FEER 16-03-95 p. 13)

US military training for Indonesian officers

Contrary to a US State Department testimony to the Congress on grave US concerns about the human rights situation in Indonesia, the vice-chairman of the US Joint Chiefs of Staff announced that the US was eager to resume training of Indonesian military officers which were suspended in 1992 in response to alleged human rights violations in East Timor. Accordingly the US Defense Ministry had applied for funds which, according to the State Department, were meant to "improve the overall professionalism and readiness of the Indonesian armed forces". (IHT 22-03-95)

Normalization of Sino-European military relations

European Union members decided in 1994 to lift restrictions on military exchanges contained in the Madrid Agreement (a package of sanctions drawn up in response to the June 1989 crushing of the anti-government demonstrations at Beijing).

The French armed forces chief was the first senior military official from a EU country to visit China in March 1995. The Austrian chief of staff was scheduled to visit in May, and the Italian armed forces chief later in 1995. (IHT 24-03-95)

South Korean-Russian cooperation on weapons research

An agreement was concluded on 21 May 1995 on mutual cooperation in the research and development of military supplies and possible joint production. (IHT 22-05-95)

South Korea-US Status of Forces Agreement

On 20 May 1995 an incident arose when US soldiers molested a Korean woman in the subway in Seoul. This led the South Korean government to prepare for a renegotiation of the current SOFA agreement of 1967. The renegotiation would aim at the ability for South Korea to detain and prosecute US soldiers who break local laws while off duty instead of having to turn them over to the US military authorities. (FEER 01-06-95 p. 13)

MINORITIES

Protection of Vietnamese minority in Cambodia

A new Cambodian immigration law was enacted on 22 September 1994, authorizing the expulsion of all unwanted 'foreigners'. There was, however, no Cambodian

nationality law yet to define the criteria for citizenship, leaving open the possibility to expel anyone who is not ethnic Khmer.

Nobody knows exactly how many ethnic Vietnamese live in Cambodia. Estimates range from 200,000 to 500,000, although the Cambodian Interior Ministry gave a figure of 100,300 in August 1994. Another estimate is that more than half of them arrived after Vietnam's 1978 invasion of Cambodia, causing legitimate concerns with Cambodia about the legality of their residence.

There is a deeply rooted fear in Cambodia that it, with a population of 9 million,would be swallowed up by Vietnam, which has 70 million inhabitants and not that much more arable land. By way of historical example, a large part of southern Vietnam, including the Mekong delta, was appropriated by the Vietnamese from the Khmer empire in the 18th and 19th centuries.

Vietnam said on 6 September 1994 it had asked the UN to help protect the rights of ethnic Vietnamese in Cambodia. (FEER 15-09-94 p. 13, 13-10-94 p. 20-21)

During talks in Hanoi the Cambodian co-premier promised that the some 150,000 ethnic-Vietnamese living in Cambodia would not be expelled. (FEER 02-02-95 p. 13)

Chakmas in India

The Chakmas are buddhist and their original home was in the Chittagong Hill Tracts in Bangladesh. Many still live there, but since the early 1950s a land conflict arose as Muslim plainsmen moved into the hill areas and put increasing pressure on the Chakma to leave. In 1964 a big group of Chakmas fled to India where they first settled in Assam state, from where many later moved to the area that became Arunachal Pradesh state in 1987. These 70,000 Chakmas in Arunachal Pradesh had demanded Indian citizenship but the Indian Supreme Court had ruled this out. The state government was also resisting these demands and wanted the Chakmas out of the state. This attitude was in accordance with a general anti-outsider agitation in several northeastern Indian states that started in 1979. Another 55,000 Chakmas fled persecution in the Chittagong Hills in 1986 and were given shelter in Tripura state. Following bilateral talks between India and Bangladesh, more than 5,000 returned to Bangladesh in 1994. (FEER 17-11-94 p. 20)

MISSILE TECHNOLOGY

(*see also:* Nuclear capacity; Weapons)

Sino-US dispute over transfer of missile technology

(*see*: AsYIL Vol. 3 p. 425, Vol. 4 p. 485)

It was reported in September 1994 that the two states were making attempts to resolve their dispute about supply of missiles by China to Pakistan. (IHT 27-09-94) On 4 October 1994 the two sides reached agreement on a definition of what constitutes a violation of the Missile Technology Control Regime (MTCR, see 1 AsYIL 270). China consequently agreed not to export missiles capable of at least 1,000-pound (500 kilograms) payload and 'inherently capable' of reaching a range of 300 kilometres. In

exchange the US would lift the trade sanctions, consisting of a two-year ban on the export to China of high-technology satellite systems, imposed in August 1993 because of the alleged Chinese transfer of missile technology to Pakistan contrary to the provisions of the MTCR. China had always insisted that the M-11 has a range and payload below MTCR guidelines, and also denied that it had delivered M-11s to Pakistan. (IHT 05-10-94; FEER 20-10-94 p. 20) However, it was reported in mid-November that there was a US offer to waive possible sanctions if China would admit the alleged violations of the MTCR and fully disclose its past exports to Pakistan. (IHT 15-11-94)

Chinese ICBM-test

According to Japanese reports China test-fired a mobile long-range missile with a range of 8,000 kilometres. The missile is known as the Dongfeng-31. When it enters service China will become less vulnerable to the risk of a disabling first strike. (IHT 01-06-95) The Chinese foreign ministry declared not to be aware of the launching. (IHT 02-06-95)

Alleged Chinese supply of missile components to Iran and Pakistan

It was alleged in a CIA report that China had recently delivered important components for missile systems to Iran and Pakistan. China on 22 June 1995 dismissed the report and said it was complying with its treaty obligations. A dismissal also came from Pakistan. (IHT 23-06-95)

NARCOTICS PROBLEM

US-Myanmar anti-narcotics operation

The US decided to increase anti-narcotics cooperation with Myanmar despite objections from US human rights officials (*see also supra,* p. 432). The new policy called for an expansion in the training of Myanmar narcotics officials and financing UN efforts to encourage Myanmarese farmers to substitute other crops fro opium. (IHT 23-6-95)

NATIONALITY

(*see also:* Aliens; Divided states: China, at p. 405; Hong Kong; Minorities)

Kazakhstan-Russia Agreement

On 20 January 1995 an agreement was concluded "on a simplified procedure for the acquisition of citizenship" by citizens of one party taking up permanent residence in the territory of the other party.

The agreement refers to the Treaty on Friendship, Cooperation and Mutual Assistance of 25 May 1992 and to the "Memorandum on Basic Principles for Settling

Questions Relating to the Citizenship and Legal Status of Citizens" of one party "who reside permanently in the territory" of the other party, of 28 March 1994 (*see supra,* p. 386)

The simplified acquisition of citizenship refers to acquisition by registration on the basis of the free expression of the will of the persons concerned, and is available for each of two categories of persons. First, those who in the past were citizen of the USSR and at the same time citizen of either the (former) Kazakh SSR or the Russian SFSR, and were residing in the territory of either as at 21 December 1991, and were a permanent resident of the party whose citizenship is sought before the entry into force of the present agreement, and second, those who have close relatives (spouse, parents, children, sisters, brothers, grandparents) who are citizens of the party whose citizenship is sought and who reside permanently in the territory of that party. (Art. 1) Although not expressly prescribed, the agreement gives the impression that acquisition of the citizenship of one party implies the renunciation and the consequent loss of the citizenship of the other party (Art. 2 para. 3: "In case where citizenship of one Party is acquired and citizenship of the other Party is simultaneously renounced ...") The agreement contains special provisions for the nationality of minor children (Art. 4).

Remarkably the Agreement prescribes that "[i]n cases where the domestic legislation of the Parties establishes more favourable conditions for the acquisition of citizenship for any category of individual, the domestic legislation of the Parties shall apply". (Art. 5 para. 2) (UN doc. A/50/83)

NAVAL INCIDENTS

(*see also:* Territorial claims and disputes)

Sino-US incident

It was reported that on 27-29 October 1994 the US aircraft carrier Kitty Hawk encountered a Chinese nuclear submarine in open waters off the Chinese coast in the Yellow Sea. The submarine was detected by US anti-submarine aircraft through electronic monitoring devices about 200 miles from the Kitty Hawk. When the submarine eluded the carrier group the US planes dropped sonic devices to track the submarine, whereupon Chinese jet fighters appeared and flew within sight of the US planes. The submarine then returned to Qingdao and the US carrier was pulled out of the area. (IHT 15-12-94)

NON-ALIGNED MOVEMENT

Split on extension of NPT

A meeting of members of the Non-Aligned Movement in April 1995 failed to reach consensus on the question of extension of the Nuclear Non-proliferation Treaty. Delegates were split almost equally between those in favour and those against an indefinite extension of the treaty. (IHT 28-04-95)

NUCLEAR CAPABILITY
(*see also:* Weapons)

North Korea
(*see also:* Inter-state relations: general aspects at p. 435)

Contrary to earlier estimates the IAEA said that the close-down of the North Korean research reactor in 1989 lasted only 75 days instead of the initial estimate of 100 days, and there were doubts as to the North Korean ability of reprocessing at that time, so that it could only have obtained plutonium for a single bomb (In early August 1994 a South Korean newspaper quoted South Korean officials as saying that close-downs took place in 1989, 1990 and 1991 and that, consequently, North Korea could be presumed to have extracted enough plutonium for 3 to 4 bombs) (IHT 01-07-94,08-08-94) Speaking about his findings after his visit to North Korea, former US President CARTER said that in the briefings he got from US intelligence services it was never alleged that North Korea had in fact built a nuclear bomb. (IHT 07-07-94)
[*Note:* According to the IAEA the approximate amounts of fissionable material needed for a single nuclear weapon are 8 kilograms of plutonium, 8 kilograms of uranium 233, or 25 kilograms of uranium highly enriched in the 235 isotope. These figures are known as threshold amounts or significant quantities and used to establish a wide range of industrial safeguards meant to deter and detect the diversion of materials from peaceful purposes to the making of nuclear warheads. (IHT 22-08-94)]

In further talks in early July 1994 the US offered a pledge of assistance in obtaining technology for North Korea to build a light-water reactor, less capable of producing plutonium. In exchange, work on the existing reactor would be halted and the structure dismantled, as would another, 25-megawatt reactor and a laboratory for reprocessing reactor fuel to separate plutonium. (IHT 08-07-94) On the other hand North Korea asked security guarantees and some form of diplomatic recognition from the US. (IHT 09/10-07-94)

After the talks were suspended as a result of the death of the North Korean president on 8 July 1994, the negotiations were resumed on 5 August but no progress was made. Meanwhile North Korea warned that it would have to start reprocessing the 8,000 spent nuclear fuel rods which were removed from the research reactor in June 1994 and which were stored in a cooling pond. (IHT 6/7-08-94)

Agreement in principle was finally reached on 13 August 1994. North Korea would commit itself to freeze or abandon the reprocessing of the 8,000 spent nuclear fuel rods for the production of plutonium. It would freeze the construction of two nuclear reactors. It would also remain a party to the Nuclear Non-proliferation Treaty. In return the US would move toward establishing diplomatic and economic relations and would arrange to provide light-water nuclear reactors to replace the existing North Korean graphite reactors. Until the completion of the reactors by 2003 the US would supply 500,000 tons of heavy oil a year. The agreement was later signed on 21 October 1994.

On 15 August the South Korean president announced that South Korea was prepared to supply the modern nuclear power plants. Apparently the US leaned toward

supply by South Korea rather than by Russia, as had been initially envisioned. North Korea, however, rejected the South Korean offer, saying that [t]he issue of the provision of the light-water reactor is a matter that must be settled between the DPRK and the US." (IHT 15 and 29-08-94, 22/23-10-94, 08-12-94) Later the South Korean foreign minister also said that South Korea was considering supplying the North with electricity until the safer nuclear plants are completed. (IHT 17-08-94) However, South Korea and the US suggested that before the provision of a modern nuclear reactor two undeclared nuclear sites in North Korea must have undergone inspection. This "special inspection" was crucial to know whether North Korea had reprocessed spent fuel into bomb-grade plutonium in the past. (IHT 18-08-94; FEER 25-08-94 p. 14) This demand was rejected by North Korea which said that it [was only] "willing to involve [itself] in clearing up nuclear suspicion in the future". (IHT 22-08-94)

In the course of the following US-North Korean negotiations in Berlin the US agreed that North Korea store the spent nuclear rods from its reactor in welded steel containers as an interim step pending their transfer to another country. This was in accordance with a North Korean demand that the spent fuel rods be preserved and retained on North Korean territory. (IHT 12-09-94)

The talks covered several aspects of the nuclear issue, such as who would provide the light-water nuclear reactors, and how North Korea's power demand would be met in the time before the new reactors were constructed, and what would happen to the 8,000 spent nuclear fuel rods. Also North Korea had asked that the new nuclear plants be financed with a no-interest, long-term loan that would be paid back not with cash, but with goods of some kind, perhaps electricity produced by the plant itself. (IHT 15-09-94)

The plan would cost $4 billion and take 10 years. (IHT 16-09-94) The US side said it was considering the project to consist of two 1000-megawatt reactors of a design like that of reactors currently under construction in South Korea. (IHT 17/18-09-94)

On 18 September North Korea announced that it had frozen its nuclear reactor program, as promised, and vowed to dismantle the remaining elements. (IHT 19/20-09-94)

At the talks which were resumed in Geneva on 23 September new demands were made by North Korea, such as payment of $2 billion in cash as compensation for North Korea's abandonment of the development of its graphite-moderated reactors. North Korea also demanded that the light-water reactors be constructed by Germany or Russia. This would greatly complicate a deal, partly because neither Germany nor Russia was willing to provide the bulk of the financing. (IHT 24/25, 28 and 29-09-94)

After indications that it was ready to grant more access to its nuclear facilities North Korea allowed the IAEA inspectors access to a fuel-fabrication plant and a fresh-fuel storage building on 13 September 1994. They formed part of the seven declared nuclear sites.

The IAEA inspectors reported that North Korea apparently did not produce weapons-grade plutonium from February 1993 to March 1994 (*see* AsYIL Vol. 3 p. 429, Vol. 4 p. 492), the period in which it had been blocking inspections of its nuclear program. The IAEA Director General also reported to the Board of Governors that samples taken from the reprocessing plant in March and May 1994 (*see* 4 AsYIL 492) provided no evidence of plutonium production during the previous year. This report

cast doubt on the widespread speculation that North Korea was producing plutonium while keeping IAEA inspectors at bay. (IHT 13 and 14-09-94)

Agreement was finally reached on 21 October 1994. (*see* Selected Documents) In order to carry out the tasks assigned to it under that agreement, an IAEA technical team visited North Korea from 23-28 November and held discussions which were useful and constructive. (UN doc. S/1995/353)

Since the agreement in principle was achieved, the US began assembling an international consortium to finance the plan. The discussions involved South Korea, Japan, China and Russia but also other countries in Europe and Asia. They would be invited to form an organization that has "an interest in working together to help resolve the nuclear issue" and play a role principally in providing the energy needs to meet North Korea's legitimate concerns. The group would also provide alternative energy for North Korea during up to 10 years between the shut-down of the graphite reactors and the starting of the light-water reactor. (IHT 23-09-94)

In a next stage the US, South Korea and Japan proceeded to set up an international consortium to underwrite the replacement of the North Korean graphite nuclear reactors. (IHT 15-11-94) Russia expressed disappointment about the North Korea-US agreement since Russia had been counting on supplying North Korea with light-water reactors. (IHT 16-11-94) China decided against taking part in the consortium. (IHT 18/19-02-95) A Korean Peninsula Energy Development Organization was finally established on 9 March 1995. (*see* Selected Documents). (IHT 10-03-95)

On 20 November 1994 technical experts of IAEA went to North Korea to monitor the 'freezing' of five graphite nuclear plants. (IHT 21-11-94) They confirmed that the nuclear facilities in Yongbyon and Taechon were not in operation and that construction work had stopped. (IHT 29-11-94)

On 5 January 1995 the US said it would start sending oil to North Korea before 23 January as the latter had so far complied with the agreement concerning its nuclear installations. (IHT 06-01-95)

The US and North Korea began a second round of expert talks on 17 January 1995 on the question of long-term storage of the 8,000 spent fuel rods from the experimental reactor. It was reported on 24 January that North Korea had agreed to put the rods in dry concrete as part of a new deal with the US (IHT 18 and 25-01-95)

Under the October Agreement both sides were to make their best efforts to conclude a reactor supply agreement within six months (by 21 April 1995). During the negotiations on the contract early February 1995, North Korea quite unexpectedly also asked another $500 million to $1 billion worth of extra economic and technical assistance to construct a simulator to train North Korean reactor operators, to install new transformer lines and electric-power sub-stations and to finance other reactor "accessories". (IHT 08 and 09-02-95) Furthermore, North Korea later proposed that the main contractor should be American, while South Korean companies could take part in a limited capacity. (IHT 29-03-95)

It was reported that the difficulties in reaching agreement on the implementation also had another reason: the failure of the US to begin liberalizing trade and investment relations by 21 January 1995. In the October agreement the two parties had pledged to "reduce restrictions on trade and investment, including telecommunications and financial transactions" within three months. Instead of making some significant step to

implement this pledge the US government was reported to have made only token gestures, for fear of stirring Congressional opposition. (IHT 11-04-95)

Finally the Berlin talks failed, and new talks were started on 20 May 1995 at Kuala Lumpur which initially proceeded favourably. (IHT 20/21 and 23-05-95) During these talks North Korea again demanded additional compensation for power lines and infrastructural improvements, estimated at $1 billion. As to the origin of the reactors the North Korean foreign ministry reiterated that while it did not matter where the reactors were made, they must carry a "Designed in America" label. (IHT 06-06-95)

On 7 June 1995 the two parties were able to announce that tentative agreement had been reached. (IHT 08-06, 12-06-95) It was signed on 13 June. (*see:* Selected Documents) Since North Korea refused to accept an agreement stipulating that it would receive reactors from South Korea, and since South Korea did not want to pay for the reactors unless the contract clearly stated that South Korean reactors would be used, this had, consequently, to be set forth in a side letter from the US to South Korea. Within the Korean Peninsula Energy Development Organization, consisting of the US, South Korea and Japan, it was agreed that the government-owned Korea Electric Power Company would be prime contractor for installation of the reactors. The latter would select a US firm as programme coordinator to oversee the project and act as a go-between. (IHT 14-06-95; FEER 29-06-95 p. 22)

Pakistan

The former Pakistani prime minister, NAWAZ SHARIF, said at a rally in the Pakistani sector of Kashmir on 23 August 1994 that both India and Pakistan had nuclear weapons. In a 1993 interview with a London-based Pakistani newspaper a retired army chief-of-staff had already said that Pakistan had carried out its first successful test in cold laboratory conditions in 1987.

Pakistan as well as India officially deny having the bomb. Responding to the above statement a foreign ministry spokesman said: "In the course of its development of a peaceful nuclear program, Pakistan has acquired the capability to acquire nuclear weapons, but we have made a sovereign decision not to produce them." (IHT 24 and 25-08-94)

During a visit to the US the Pakistani prime minister confirmed that the nuclear project at Khushab involved a small reactor for an experimental purpose. She emphasized that Pakistan lacked the capability eventually to reprocess the reactor's spent fuel in order to separate the plutonium which could be used in nuclear weapons.

US officials said that the reactor was a so-called heavy-water reactor with a capability of 40 megawatts. As a reactor built largely with indigenous technology it would not be subject to international inspection. According to US intelligence reports the nuclear weapons allegedly already in possession of Pakistan are based on a Chinese design using highly enriched uranium as the fuel for nuclear fission. Smaller and more powerful plutonium-based weapons were said to fit more easily onto ballistic missiles. (IHT 10-04-95)

India

In an attempt to stem the spread of missile technology a meeting in New Delhi of a US-led group of countries (US, Britain, Switzerland and Australia) pressed India and Pakistan to renounce their atomic weapons programs. (IHT 31-08-94)

India announced on 5 January 1995 that it had received a supply of enriched uranium from China. It would be mixed with domestically produced plutonium oxide and used to fuel the Tarapur atomic power plant near Bombay. It had thus avoided a hold applied by Western countries in their effort to press India into the existing safeguards and non-proliferation arrangements.

Most of India's reactors are locally designed and use natural (non-enriched) uranium. These reactors are outside international controls, and their spent fuel can be reprocessed to extract plutonium for atomic weapons. But the Tarapur plant, commissioned in 1969, has two 160-megawatt units supplied by General Electric and uses imported enriched uranium as fuel. Under a 1963 tripartite agreement with the US and the IAEA, Tarapur is subject to regular inspections and monitoring. After India's explosion of a nuclear device in 1974, the US withdrew from its arrangement to supply enriched uranium. Then France stepped in with a long-term agreement which expired in 1993, and Russia too decided to require adherence to the non-proliferation obligations for the supply of enriched uranium. Developing a uranium-enrichment facility for just one plant would be uneconomical. The Chinese uranium would be low-enriched and not weapons-grade, and would be subject to IAEA safeguards throughout the fuel cycle at Tarapur. (FEER 19-01-95 p. 22)

Japan

The US Energy Department announced in early September 1994 that the US would stop export of technology to Japan for the refinement of bomb-grade plutonium from breeder reactors. These exports had been taking place for the past seven years, despite the official US position against the export of any technology conducive to the spread of nuclear weapons. (IHT 10/11-09-94)

At the end of 1993 Japan's stocks of plutonium amounted to more than 10,000 kilograms. About 60% was held at plants in France and Britain that reprocess spent fuel from Japanese nuclear-power stations. A further 3,000 kilograms was stored at a government fuel fabricating plant in Ibaraki prefecture. (FEER 08-12-94 p. 13)

Chinese nuclear test

China continued its testing of a new generation of ballistic missile warheads by exploding a nuclear device beneath its western desert on 7 October 1994. The test was part of a series that was undertaken to verify the reliability of miniatured warheads designed during the 1980s for use with Chinese strategic missiles. The Chinese foreign ministry confirmed the test and said that "China will put an end to its nuclear tests" as soon as negotiations on a comprehensive nuclear test ban treaty would be completed in 1996.

It was China's 41st nuclear test since 1964, compared to 44 by Britain, 210 by France and more than 1,000 by the US. (IHT 8/9-10-94)

In the fall of 1994 the US Defense Secretary raised the idea of offering China sophisticated computer simulation programs as a substitute for nuclear testing. (IHT 18/19-02-95)

On 15 May 1995 another underground test took place at the Lop Nor testing site in the western province of Xinjiang. The blast drew sharp protests from many of China's neighbours, especially Japan, Kazakhstan and Australia. At the session of the Disarmament Conference at Geneva further criticism was expressed by Japan and four other non-nuclear states: Finland, New Zealand, Argentina and Belgium. China was expected to conduct two to four more tests later in 1995. (IHT 16-05 and 02-06-95)

Light-water nuclear reactors for China

China and South Korea were due to sign an agreement in November 1994 on construction of two light-water nuclear reactors in China. (FEER 17-11-94 p. 13)

Japanese nuclear waste transport

Japan decided not to disclose the route of the "Pacific Pintail", a freighter owned by British Nuclear Fuels Ltd, which was to carry nuclear waste from Europe to Japan. The ship was to depart from Cherbourg on 23 February 1995. The waste had resulted from the reprocessing of spent nuclear material into fuel-grade plutonium. (*see* also 3 AsYIL 428) (IHT 22-02-95) On 28 February 1995 an Indonesian official said that Japan had guaranteed that the ship (with 13.7 tons of radio-active material) would not pass through Southeast Asian waters. (IHT 01-03-95) The ship arrived in Japan on 25 April 1995. (IHT 26-04-95)

It turned out that the ship had been routed around South America. The Panama Canal-route was avoided to prevent expected protests. This was ironic because the canal was used for more than 140 shipments of spent fuel from Japan to France and Britain over the last decade and experts usually consider spent fuel a marginally more risky cargo than reprocessed nuclear waste. (FEER 18-05-95 p. 12)

US purchase of Kazakhstan uranium

The US purchased and transfered an amount (some 600 kilograms) of enriched uranium from Kazakhstan to the US, putting it, according to the US Defense Secretary, "forever out of the reach of potential black marketeers, terrorists or a new nuclear regime". The operation was carried out with the knowledge and approval of the Kazakhstan government and Russia. The transaction was a result from a declaration by the US government in September 1993 that it was prepared to "pursue the purchase of highly enriched uranium from the former Soviet Union and other countries and its conversion to peaceful use". (IHT 24-11-94)

Progress of nuclear developments in Iran

It was reported that "senior American and Israeli officials" had reached consensus that barring interruption "by some foreign power" Iran was more or less five years away from having an atomic bomb. These conclusions were being drawn despite the fact that Iran had done little more than amass nuclear material and some equipment, such as a neutron source reactor and an isotope separator. It had yet to build a nuclear reactor that can be used to develop nuclear weapons. Iran possesses three research reactors, among which an American one which has lacked supply of high-grade uranium since 1979. Besides Iran has at its disposal some laboratory facilities ("hot cells") for plutonium fission, and a quite small electromagnetic 'calutron' supplied by China. The worries were in fact predicated by the assumption that "the Iranians will be able to take quantum leaps in their push to collect the components needed to build an atomic weapon". "Senior Israeli officials" were also quoted as saying that if the program was not halted they would be forced to consider attacking Iran's nuclear reactors, as they did in 1981 when Israeli warplanes bombed Iraqi nuclear reactors.

According to the same reports the most active centre for nuclear weapons research and production is in Bushehr, 750 miles south of Teheran. It has two 1,300 megawatt reactors under construction. (IHT 06-01-95; NRC 07-04-95)

Russia agreed to complete the war-damaged Bushehr nuclear power station, and thus revive a project abandoned by German contractors on alleged breach of contract by the Iranian government after the 1979 Islamic Revolution. After the Iraq-Iran War the German government forbade the resumption of the project on the instigation of the US. The first of the projected two Russian units would be operational within four years. (IHT 09-01-95; NRC 07-04-95). The project which included the sale of light-water nuclear reactors was confirmed despite US protests. The deal would be worth $800 million to $1 billion. The Germans had withheld key blueprints and technical documents relating to the site, making it more difficult to fit 1,000-megawatt Russian-made reactors and turbines into a damaged structure intended for German-designed 1,200-megawatt reactors.

The US had provided Russia with an intelligence report on Iran's alleged ambitions to build a nuclear bomb, and had promised the Russian Atomic Energy Ministry huge projects to compensate Russia for abandoning the Iran contract. According to US officials the report showed that Iran had imported equipment needed to build nuclear weapons and that it had sought to buy enriched uranium from former Soviet republics like Kazakhstan.

Both the Russian foreign ministry and the atomic energy ministry denied that the light-water reactors could be used to create nuclear weapons, and said that Iran had not previously violated atomic agreements. (IHT 04-04 and 20/21-05-95) But according to US sources Russia had provided assurances that it did not intend to proceed with a part of the deal that particularly worried the US, viz. the proposed sale of a gas centrifuge plant that would have provided Iran with a supply of enriched uranium that could be used to make nuclear bombs. The spokesman for the Russian foreign ministry said that the plan was still being debated. (IHT 05-05-95)

In February 1995 the Chinese Foreign Ministry emphasized that China and Russia were justified in selling civilian nuclear technology to Iran as long as it is done under the safeguards of the IAEA. (IHT 18/19-02-95) It said on 29 March 1995 that it had fulfilled its commitments against nuclear and chemical arms proliferation in its relations with Iran, and dismissed Western charges that China and Iran were engaging in transactions of nuclear and chemical weapons technology. (IHT 30-03-95) A couple of weeks later the Chinese foreign minister again rejected a plea by his US colleague not to go ahead with the sale, saying: "We respect the views of the United States, but what we are doing is consistent with international practice" and adding that no international law prohibited the deal.

Under a 1992 agreement China would build two 300-megawatt pressurized water reactors in Iran and provide nuclear know-how. Several years ago China sold Iran a small research reactor and an electromagnetic isotope separator that could be converted to enrich a small amount of uranium for research. (IHT 18-04-95) In May 1995, however, Chinese officials divulged that there were difficulties over the terms of the implementation of the agreement, such as regarding the site and other matters. (IHT 18-05-95)

On 23 March 1995 the head of the Russian intelligence agency said that his agency did not support the US contention that Iran is developing nuclear weapons. The statement said that Iran's level of achievement in the nuclear field did not exceed that of another 20 to 25 countries. The agency report said that, without help from outside, Iran would not be capable of organizing the production of weapons-grade nuclear materials. (IHT 24-03-95)

In May 1995 the director of Iran's Atomic Energy Organization stated that Iran intended to build a number of nuclear power plants (the reported number of ten was later denied and corrected to three) in the next two decades, but denied accusations that Iran was trying to develop nuclear weapons. Iran had already invested $6 billion in the project.

He told that a formal contract with China was signed in 1994 for two nuclear power reactors. Chinese experts had completed a feasibility study and had begun to draw up blueprints and engineering reports for a site in southern Iran. Iran had already made a down payment for the project which would cost $800 million to $900 million. He denied that Iran had ever negotiated a plan to buy a gas centrifuge from Russia that could have rapidly enriched uranium to bomb-grade quality, and also denied that there existed a parallel nuclear program through the military. (IHT 15 and 18-05-95)

Extension of Nuclear Non-proliferation Treaty
(*see* also: Non-aligned movement)

In facing the projected conference on the permanent extension of the NPT, about 90 developing states were resisting a US-led effort towards an unconditional, indefinite extension. The objection was based on the view that the nuclear powers had not sufficiently pursued nuclear disarmament, resulting in the Treaty turning out to be a bad deal: on the one hand the commitment not to seek to obtain nuclear weapons, on

the other hand a consolidation of the nuclear powers' military and political superiority. The overall number of US and Russian strategic nuclear arms had become more than twice the number at the time of signature of the Treaty. As a result the developing countries aimed at linking the extension to new steps toward disarmament.

Another issue complicating the drive towards extension of the Treaty was the fact that Israel, which has a substantial, undeclared nuclear arsenal, had not signed nor did it intend to sign the Treaty, nor had the US ever pressured it to endorse the Treaty. US officials were referred to as having said that it is a waste of time to urge Israel to adhere to the treaty as it has since long relied on its nuclear arsenal as the ultimate security guarantee and is highly unlikely to sign the treaty. (IHT 02-03-95)
[*Note:* For adherence of Asian countries to the NPT: see 3 AsYIL 256]

At the conference on the renewal of the NPT it was reported that a compromise was being forged on the basis of a split among the 111 members of the Non-Aligned Movement. (IHT 10-05-95)

Sino-US nuclear cooperation agreement

According to a US official China's negative response to US objections to a prospective Sino-Iranian deal on nuclear equipment (*see* above) would influence the implementation of a recently signed Sino-US nuclear cooperation agreement, meant to give China access to US civilian nuclear technology. Under US law US sales would not be permitted unless the President testified to Congress that China's nuclear trade with Iran and Pakistan was appropriate. (IHT 18-04-95)

Protests against French nuclear tests

Japan on 14 June 1995 accused France of betraying the trust of non-nuclear states by deciding to resume nuclear testing. (IHT 15-06-95)

OIL AND GAS
(*see also:* Foreign investment)

Vietnamese offshore oil production

It was reported that oil began flowing from the Dai Hung field off Vietnam's southeastern coast. Vietnam expects an increase in oil output to about 20 million metric tons a year by 2000, from 6.3 million tons in 1993. (IHT 17-10-94)

In February 1995 BP, together with Statoil (Norway) and Oil and Natural Gas Corporation (India) announced the first commercial gas discovery off Vietnam, in the Nam Con Son basin of the South China Sea, which is also claimed by China. The area, some 450 kilometres southeast of Ho Chi Minh City, is claimed by Vietnam as part of its continental shelf. Oil and gas discoveries in the year ending May 1995 led to a major upgrading of Vietnam's petroleum and gas prospects. (IHT 25-05-95)

Central-Asian pipelines

Depending on financing the building of a pipeline from Turkmenistan through Iran and Turkey to the Mediterranean would start early 1995. When completed it would enable the transport of gas from Turkmenistan to Europe while bypassing Russia.

Kazakhstan formed a consortium with Oman to build a pipeline through Russian territory to the Black Sea, in order to avoid dependence on Russian pipelines. (IHT 19/20-11-1994)

OPEC

The organization held a meeting at Bali, Indonesia and decided on 22 November 1994 to freeze oil output through the whole of the next year, holding daily production at 24.5 million barrels. Before the middle of November the price for the OPEC basket of crude oil averaged $16.97 a barrel, compared with its target of $21. In inflation-adjusted terms, the price was not much higher than it was before the 1973 oil embargo.

OPEC's members in 1994 were Algeria, Gabon, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the UAE and Venezuela. (IHT 21 and 23-11-94)

China

China became a net importer of oil for the first time in 1993. (IHT 03-01-95)

In early June 1995 China announced details of its annual round of bidding for oil exploration tracts in the Tarim and Junga basins in Xinjiang Province. The interest of foreign oil companies in the Tarim Basin had fallen off because of the cost of operating in harsh desert conditions and the potential problem of transporting crude oil. Under the terms offered by China the foreign companies bear 100 percent of the exploration risk, while China National Petroleum reserves the right to a 51 percent stake if oil is found. (IHT 09-06-95)

Thai-Myanmarese gas agreement

The Thai State Petroleum Authority signed an agreement to import natural gas from Myanmar starting in 1998. The project includes sending gas through a 400-kilometre pipeline from the Gulf of Martaban overland to the Thai border.

Mon and Karen guerillas who operate in the territory oppose the project as providing revenue for the Myanmar government. (IHT 03-02-95)

PASSPORTS AND VISAS

Malaysia-Thai border smart card system

The ministerial committee of the Indonesia-Malaysia-Thai Growth Triangle endorsed a proposal on 16 December 1994 to replace border passes at the Malaysia-Thai border with smart cards for frequent travellers. The smart card, similar to a credit card, would simplify immigration procedures, reduce immigration manpower and provide easier access between the two countries. (Star 17-12-94)

Border identification cards in lieu of passports

Under the Second Protocol (1994) to the 1967 Malaysia-Philippine Anti-Smuggling Co-operation Agreement, which was due for signature on 29 March 1995, border residents of both countries would be issued with special border identification cards, replacing the need for international passports. (NST and Star 29-03-95)

PIRACY

Increase and decline of piracy in 1994

According to the annual Piracy Report, issued by the Regional Piracy Center (which was created in 1991 by the International Maritime Bureau), incidents of piracy worldwide declined in 1994, but increased in the Indonesian archipelago.

There were 90 incidents of piracy around the world, against 103 in 1993 and 115 in 1992. In Southeast Asia there were 33 incidents, compared with 15 in 1993, while the number of incidents in the Indonesian archipelago doubled, from 11 to 22.

In East Asia the number sank to 38 from 68 in 1993, the South China Sea having had 14 incidents. Three incidents were reported in Southwest Asia, down from 5. (IHT 15-02-96)

Instances of piracy in the South China Sea

A Panama-flagged freighter, on its way from Singapore to a Cambodian port, was hijacked off the Vietnam coast on 23 June and headed for Chinese waters. Another freighter was hijacked on 24 March and towed to San Wei in Guangdong, China. (IHT 27-06-95)

RECOGNITION

Visit of Pakistani prime minister to Gaza

On an invitation of the Head of the Palestine Liberation Organization the Pakistani prime minister planned to visit Gaza during her trip to Egypt in September 1994. Since

Pakistan does not recognize Israeli authority in the Occupied Territories the prime minister planned to enter the Gaza area without Israel's permission.

Israel stated that the self-rule agreement did not give the PLO the right to grant visas to enter the Gaza strip, and barred the Pakistani prime minister. Although Israel later authorized the visit after intervention by the Egyptian president the Pakistani prime minister decided not to reschedule the aborted visit. (IHT 01-09-94)

REFUGEES

Indochinese refugees

The International Conference on Indo-Chinese Refugees, Geneva 13-14 June 1989, had adopted the Comprehensive Plan of Action (CPA), being a framework for international consensus and cooperation between first-asylum and resettlement countries, Vietnam, Laos, and the UNHCR, and aimed at a comprehensive solution of the problem of refugees and non-refugees from Vietnam and Laos. Its objectives were (1) discourage clandestine departures, (2) assure access to a status-determination process for all asylum-seekers, (3) provide resettlement opportunities for those qualified as refugees, (4) repatriate in safety and dignity those volunteering or not fulfilling refugee criteria.

During 1994 7,018 Vietnamese and 6,187 prima facie Lao refugees were resettled, and 12,555 Vietnamese and 7,018 Lao were repatriated voluntarily within the CPA framework. In the first four months of 1995, 1,079 Vietnamese and 2,166 prima facie Lao were resettled, and 3,084 Vietnamese and 1,282 Lao repatriated voluntarily. [From mid-May 1995 interest in voluntary repatriation declined to negligible levels due to renewed expectations of resettlement to the US.]

The (sixth) Steering Committee meeting of the International Conference on Indo-Chinese Refugees on 16 March 1995 established 31 December 1995 as the target date for the conclusion of activities under the CPA in ASEAN countries and shortly thereafter with regard to Hong Kong. (UN doc. A/AC.96/846/Part II/10)

Sri Lankan refugees

8,147 Sri Lankan refugees repatriated from India in 1994. There was an acceleration in the repatriation rate to 10,013 during the first quarter of 1995, due to the cessation of hostilities between government forces and Tamil insurgents which was in effect from 8 January to 19 April 1995. More than 31,000 persons had returned since July 1992, and approximately 54,000 refugees were still in the Indian state of Tamil Nadu. (UN doc. A/AC.96/846/Part II/10)

Myanmar refugees

In 1994 80,000 Muslim refugee residents of the Rakhine State in Myanmar returned from Bangladesh under the auspices of UNHCR, leaving some 120,000 scheduled to return during 1995. (UN doc. A/AC.96/846/Part II/10)

Afghan refugees

329,400 Afghan refugees returned to Afghanistan in 1994, comprising 226,700 from Iran and 102,700 from Pakistan. They joined more than 3 million who had returned between 1990 and 1993. 2.6 million Afghans still remained in neighbouring countries. (UN doc. A/AC.96/846/Part V/13)

Refugees in Iran

At 31 December 1994, 1,623,000 Afghans and 118,000 Iraqi refugees were in Iran. In addition, there were 68,000 persons of undetermined nationality, the majority appearing to be Tajiks, Azeris and Bosnians. (UN doc. A/AC.96/846/Part V/6)

Vietnamese refugees in Indonesia

Indochinese 'boat people' had been concentrated on Galang island, south of Singapore. From the 145,000 people who had landed in Indonesia since the late 1970s, 132,000 had been resettled during the first ten years. Since the adoption of the Comprehensive Plan of Action in 1989, 4,500 people had been voluntarily repatriated.

Seven months after the completion of the screening by the resettlement countries there was some revolt and virtual take-over of the island by a number of the remaining 8,000 Vietnamese and Cambodians who were not eligible for resettlement. (FEER 14-07-94 p. 16)

Vietnamese 'boat people' in Hong Kong

Vietnam agreed to hold talks with Britain in January 1995 on the repatriation of all Vietnamese refugees being held in Hong Kong before the colony would revert to Chinese rule. About 27,000 Vietnamese were still in detention camps. (IHT 21-12-94)

Repatriation of Vietnamese refugees

Representatives of about 30 Asian countries attended the sixth technical committee meeting on Indochinese refugees in Kuala Lumpur in February 1995 to discuss ways to speed up the repatriation of the still remaining Vietnamese refugees. According to the UNHCR 5.5 percent of the 839,000 people who left Vietnam since 1975 were still in Asian 'first asylum' countries. So were 3.2 percent of the 360,000 who fled Laos. There were still more than 5,000 'boat people' in Malaysia, some 6,000 in Indonesia and 22,000 in Hong Kong.

The conference agreed on 23 February that all Vietnamese in Asian camps would be repatriated by the end of 1995, while Hong Kong was to complete the process 'shortly afterwards'. The UK representative for Hong Kong confirmed the process would be completed in 1996. China had told the meeting that it would not permit Hong Kong to remain a place of asylum after it had take over the territory in 1997.

All efforts would be made to get the refugees back to Vietnam voluntarily, but if this failed the repatriation would be carried out under the Orderly Repatriation Program. The Vietnamese government agreed to accept 3,600 refugees a month.

Before the conference agreements had already been concluded between the UNHCR, Malaysia and Vietnam and between the UNHCR, Indonesia and Vietnam. (IHT 22 and 24-02-95, 16-03-95; NST 24-02-95; Star 18-02, 22-02 and 24-02-95)

REGIONAL SECURITY

Military exercises in the Persian Gulf

The US, Britain and Kuwait held joint military exercises off the Kuwaiti coast, close to Iranian territorial waters. Shortly after the end of the exercises Iran warned the US on 4 October 1994 against 'illegal military operations' in the Gulf, accusing US forces of having provoked Iranian helicopters and ships in the region. Iran demanded through the UN that the 'illegal movements' of US forces in the Gulf be stopped. (IHT 05-10-94)

ASEAN Regional Forum

(*see also:* 4 AsYIL 505)

The first formal talks among 18 states in the context of the Forum took place on 25 July 1994 at Bangkok. Apart from the ASEAN member states the meeting was attended by the US, Russia, Japan, China, South Korea, Vietnam, Australia, New Zealand, Canada, Laos, Papua New Guinea and the European Union. (IHT 25-07-94)

The meeting represented the first time such things as preventive diplomacy and the need for transparency in the region's arms build-up were discussed under ASEAN sponsorship. (FEER 04-08-94 p. 14)

The meeting agreed on annual talks and on developing measures to defuse potential conflicts but there was no determination of detailed steps to be taken. Officials envisaged that such steps would likely include exchanges of non-classified military information, cooperation in regional peace-keeping, and registering purchases of conventional arms. (IHT 26-07-94)

Indo-US security agreement

India and the US signed a security agreement on 12 January 1995. The agreement calls for joint military exercises and training, greater cooperation and consultation between the armed forces, defence research collaboration and joint production of military hardware. The agreement refers for the first time to regular cooperation between civilians of both defence ministries, who will form a group that would review post-Cold War strategy. On the military side, the agreement calls for more high-level exchanges between services, and training and joint exercises at progressively higher levels of scale and sophistication. It also calls for expanded defence research and production. (IHT 13-01-95)

RIVERS
(*see also:* Environmental pollution and protection)

Mekong River cooperation

On 5 April 1995 Cambodia, Laos, Thailand and Vietnam concluded an Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (*see* Selected Documents).

A couple of days later Thailand proposed ideas on better exploitation of the river. Thai and Cambodian officials would hold discussions in May 1995 on a hydro-electric dam project that would provide water to Thailand in exchange for electricity to Cambodia. The project would use three dams to divert water from the Strung Nam river in southwest Cambodia to Thai power plants in Trat Province. Electricity would be generated in an aqueduct between the countries and would be sent back to a power station in Cambodia. Thailand also proposed that Laos divert water during the rainy season from its northwestern townships to a northern Thai reservoir. Under this plan Thailand would build a 38-kilometre aqueduct to carry water south across the border. (IHT 10-04-95)

Ganges River water-sharing

The Indian and Bangladesh prime ministers discussed the water-sharing issue at the SAARC-meeting at New Delhi in early May 1995. Bangladesh was accusing India of diverting the river flow and thereby reducing the flow of water to a level of 9,000 cubic feet per second, from the level of 34,000 cubic feet agreed to in 1977. (IHT 09-05-95) Indo-Bangladeshi talks ended on 25 June without any breakthrough. However, it was agreed to re-activate the Joint Rivers Commission which had not met for the past five years, to "work out details on sharing of the waters of common rivers, including the Ganges, on a permanent basis." (IHT 26-06-95)

SANCTIONS
(*see also:* Inter-state relations:general aspects; Iraq-Kuwait War)

Remaining US sanctions against China

The US decision in late May 1994 to extend the MFN-status of China did not affect certain measures taken by the US as a response to the 1989 Beijing incidents, such as the ban on development funds for China. The sanctions specifically bar China from receiving so-called trade development assistance and ban the payment of risk insurance for investments in China. At the time the sanctions were imposed the US Trade and Development Agency had been spending about one quarter of a roughly $30 million fund to conduct feasibility studies. The fund had meanwhile grown to $45 million. Another sanction involved the US Overseas Private Investment Corp. which provides risk insurance to American companies investing abroad.

In August 1994 there were unconfirmed and repudiated reports about discussions being held on lifting the barriers. (IHT 25-08-94)

US sanctions on cooperation with Khmer Rouge

The new US 1995 Foreign Operations Act carries provisions which might affect the relations between the two countries. First, a provision mandates stopping assistance to any country "cooperating tactically or strategically with the Khmer Rouge in their military operations".

Another provision concerns aid given to the Thai military under the International Military Education Training (IMET) programme, and requires the Department of State to prepare a report by 1 February 1995 "on the extent of Thai military support for the Khmer Rouge and the efforts of the Thai Government to impede support for Burmese democracy advocates, exiles and refugees". (FEER 15-09-94 p. 16)

US embargo on delivery of aircraft to Pakistan
(*see:* AsYIL Vol. 1 p. 271, Vol. 2 p. 286, Vol. 4 p. 508)

On the occasion of a visit by the US Defense Secretary the Pakistani Prime Minister demanded that the US either deliver the ordered fighter planes or return the $650 million already paid by Pakistan.
[Pakistan ordered 71 F-16s in 1989, the prepaid amount of $658 million covering about half of them. Under the so-called Pressler Amendment the US not only suspended delivery of the planes but also kept the money and refused to return other Pakistani military equipment sent to the US for repairs] (IHT 11-01-95)

The Pakistani demand was repeated by the prime minister during her visit to the US in April 1995. The US president agreed that the demand was reasonable and promised to consult the Congress about it. (IHT 12-04-95) The first result was that aircraft parts sent to the US for repairs were being returned to Pakistan unrepaired. (IHT 19-04-95)

Easing of US embargo on North Korea

A 44-year-old US trade embargo on North Korea was eased by allowing US firms to make telephone calls to North Korea, use credit cards there and provide some banking services. In addition, American companies would be allowed to buy North Korean magnesite. (FEER 02-02-95 p. 53)

Violation of UN arms embargo against Bosnia

It was reported that with tacit US acceptance Iran had delivered large quantities of arms to the government of Bosnia since late 1994. (IHT 15/16-04-95)

Cut in aid to protest nuclear test

Japan announced that it would cut its grant program aid by way of protest against the recent Chinese nuclear weapon test immediately after the extension of the Nuclear Nonproliferation Treaty. It was meant as a political message and would not affect Japan's huge program of low-interest loans to support China's efforts at economic reform. (IHT 23-05-95) China expressed regret for the Japanese move, warning that it would hurt bilateral ties. The Foreign Ministry spokesman said: "We are always against politicizing economic issues and linking economic cooperation with political issues as a means to exert pressure". (IHT 25-05-95)

SEA TRAFFIC
(*see also:* Territorial claims and disputes)

Vessel Traffic Monitoring System for Straits of Malacca

The Malaysian government had decided on 26 September 1994 to have a sophisticated computerized surveillance system installed to monitor the movement of ships using the Straits of Malacca. The "Vessel Traffic Monitoring System" (VTS) would be one of the biggest of its kind to be implemented in the world and would be fully operational in 29 months.

Under the VTS, computers, radar and radio stations would be installed at strategic spots along the 765 km waterway. Ships using the straits would be able to communicate with the centres to know the traffic situation, weather condition, movement of ships carrying dangerous cargo and other information which could help safe navigation. When fully installed, the VTS would minimize vessel collisions in the straits where 62 incidents had been reported since 1977. (NST and Star 27-09-94)

Extension of traffic separation scheme in Straits of Malacca

The three littoral states had proposed an extension of the traffic separation scheme to the IMO in March 1995, at a seminar on conservation of marine and coastal ecosystems. At present only certain stretches of One Fathom Bank, Tanjong Piai off Johor and Pulau Batu Putih (regarded as the most congested areas) are covered by the traffic separation scheme which divides the route for north-bound and south-bound ships. The proposal would cover all stretches between One Fathom Bank and Pulau Batu Putih.

Subsequently the Malaysian government announced that it would submit proposals to improve navigation in the straits in September 1995. These proposals would include extension of the existing traffic separation scheme by another 100 nautical miles, the introduction of three designated navigational routes for different types of vessels (ships on their way to Malaysian ports, ships simply passing through the straits, ships that are berthed in transitional waters), and installation of additional navigational aids like lighthouses, signal lights and radar equipment to assist ships to navigate safely. (NST 20-03 and 07-06-95)

Vessel collisions in the Straits of Malacca

Two collisions were reported in the first half of 1995. The first was between a Chinese vessel, MV Fei Teng, and a timber ship, Angel Endeavour, at Port Klang on 3 January. No oil spill was reported but the Chinese vessel leaked, spoiling its soya bean cargo, and caused an overpowering stench at port. The second collision, which took place about 8 nautical miles off Kuala Sepang on 25 May, was between an empty 2,027 tonne tanker, Eastern Bliss, and a 72,759 tonne bulk carrier, Samrat Ashok. Following the collision fire broke out at the Eastern Bliss. Consequent to the collision and fire, an oil slick about 1.6 km in diameter from the Eastern Bliss was spotted. (NST 27-05-95)

Sea lanes through Indonesian archipelago

In the wake of the Indonesian ratification of the 1982 Convention on the Law of the Sea (CLOS) the Indonesian government moved to establish at least three north-south archipelagic sea lanes: (1) Karimata Strait - Java Sea - Sunda Strait, 615 nautical miles, linking the South China Sea and Indian Ocean, not considered suitable for ships of more than 18 meter draught; (2) Makassar Strait - Lombok Strait, 660 nautical miles, linking the Pacific Ocean, Philippine waters and the Indian Ocean; (3) Maluku Sea - Banda Sea - Indian Ocean, with three branches north of Timor extending (a) west through the Ombai and Savu straits, (b) south through the Leti Strait and (c) east through the Arafura Sea.

Indonesian officials insisted that the proposed sea lanes were not directed at restricting international shipping but at putting a rein on foreign warships. As long as they do not stray more than 25 nautical miles on either side of their charted course, submarines could remain submerged and surface vessels could launch aircraft and conduct other operations. Outside the lane the rules on innocent passage would apply: this would imply prior notification, submarines must surface and show their flag, and airplanes must stay deck-bound. The CLOS does not explicitly regulate the scope of innocent passage for warships and consequently different states have different interpretations.

The Indonesian defence ministry rejected the notion that the determination of the archipelagic sea lanes had to be approved by the International Maritime Organization.

On four occasions Indonesia had sought to close its straits to foreign shipping: in 1958, 1964, 1978 and 1988. The first two incidents were in reaction to particular events involving the Netherlands and Britain. In 1988 the Indonesian armed forces announced it would close the Sunda Strait to all traffic for two 48-hour periods and the Lombok Strait for four 48-hour periods while the Indonesian navy conducted month-long sea exercises in the Java and Flores Seas. But it was explained later that the officers concerned did so because of an inadequate understanding of the law. In 1994 Indonesia still contended that sea lanes could be closed temporarily as long as the international community is notified beforehand and an alternative route is made available. (FEER 29-12-94/05-01-95 p. 18)

SETTLEMENT OF DISPUTES
(*see:* Territorial claims and disputes)

SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION (SAARC)

South Asia Preferential Trade Association

The SAARC member states on 1 May 1995 approved the establishment of the South Asia Preferential Trade Association (SAPTA) that would start lowering tariffs by 8 December 1995. SAPTA would initially cover only a small number of trade items.

1995 Joint Declaration

In a joint declaration at the end of the summit conference the member states also called for a combined battle against terrorism and demanded the elimination of nuclear weapons. (IHT 03-05 and 05-05-95; FEER 11-05-95 p. 13)

SOUTHEAST ASIA COMMUNITY

It was reported that ASEAN was considering halfway measures to involve Vietnam, Laos, Cambodia and Myanmar in joint activities before these countries become ASEAN members. One of these would be the founding of a Southeast Asia Community. In May 1994 ten countries met in Manila to draw up a manifesto for that purpose. (FEER 28-07-94 p. 24)

SPACE ACTIVITIES

Chinese launches of communication satellites

The Apstar-1 communication satellite, owned by the seven-member APT Satellite Co. consortium consisting of three Chinese government bodies, Singapore Telecom, and Thai, Sino-Macao and Hong Kong (Taiwan-backed) companies, was launched in China on 21 July 1994 before clearing from the International Telecommunication Union which was not expected before November or December 1994. The ITU procedure includes: publication of the desired orbital position, the coordination with nearby satellites (consultation with other countries whose own satellites could be affected) and listing on the Master International Frequency Register.

The projected position of the Apstar satellite was close to two other ones already orbiting over Asia: 131 degrees east longitude, between the Sakura 3A of Nippon Telegraph and Telephone Co. at 132 degrees east, and the US-based Rimsat at 130 degrees. Negotiations were held to find a compromise. Japan accused China of violating international regulations, and threatened to take appropriate measures when the satellite's relay unit would interfere with a Japanese one. (IHT 14 and 23/24-07-94; FEER 04-08-94 p. 63, 18-08-94 p. 46 et seq.)

There are other examples of satellite operators not adhering to international conventions. By carrying StarTV, Asia Satellite Telecommunications (AsiaSat) exploited a loophole in international rules meant to prevent international TV broadcasts without prior consent from governments of the receiving countries. Another example is Tonga which, while not violating the letter of ITU rules, leases its orbital slots to others (the US-based Rimsat). (FEER 18-08-94 p. 50)

The projected launch of a second Apstar satellite, built by Hughes Aircraft Co, on 26 January 1995 met with objections from the Thai Shinawatra Satellite PLC for the same reason of having a route too close to two Thaicom satellites and thus likely to interfere with their functioning. (IHT 25-01-95) The launch failed as either the satellite or the rocket carrying the satellite exploded shortly after take-off. (IHT 27-01 and 09-02-95; FEER 09-02-95 p. 53) China Pacific Insurance Co. paid $160 million in compensation to Asia-Pacific Communication Satellite Co. for the unsuccessful launch. (IHT 29-03-95)

Apstar-2 would have enabled numerous cable-television broadcasters to compete with the dominant Star-TV network in the Asia-Pacific market. Star-TV is a prime user of AsiaSat-1, owned by Asia Satellite Telecommunications Co. and launched in 1990. The latter was scheduled to have an AsiaSat-2 launched in spring 1995 by the same kind of Chinese rocket which launched the Apstar-2. (IHT 28/29-01-95)

Competition in satellite-launching

China charges much less than Western companies for a launch, causing the US to make it a trade issue. A Sino-US agreement of 1988 limited the number of Chinese launches of US-built satellites in 1994 to nine and stipulated that China charge close-to-market prices. A new agreement was signed in March 1995. In it China agreed to conduct no more than 11 commercial-satellite launches annually over the next seven years and not to undercut Western bids for launches by more than 15%. Under a similar US-Russian agreement the Russian charge should not be lower than 7.5% below the cheapest Western bid. (FEER 18-08-94 p. 48; 23-03-95 p. 63)

Japanese rocket launch

Japan launched its domestically developed H-11 rocket on 28 August 1994 after two failed launching attempts earlier in the month. The rocket, the first Japanese-made rocket able to lift heavy satellites, carried a 2-ton government satellite for telecommunications research. Previous Japanese rockets were based entirely on US designs, which gave the US veto power over all launches. (IHT 29-08-94) However, the satellite developed serious problems because of a faulty valve controlling fuel injection. (IHT 31-08-94) On 31 August the effort to place the satellite into the required orbit was abandoned. (IHT 01-09-94)

SPECIFIC TERRITORIES WITHIN A STATE: EAST TIMOR

(*see also:* Asylum)

International developments

In his annual report to the UN General Assembly on the subject of East Timor, published on 22 September 1994, the Secretary-General recalled that the Indonesia-Portugal dialogue had been under way since 1983 and that it was reactivated towards the end of 1992 after an interruption in 1991. There had been five rounds of discussions between the Secretary-General and the two ministers for foreign affairs, the latest one held on 9 January 1995, while a sixth round would be held at Geneva on 8 July.

During the fifth round ministerial talks an All-Inclusive Intra-East Timorese dialogue was contemplated. Indonesia said on 23 March 1995 that it would not boycott the UN-sponsored talks but was disappointed over the way the UN Secretary-General had included key dissident figures without consulting Indonesia. The meeting finally took place in Salzburg, Austria, from 2-5 June. *(see infra)*

Although the positions of Indonesia and Portugal remained far apart a number of mutually agreed confidence-building measures, primarily of a humanitarian nature, had been carried out.

On 6 May 1994 agreement was reached on a number of steps to be undertaken by both sides, such as continuation and expansion of access to East Timor for the UN and human rights and humanitarian organizations and of visits to East Timor by East Timorese living abroad, and of East Timorese to Portugal, the exploration of ways towards facilitating an all-inclusive intra-Timorese dialogue, and a willingness to meet separately with East Timorese representatives holding opposing views on the political status of East Timor.

The Secretary-General continued to discuss with the Indonesian government the situation of East Timorese in custody and the need for taking measures aimed at their early release. In March 1994 the UN Commission on Human Rights adopted a consensus statement on the subject (UN doc. E/1994/24-E/CN.4/1994/132 para. 482, A/AC 109/2026 of 22-06-95, IHT 11-01-95, 24 and 29-03-95) and in July 1994 the Commission's Special Rapporteur on extrajudicial, summary or arbitrary executions visited East Timor at the invitation of Indonesia. (UN doc. A/49/391; FEER 14-07-94 p. 13; 28-07-94 p. 18)

Portugal's persistent demand had been a referendum on self-determination for the 600,000 East Timorese, which remained unacceptable for Indonesia. (IHT 09-01-95)

Intra-Indonesian efforts to solve the conflict

In August 1994 the Roman Catholic bishop of East Timor said in an open letter that Indonesia should hold a referendum to decide the future of the territory. Failing that he proposed talks between the Indonesian government and East Timorese political parties on how to give effective autonomy to the local population. Following these moves an overseas representative of the armed resistance movement proposed a unilateral cease-fire if the Indonesian government was prepared to start talks. (IHT 20/21-08-94)

The above efforts resulted, inter alia, in a four-day All-Inclusive Intra-East Timorese Dialogue in Austria, in early June, 1995. While admitting that the talks

would not resolve the main dispute, the Indonesian ambassador at large for East Timor expressed the hope they might improve ties, in particular over economic and cultural issues. However, a leader of the East Timorese activists insisted on a total withdrawal of Indonesian troops, and elections. (IHT 29-03, 3/4 and 05-06-95) The meeting ended with a consensus on a common declaration and on agreement to hold further meetings. In the declaration the delegates called for respect of human rights and the preservation of the cultural identity of the region. (IHT 06-06-95)

The essence of the Indonesian-Portuguese conflict

The essence of the difference of opinion between Indonesia and Portugal is Portugal's insistence that East Timor's decolonization was not completed by Indonesian-run balloting whereby - according to Indonesia - the majority of the population opted for integration with Indonesia. (FEER 20-10-94 p. 21)

US suggestions on military presence in East Timor

The US Assistant Secretary of State for human rights urged the Indonesian government to reduce the number of troops stationed in the province since, as he put it, the presence of "a fairly substantial number" of military forces "is certainly a major concern about the process of addressing this human rights question". (IHT 21-04-95)

SPECIFIC TERRITORIES WITHIN A STATE: KASHMIR
(*see also:* Inter-state relations: general aspects, at p. 438)

Indian middle course policy

The Indian government on 8 August 1994 pulled back its troops which had surrounded the Hazratbal Mosque in Srinagar since 1993 but at the same time decided to extend the emergency powers under which it ruled the territory for another six months. (IHT 10-08-94)

Essential Indian position

In response to a statement issued by the Organization of the Islamic Conference on Kashmir and circulated in the UN Commission on Human Rights in March 1995, India also issued a statement in which the essentials of the Indian position was defined as follows: "Jammu and Kashmir acceded to India, in accordance with the Indian Independence Act of 1947, like the other Princely States, through an Instrument of Accession duly executed by its then Ruler and accepted by the Governor-General of India. This was ratified by a popularly elected Constituent Assembly, which went on to enact a Constitution recognizing the State as an integral part of India." (UN doc. E/CN.4/1995/167)

Offer of Iranian mediation

During his state visit to India the president of Iran on 19 April 1995 offered to mediate the Indo-Pakistani dispute over Kashmir, and said the US must not be allowed to get involved. (IHT 20-04-95)

Fight against Muslim militants

According to Indian news reports, tens of Muslim militants, or 'infiltrators' (the official Indian term for Pakistani militants and foreign mercenaries) had died in battles with Indian troops in late April 1995. More than 11,000 people had died in secessionist-linked violence in Kashmir since 1989. (IHT 27-04-95)

On 11 May 1995 Indian government forces, which had besieged the town of Charar-i-Sharief, 40 kilometres northwest of Srinagar, since March, stormed an Islamic shrine, killing dozens of Muslim separatist guerillas and destroying the religious complex. The 650-year-old mausoleum of SHEIKH NURUDDIN NOORANI, Kashmir's patron saint, and an adjacent mosque were destroyed by fire. There were contradictory explanations as to who caused the fire, the militants or the army.

The Pakistani foreign ministry stated that "The government of Pakistan condemns this act of sacrilege, which is an affront to the conscience of Muslims the world over". (IHT 12-05-95)

Considerations on autonomy

After the Charar-i-Sharief incident there were reports of the Indian government considering larger autonomy to Kashmir.

Since independence the state had a special constitutional status and the state government had wide authority in the early years after independence in 1947. Much of it was lost in a clash with the central government in 1953 and the state came progressively under control of the central government. It lost political authority altogether with the imposition of direct rule in 1990. Muslim leaders always wanted to have the state's future decided in a plebiscite supervised by the UN, an option which had been rejected by India. The Indian prime minister repeated the Indian stand (*see supra,* p. 492) in an interview on 17 May 1995: "Kashmir is an integral part and parcel of India. The accession is final", referring to the accession to India in October 1947 by the Hindu ruler MAHARAJA HARI SINGH, which was never accepted by Pakistan. The latter has been holding a third of Kashmir since 1947 and has demanded a right for the Muslim majority in the Indian-ruled part to choose for joining Pakistan by way of a plebiscite. (IHT 19-05-95)

[*Note:* Under Art. 370 of the Indian constitution the Indian parliament can not make laws for Jammu and Kashmir except in the field of foreign affairs, defence and communications. The possibility of direct rule was constitutionally limited to five years. The Indian government had to get parliament to pass an amendment to allow direct rule after 18 July 1995.]

SPECIFIC TERRITORIES WITHIN A STATE: TIBET

Government's response to referendum plan

Chinese government officials rejected the idea of holding a referendum proposed by the Dalai Lama. Tibet was constituted as an Autonomous Region in 1965. (IHT 16-03-95)

TAXATION

Malaysia-Turkey taxation agreement

Malaysia concluded agreements on the avoidance of double taxation with: Turkey (28 September 1994) and Jordan (2 October 1994). (NST 30-09 and 03-10-94; Star 29-09-94)

TERRITORIAL CLAIMS AND DISPUTES

(*see also:* Oil and gas)

Sino-Vietnamese clashes in the South China Sea

In April 1994 an incident occurred when Vietnamese gunboats chased away a Chinese seismic research vessel which entered into a disputed oil-drilling area in the southwestern part of the South China Sea. The activities of the Chinese vessel were related to an announcement from Crestone Energy Corp. on 19 April that it was beginning work in the Wan'an Bei 21 field, awarded to it by China in 1992. (*see* 2 AsYIL 378) (FEER 13-10-94 p. 29)

Later two Chinese warships blockaded a Vietnamese oil drilling rig and prevented it from working in an area claimed by both countries by turning back a Vietnamese vessel which attempted to resupply the rig. The area belonged to the same 25,000 square kilometre Wan'an Bei block (Tu Chinh for the Vietnamese), about 400 kilometres off Southern Vietnam and west of the Spratly Islands.

When Vietnam awarded an oil concession in an area just west of the Wan'an Bei block to a US-Japanese group led by the US Mobil Corp., China condemned it as illegal. In the Vietnamese view both areas are on the Vietnamese continental shelf. (IHT 19-07-94)

The doughnut formula for the South China Sea

It was reported that Indonesia had put forward a proposal on the competing claims to parts of the South China Sea that became known as the 'doughnut formula'. It would divide the South China Sea by drawing a line in the shape of an elongated doughnut by projecting 320-kilometre EEZs from the shores of the following littoral states: Vietnam, Malaysia, the Philippines and Brunei. The hole of the doughnut, i.e. the middle of the South China Sea, including the disputed Spratley chain, would be discussed by

competing claimants as an area for potential joint economic development. It was said, however, that the proposal was not widely accepted by the other ASEAN countries, and that there was reluctance from the Chinese side to discuss the legal basis of its sovereignty claims. (FEER 11-08-94 p. 18)

The Mischief Reef incident and its aftermath

On 8 February 1995 the Philippine president referred to the deployment of warships and the building of structures by China on the Panganiban Reef (also known as Meijijiao Reef in Chinese, or Mischief Reef) in the Kalayaan Island Group (those of the Spratly Islands claimed by the Philippines and within the Philippines' exclusive economic zone). Before that China already held seven reefs in the area. The actual reef is under water and surrounds a lagoon. It seemed that China had built the structures on Mischief Reef during the last monsoon season. Philippine patrols apparently had already spotted them in November 1994 but the issue was not raised publicly until February 1995.

The actions were considered inconsistent with international law and the spirit and intent of the 1992 ASEAN Declaration on the South China Sea (3 AsYIL 480). The Philippines lodged a 'strong diplomatic protest' with China. Meanwhile a group of Filippino fishermen claimed they had been detained by Chinese military on a shoal in the area for a week in January 1995. (IHT 09-02 and 17-02-95; FEER 01-06-95 p. 20)

China on 9 February denied the Philippine accusations about the erecting of large structures and said, instead, that it had merely set up shelters at Meijijiao coral reef for Chinese fishermen. China also denied that its navy had intruded into territory claimed by the Philippines and that it had detained or arrested any Filipino ship. (IHT 10-02-95; FEER 23-02-95 p. 15)

In a statement of 15 February 1995 the Philippine president introduced a new approach, proposing that every disputed island be placed " under the stewardship of the country closest to it", provided that each state then allowed anchorage and other 'peaceful pursuits' by the other claimants. He called the Chinese occupation of the disputed reef a "multilateral concern ... of all the countries interested in the long-term stability of the South China Sea and the East Asian region as a whole." (IHT 16-02-95)

On 22 February the Philippine side announced that it would build lighthouses and run naval patrols in the area. The president said that lighthouses "ensure safety at sea for all nations that pass through those waters" and "provide landmarks to where our territories are".

The two sides started talking over the issue on 20-22 March (IHT 21, 23 and 24-02-95, 15 and 21-03-95) and agreed to further discussions at an unspecified date. (IHT 23-03-95)

The Philippine president announced on 29 March 1995 that the Philippine navy had destroyed Chinese structures and removed Chinese markers on the Thomas 1 and Thomas 2 shoals, Half Moon Shoal and Pennsylvania Reef. Earlier the navy had blown up Chinese markers on Jackson Atoll, Half Moon Shoal and Sabina Reef. The chief of the armed forces said that the nearest of these markers were 80 kilometres from the southwestern Philippine island of Palawan "and therefore clearly within Philippine

territory". The latest instance of destruction of Chinese markers was reported on 15 June 1995.

A physical confrontation between China and the Philippines took place around mid-May 1995, when a Philippine navy ship carrying a general and a group of journalists came to 8 nautical miles north of Mischief Reef and launched helicopter sorties. Two Chinese vessels with markings identifying them as fishing boats blocked the Philippine ship. (IHT 17-05-95, 16-06-95)

US attitude vis-à-vis the South China Sea

In a statement of 13 February 1995 the US State Department said: "Our position on this is that we don't take a position on the merit of competing claims in the South China Sea. We have stated firmly that these conflicting claims should be resolved peacefully, that we see no justification for any threat or use of military force, and that we would view the use or threat of force as a very serious matter." (IHT 15-02-95)

In the "East Asia Strategy Report" prepared by the US Defense Department it was said: "Our strategic interest in maintaining the lines of communication linking Southeast Asia, Northeast Asia and the Indian Ocean make it essential that we resist any maritime claims beyond those permitted by the Law of the Sea Convention". (IHT 28-02-95)

On 10 May 1995 the US government issued its strongest statement of concern on the Spratly dispute, calling on China and its five neighbours to "intensify diplomatic efforts" to prevent a possible outbreak of hostilities. It said that the US had "an abiding interest" in the maintenance of peace and stability in the South China Sea, adding that unhindered navigation by ships and aircraft through and above the sea was "essential for the peace and prosperity of the entire Asia-Pacific region, including the US". (IHT 13/14-05-95)

The ASEAN attitude

ASEAN reacted to the Mischief Reef incident by a statement of 18 March 1995 in which the ASEAN foreign ministers expressed their "serious concern over recent developments which affect peace and stability in the South China Sea". They urged all concerned to remain faithful to the letter and spirit of the 1992 Manila Declaration on the South China Sea (3 AsYIL 480) and called upon all parties to accordingly refrain from taking actions that could "destabilize the region and further threaten the peace and security of the South China Sea". Finally they urged the countries in the region to undertake "cooperative activities which increase trust and confidence and promote stability" and encouraged "all claimants and other countries in Southeast Asia to address the issue in various fora, including the Indonesia-sponsored workshop series on managing potential conflicts in the South China Sea". On 22 March Vietnam stated it fully supported the position of the ASEAN countries as expressed in the foreign ministers' statement. (KK)

The serious concern of ASEAN over China's intentions and policy in the South China Sea as demonstrated by its recent actions on Mischief Reef was explicitly expressed at the Sino-ASEAN consultative meeting of senior officials that took place at Hangzhou on 2-3 April 1995. (ASEAN Ann. Rep.94-95 p. 60)

In July 1995 the ASEAN Foreign Ministers expressed their concern and called on all claimants to refrain from taking actions which could destabilize the region, including possibly undermining the freedom of navigation and aviation in the affected areas. (A/50/713 paras 139-140)

The nature of the Chinese claim

It was said that at the ASEAN-China consultative meeting at Hangzhou in April 1995 Chinese officials said they were planning to modify the Chinese claim to ownership not of the entire Spratly area, but only of the islands and reefs. (FEER 01-06-95 p. 20)

Taiwanese policy regarding the Spratlys

According to news reports Taiwan planned to reinforce its claims to sovereignty over the Spratly and Pratas Islands by sending armed patrol boats and erecting a marker over Taiping Island, the biggest in the Spratlys and occupied by Taiwan marines. (IHT 30-03-95)

Taiwan - Vietnam

Vietnam accused Taiwanese artillery on Ban Than atoll to have fired at a Vietnamese supply ship on 25 March 1995 when the ship passed 800 metres from the atoll, where Taiwan had started construction work.

The incident was described as a "very serious action in violation of Vietnamese sovereignty". However, the Taiwanese authorities rejected the Vietnamese protest and maintained that the island belongs to Taiwan which was justified in expelling foreign vessels from its waters. Yet it recalled patrol boats sent to the Spratlys to protect fishermen because it did not want to risk the possibility of conflict in the area.

At around the same time the Taiwanese president as well as the Chinese foreign minister called on avoiding controversy and emphasizing joint management. (IHT 05-04-95)

Malaysia - China

In March 1995 Malaysia arrested the crew of a Chinese fishing boat 70 miles off Sarawak in waters claimed by Malaysia but also falling within China's claim. (IHT 07-04-95)

No impediment to freedom of the seas

There were signs that the countries involved in the dispute over the Spratlys were moving towards a peaceful settlement based on the principles of international law, and particularly the CLOS. China and the Philippines reportedly agreed on a mutual code of conduct that would allow for freedom of navigation. (UN doc. A/50/713 paras 139-140)

China, responding to concern expressed by several countries, declared that its claim to the islands is not meant to impede freedom of navigation or the safe passage of aircraft and ships of other countries. The statement was the first to clarify China's claim by separating its territorial dispute from international questions of freedom of the seas. (IHT 22-05-95)

Detention of Chinese fishermen in disputed area

The Philippine navy caught 50 Chinese fishermen and detained four Chinese fishing boats who were fishing in an area of the South China Sea claimed by the Philippines, near the Arellano shoal. (IHT 27-03-95) When demanding the release of the boats and their crews the Chinese foreign ministry said that China held indisputable authority over the Spratlys and their waters. (IHT 29-03-95) The Philippine president rejected the demand, saying the fishermen had been destroying the environment and "deserve condemnation by the international community". (IHT 30-03-95) They were charged with illegal entry and poaching with explosives and cyanide. (IHT 04-04-95)

Sipadan and Ligitan Islands
(*see:* AsYIL Vol. 1 p. 348, Vol. 2 p. 379)

Malaysia had proposed in the Indonesia-Malaysia Joint Working Group in September 1994 that the dispute be referred to the International Court of Justice. The proposal was made because all documents and papers in support of its claim had been discussed with Indonesia during three meetings of the JWG but the dispute remained unresolved. Malaysia wanted the dispute to be resolved speedily in a just manner so that both countries could concentrate on strengthening bilateral relations. Indonesia, while not rejecting outright Malaysia's proposal, preferred to refer the dispute to the ASEAN Higher Council, set up under the ASEAN Friendship and Cooperation Agreement, on the ground that resolution of the dispute within ASEAN would reflect Southeast Asia's ability to settle its differences amicably. This was not acceptable to Malaysia: as it also had territorial disputes with other ASEAN states, the latter could rely on 'vested interests'. In a meeting with the Indonesian president the Malaysian prime minister later agreed to settle the dispute over the two islands through bilateral negotiations.

In February 1995, however, the Malaysian foreign minister suggested that the meetings be held at a higher level, involving the leaders of the two countries, since discussions at the officials' and ministerial levels had been exhausted. This initiative was taken following press reports on 9 February 1995 that the Indonesian Survey and Mapping Coordinating Unit had included the two disputed islands into the Republic's new map.

On the basis of a report prepared by the JWG the dispute was discussed for the first time by the Indonesia-Malaysia Joint Commission in June 1995. At the end of the meeting, Malaysia and Indonesia agreed to hold high-level talks between representatives of the heads of government to find a peaceful solution. No time frame was fixed for the talks. (IHT 17/18-09-94; NST 13-09 and 18-09-94, 13-02, 17-02, 26-02, 09-06 and 10-06-95; Star 08-09-94, 13-02, 17-02, 26-02, 09-06 and 10-06-95)

Pulau Batu Putih

Malaysia and Singapore agreed in principle to refer their dispute over Pulau Batu Putih to the International Court of Justice. The agreement was reached on 6 September 1994. No agreement could yet be reached at a meeting of officials in June 1995 on the terms of reference for the special agreement required for the submission of the dispute, and another meeting on the outstanding matters was scheduled for later in the year. (NST 08-09-94, 16-06 and 17-06-95)

Terumbu Layang-Layang

The Malaysian prime minister announced on 26 May 1995 that the island of Terumbu Layang-Layang belongs to Malaysia and that its status should not be questioned by other countries. Terumbu Layang-Layang is one of the Spratly Islands and Malaysia claims sovereignty over the island because it lies within Malaysia's exclusive economic zone. (NST and Star 27-05-95)

Japanese fishing in disputed territory off Northern Japan

A Russian patrol vessel sank a Japanese fishing boat and seized its crew in disputed waters off northern Japan. Russia notified the Maritime Safety Agency of Japan about the matter. Japan protested against the incident, warning that it could harm efforts to solve a dispute over fishing rights. (IHT 06-10-94) Talks over these rights began on 13 March 1995. (IHT 14-03-95)

Russian proposal on disputed Kuril Islands

Russia proposed a plan for a free economic zone in the disputed Kuril Islands with Japanese participation, but Japan reacted coolly and said it found it difficult to accept the proposal if the islands were kept under Russian jurisdiction. (IHT 13-10-94)

Gulf of Tonkin

In October 1994 China filed an official protest with Vietnam, accusing Vietnam of "gross violations of its rights and sovereignty" in the Gulf of Tonkin. Reacting to these protests, Vietnam accused China of "systematic and unacceptable" violations in the Gulf of Tonkin, warning that it reserved the right to "defend its territorial waters". These alleged violations comprised Chinese fishing boats systematically violating the Vietnamese EEZ and territorial waters. Besides the Chinese territorial claims in the Gulf were called a violation of the UN Law of the Sea Convention and of Vietnamese sovereignty.

Vietnam ratified the 1982 CLOS in June 1994 which it says legitimizes its claim to sovereignty over areas of the gulf and the 'Eastern Sea' (known to the Chinese as the 'South China Sea'). Discussions on demarcation began in 1993 but had not resulted in a solution. Meanwhile Vietnam had begun oil exploration in the contested area in association with foreign companies. (IHT 18-10-94)

Sino-Indian territorial claims

China claims 90,000 square kilometres in the Indian northeastern Arunachal Pradesh state. Reversely India holds the view that China occupies 33,000 square kilometres in the Aksai Chin region of Jammu and Kashmir. (IHT 17/18-12-94)

Persian (Arab) Gulf Islands
(*see:* AsYIL Vol. 2 p. 379, Vol. 3 p. 450)

In mid-February 1995 US news reports quoted Defense Ministry officials according to whom Iran had stationed about 5,000 troops on Abu Musa Island and the two Tunb Islands located near the Strait of Hormuz, and equipped them with missiles. Iran insisted that the measures were of a strictly defensive nature. (IHT 01 and 02-03-95)

On 22 March 1995 the US Defense Secretary accused Iran of also having moved chemical weapons to the islands, which could threaten the safety of oil shipping in the Persian Gulf. (IHT 23-03-95)

Natuna Islands and Natuna gas field

The Natuna gas field is about 230 kilometres northeast of the Natuna Islands. It lies inside the Indonesian 200-mile exclusive economic zone. Indonesia is developing it with Exxon of the US. (*see:* Foreign investment, *supra* p. 416)

At the informal 1993 workshop on the South China Sea at Surabaya a Chinese map showed the field falling under Chinese control. Indonesia had sent a diplomatic note requesting clarification of the Chinese map. It complained that in adhering to its 'historic claims' China had not clarified whether it is claiming the islands or the seabed or the water. Asked about Indonesian concerns a Chinese foreign ministry spokesman said that maritime boundaries in the South China Sea would be settled through bilateral consultations and negotiations. (IHT 12-04-95; UN doc. A/50/713 paras. 139-140) Chinese denial of the existence of any dispute with Indonesia on the Natuna Islands was repeated in June 1995, and was accompanied by an assurance that China was prepared to settle questions of demarcation by negotiation. (Kompas 23-06-95)

TERRITORIAL INTEGRITY

Russian bombing of Afghan border area

For the fourth time during the current month it was reported on 11 January 1995 that Russian jets had bombed border areas in the northern Afghan province of Badakhshan. The province borders Tajikistan, where Russia was deploying troops to help fight ant-government Islamic guerillas suspected of having bases in Afghanistan. (IHT 12-01-95)

TERRITORIAL WATERS
(*see also:* Borders; Jurisdiction)

Extension of Korean territorial sea

South Korea planned to expand its territorial sea to 12 nautical miles off its southern coast. This would affect the waterway between South Korea and Japan and would consequently need bilateral consultations. The two countries currently claimed territorial zones of 3 nautical miles in the area.

The expansion would serve to protect fishing grounds from Chinese poachers. South Korean fishermen complained that some of their richest fishing grounds, including those in the Korean Strait, were being overfished by Chinese boats. (IHT 4/5-03-95)

Malaysia-Singapore agreement on demarcation of territorial waters

The two countries signed an agreement on the demarcation of their territorial waters on 7 October 1994, after 14 years of negotiations which commenced in 1980 when a joint hydrographic survey was conducted.

The agreement clearly defines the boundary based on precise co-ordinates in the Straits of Johor, totalling 48 nautical miles. This was done in accordance with the Straits Settlement and Johor Territorial Waters Agreement 1927, which marked the agreement between the Sultan of Johor and the Government of the Straits Settlement on the concept of a territorial waters boundary following the deep water channel. The need to delimit precisely the territorial waters boundary was recognized in late 1971, arising from concern over reclamation activities and its effects upon navigation as well as concern over pollution in the straits. (NST 15-10-94,08-08-95)

TERRORISM

Muslim militants in Pakistan

It was suspected that clandestine Muslim training centres in North-West Frontier Province in Pakistan had been used as fronts for terrorist activities abroad by Muslim militants. The international links came to light when the suspected mastermind of the 1993 bombing of the World Trade Center in New York was captured in a boarding house in Islamabad and was immediately deported to the US (*see* Judicial assistance).

The prime minister stated that the government favoured closing the training centres, religious schools and other similar places but would need foreign, particularly US, assistance for doing so, because such measures would prompt the militants to fan out across Pakistan. The call for help could refer to a resumption of aid programs or to persuading other states to take back their nationals who had joined activist groups in Pakistan. (IHT 23-03-95)

[*Note:* The above Pakistan-born suspect was said also to have made an attempt to assassinate the Pakistani prime minister, to have been involved in plotting to assassinate

the Pope during the latter's visit to the Philippines in January 1995, and to have been involved in the bombing of a Philippine airliner on 11 December 1994 and the preparation of the bombing of two US jumbo jets near Hong Kong. IHT 27-03-95]

TRANSIT

See: Inter-state relations: general aspects, at p. 440, 442; International trade, at p. 453

UNITED NATIONS

Japanese candidacy for permanent seat in the UN Security Council

Japan announced on 13 September 1994 that it would formally seek a permanent seat on the UN Security Council, but that it would claim exemption from actions aimed at using force. (IHT 14-09-94)(*see also supra,* p. 435)

Malaysian peace-keeping troops in Bosnia-Herzegovina

In mid-December 1994 the Malaysian government announced that the strength of the Malaysian troops serving under UNPROFOR would be increased from about 1600 to 3000 men. However, the defence minister announced in June 1995 that the UN had rejected Malaysia's offer and would only allow an increase of between 200 to 300 men. (Star 15-12-94 and 20-06-95)

ASEAN peacekeeping force for UN missions

Malaysia and Singapore agreed on the idea of an ASEAN peacekeeping force for UN missions, and to have it accepted by the other ASEAN member countries. The idea was first announced after bilateral discussions between the Malaysian and Indonesian defence ministers in November 1994. (NST 18-01-95)

Status of contributions to the UN regular budget for 1995

State	scale of assessments (%)	contribution payable ($)
Afghanistan	0.01	109,278
Bangladesh	0.01	109,278
Bhutan	0.01	109,278
Brunei Darussalam	0.02	218,556
Cambodia	0.01	109,278
China	0.72	7,868,000
India	0.31	3,387,611
Indonesia	0.14	1,529,889
Iran	0.60	6,556,667

Japan	13.95	52,442,506
Kazakstan	0.26	2,841,222
Korea (DPRK)	0.04	437,111
Korea (ROK)	0.80	8,742,223
Kyrgyszstan	0.04	437,111
Laos	0.01	109,278
Malaysia	0.14	1,529,889
Maldives	0.01	109,278
Mongolia	0.01	109,278
State	scale of assessments (%)	contribution payable ($)
Myanmar	0.01	109,278
Nepal	0.01	109,278
Pakistan	0.06	655,666
Papua New Guinea	0.01	109,278
Philippines	0.06	655,666
Singapore	0.14	1,529,889
Sri Lanka	0.01	109,278
Tajikistan	0.03	327,833
Thailand	0.13	1,420,611
Turkmenistan	0.04	437,111
Uzbekistan	0.19	2,076,278
Vietnam	0.01	109,278

(UN doc. ST/ADM/SER.B/480)

Increase of Korean contribution

According to the foreign ministry of the Republic of Korea the country would increase its contribution to the UN to about $48 million to reflect its growing role as a world-class economy. (IHT 13-04-95)

UNRECOGNIZED ENTITIES

North Korea-Taiwan contacts

It was reported that North Korea had stepped up contacts with Taiwan in the past year. Among the visitors arriving in Taiwan were those coming from the Korean National Development Committee, a semi-official agency. (FEER 21-07-94 p. 12)

US policy vis-à-vis Taiwan

On 7 September 1994 the US announced a change in Taiwan policy, reaffirming the US position that there is only 'one China', but loosening some of the strictures that

had prevented US officials from carrying out direct talks with Taiwanese officials on trade and economic issues. For the first time since 1979 the most senior US official in Taiwan visited the Taiwan president to brief him on the policy change.

The adjustments included permission for cabinet-level visits, allowing a more suitable title for the Taiwanese representative office in the US, and allowing Taiwanese officials as such to visit US government offices. (IHT 09 and 12-09-94; FEER 21-07-94 p. 20)

Visit to the US by Taiwanese president

In response to an invitation to the Taiwan president by Cornell University in the US to address an alumni function in June 1995 the US Senate Foreign Relations Committee and the US House International Affairs Committee approved resolutions in March and April 1995, urging an end to a long-standing restriction on visits from Taiwan leaders. (IHT 07-04-95)

On 9 May 1995 the US Senate approved a resolution with 97 to 1 vote calling on the president to allow the visit, after a similar resolution was adopted unanimously by the House of Representatives on 2 May. State Department officials said, however, that despite the Senate vote the administration would not grant a visa, and that the visit was not worth touching off a major dispute with China. A State Department spokesman said that the administration was not rethinking its position and that allowing the visit would be seen by China "as removing an essential element of unofficiality in the US-Taiwan relationship" and "would have serious consequences for US policy".

However, under intense pressure from the US Congress the US president on 20 May 1995 decided to grant a visa, thus breaking a 16-year policy and a commitment of September 1994 in which the US government assured the Chinese government that only transit stops for safety, comfort or convenience would be allowed.
[Under the 1994 upgrading of unofficial relations with Taiwan *(see supra)* the aircraft of the Taiwanese president could make brief transit stops in the US "for safety, comfort and convenience", as it did in 1994 for refuelling at Hawaii.] (IHT 12 and 23-05-95; FEER 25-05-95 p. 13)

Australian position regarding visa for Taiwanese officials

The Australian foreign minister told Parliament that the government was not contemplating allowing the Taiwanese president, nor for that matter the Taiwanese prime minister, to visit Australia, whether officially or otherwise. The response was given with regard to an invitation extended to the Taiwanese president to address the National Press Club in Canberra. The statement said, inter alia: "It has been the policy of the Australian government to restrict private visits to Australia by high-level officials from Taiwan to those which are strictly related to the promotion of our strong and expanding economic and trade interests". (IHT 30-05-95)

Meeting of Czech prime minister with Taiwanese prime-minister

The prime minister of the Czech Republic met with the Taiwanese prime minister in Prague on 19 June 1995 during the latter's European tour. The meeting was classified as unofficial, informal. (IHT 20-06-95)

(NON-)USE OF FORCE
(*see: Inter-state relations: general aspects*)

VIETNAM WAR

Number of victims

According to incomplete figures, released by the Vietnamese government, more than 1 million soldiers and about 2 million civilians were killed from 1954 to 1975. Another 300,000 soldiers were listed as missing and 600,000 had been wounded. Two million Vietnamese were left invalid, and nearly as many suffered from the effects of chemical defoliants used by US forces. Besides, according to US statistics 200,000 South Vietnamese troops died and 500,000 were wounded. (IHT 05-04-95)

WEAPONS
(*see also:* Inter-state relations: general aspects, at p. 438; Nuclear capability)

Sino-US agreement on production of nuclear weapons

On 4 October 1994 China and the US issued a joint statement pledging to work together to promote "the earliest possible achievement" of an international convention "banning the production of fissile materials for nuclear weapons". (FEER 20-10-94 p. 20)

Indian attitude toward NPT

India stated that it was prepared to meet the efforts for extending the NPT part of the way: it would ban further production of fissile materials as long as all others do the same. A convention on the matter would ban further production of highly enriched uranium or plutonium. In this respect India and the US shared the same view, and it was in accordance with India's long-standing view that non-proliferation regimes should apply equally to all countries.

India had so far resisted signing the NPT because it is flanked by China and it is in a stalemate with Pakistan. India wanted the five nuclear powers to commit themselves to deadlines for disarmament. (FEER 02-02-95 p. 16)

Indonesian attitude toward NPT

The Indonesian foreign minister said that the Indonesian opposition to the extension of the Nuclear Non-proliferation Treaty was not final, and that members of the Non-aligned Movement were still considering whether or not to support the indefinite extension. (IHT 22-02-95)

WORLD TRADE ORGANIZATION

(*see also:* International trade, *supra,* p. 447, 451)

US complaint against South Korea on quarantine

The US filed a complaint with the WTO for mediation in a quarrel over South Korean quarantine procedures to inspect a shipment of American grapefruit for harmful chemical residue. These procedures were newly introduced and allowed for "first quarantine and later inspection", reversing the order under prior rules. South Korea said the new procedure was intended to protect consumers. (IHT 07-04-95)

The US had also asked for WTO-sponsored consultations with South Korea to demand changes in its shelf-life rules for imported meat products. (FEER 25-05-95 p. 48)

Singaporean complaint against Malaysia

Singapore filed a complaint for being hurt by Malaysian restrictions on imports of plastic resins. The sole local producer of polyethylene is Titan, a Taiwanese-Malaysian petrochemicals plant that started production in 1991; it is also one of only two local producers of polypropylene. Titan was initially protected by a 30% duty on resin imports. When foreign suppliers remained competitive the Malaysian government introduced a non-tariff barrier – the import permit. In addition it decreed that all permit applications had to be accompanied by a 'no objection' letter from Titan. (FEER 26-01-95 p. 44)

WORLD WAR II

Japanese compensation for Asian war victims

On 31 August 1994 Japan officially announced a 10-year, $1 billion program that would provide symbolic compensation for women used as prostitutes by the Japanese army during the war. It would also refer to Taiwanese conscripts whose savings were confiscated and South Korean labourers who were marooned on Sakhalin Island after the war. The money would be used for the construction and operation of vocational centres for women in several Asian countries, as well as for additional research on World War II. The program marked a major reversal in Japan's position. For years

Japan maintained that the issue of wartime compensation had been completely settled by the 1951 peace treaty.

Besides it was possible that a privately financed endowment of $100 million would be set up that would make payments directly to victims. the grants would be classified as 'gifts of atonement', not compensation for sexual slavery. (IHT 31-08-94) The fund was actually established in June 1995 under the name "Asian Peace and Friendship Foundation for Women". (IHT 15-06-95)

It was reported that the Japanese scheme was not favourably received by the public in several countries, such as South and North Korea and the Philippines. According to adversaries the program is an attempt by Japan to avoid legal responsibility for its actions by offering only symbolic compensation to the victimized women. (IHT 19-07-94, 31-08-94, 3/4-09-94) In February 1995 supporters and survivors of some 200,000 Asian women who were forced into prostitution by the Japanese army held a conference in Seoul, rejecting 'sympathy money' and pushing the Japanese government to pay direct compensation in order to "restore the honour" of the women involved. (IHT 28-02-95)

On 6 December 1994 the Japanese government officially decided to make no direct government payments to compensate 'comfort women' and would only finance the previously announced $1 billion program. (IHT 07-12-94)

Taiwan fixed-debt problem

The Taiwan fixed-debt problem involves the unpaid wages and frozen post-office savings accounts of Taiwanese soldiers who served in the Japanese Imperial Army.

A panel of Japanese and Taiwanese politicians met in March and June 1994 to try to reach a settlement but failed to bridge a gap of more than 3 trillion yen ($30 billion). Japan wants to settle the debt on the basis of the original sums due, plus interest and an allowance for inflation. Taiwan argues that the Taiwanese soldiers should be accorded the same status as soldiers in Japan's post-war Self-Defence Forces and should be compensated accordingly. That would mean multiplying the original debt by about 7,000 times, or roughly equivalent to Japan's defence budget.

Initially the government at Taiwan refused to have anything to do with Taiwanese veterans' claims as it felt "not obliged to help people who had helped the enemy". The turning point came in the early 1980s, when democratization unleashed popular pressure on the government to admit and to actively encourage war claims against Japan. From the Japanese side the Supreme Court ruled in 1982 that Taiwanese soldiers were entitled to compensation. (FEER 20-10-94 p. 24)

On 21 December 1994 Japan announced it would spend 35 billion yen ($350 million) over the next five years to settle World War II debts to people from Taiwan. Claims included military pay-checks owed to conscripts from Taiwan who fought for Japan and money in postal savings accounts that was never paid back. However, the interest groups involved denounced the amount as insulting. (IHT 22-12-94)

Lawsuit by Chinese victims

Thirty-six Chinese victims of World War II on 26 April 1995 filed a lawsuit in Tokyo against the Japanese government and Japanese conglomerates, demanding an apology and compensation.

The Chinese state had taken the position that it would not seek war indemnities but would not stop private individuals from demanding compensation. (IHT 27-04-95)

Gas weapons left from the war

Japan was to send a study team to southern China in late February 1995 to start sealing or dismantling chemical bombs left there in World War II. New documents were said to show that Japan produced more than 5 million gas shells and grenades by the end of the war. The report could shed light on poison gas shells left in China by retreating Japanese troops, an issue currently under discussion by the two governments. (FEER 23-02-95 p.13; IHT 25-05-95)

Japanese apologies for the war

At the insistence of the Japanese prime minister, the Japanese Parliament passed a resolution on 9 June 1995, expressing an apology for Japanese conduct relating to the war. The resolution was directed principally at Asian countries that were invaded by Japan, to mark the 50th anniversary of the end of the war. The relevant paragraph of the resolution has been translated in various ways:

> "Recalling many colonial rules and acts of aggression in the modern history of the world, we recognize and express deep remorse for those acts our country carried out in the past and unbearable pains inflicted upon people abroad, particularly people of Asia",

or:

> "While giving thought to the many acts of colonial control and aggression that have occurred in modern world history, we recognize the acts of this kind carried out by our country in the past and the suffering that we caused the people of other countries, especially those of Asia, and we express our feeling of deep remorse",

or:

> "Recalling many aggressive-like acts and instances of colonial rule in modern world history, we recognize and express deep remorse for these kinds of actions carried out by our country in the past. They brought unbearable pain to people abroad, particularly in Asian countries".

(IHT 07, 08 and 10/11-06-95)

LITERATURE

BOOK REVIEWS*

Quasi-States: Sovereignty, International Relations and the Third World by ROBERT H. JACKSON (Cambridge Studies in International Relations: 12), Cambridge University Press, 1990, pp. 225; ISBN 0521447836, UK£ 14.95/US$ 18.95.

The author purports to contribute some empirical and sociological theoretical support for change to the citizenries of many Third World States whose adverse circumstances are the result of the institution of 'negative sovereignty', i.e. the international moral and legal normative framework that upholds the sovereign statehood of the new and weak Third World States that have been recognised by the international community since about 1960. The author observes that equal sovereignty and the principle of non-intervention for all states have the unintended consequence of making it impossible to address the problems of some states by international means without the consent of their governments for fear of being accused of paternalism, neocolonialism, and even racism. The author argues that the fundamental causes of many adverse circumstances in Third World 'quasi-states' is due to their premature and unnecessary legal recognition which has failed to take into account the huge societal and cultural differences and, at the same time, prevented others from intervening into their 'domestic affairs', such as human rights and socio-economic development. The author suggests that alternative arrangements such as a more intrusive form of the international trusteeship providing for international supervision might have been better suited to the different circumstances and needs of particular situations and could have prevented or reduced the adversity.

The author investigates the various aspects of 'negative sovereignty', including its contents, historical development, consequences in terms of international politics and domestic conditions. He then assesses its implications for international relations theory and finally draws his conclusions on the prospects of 'quasi-states' under such an institution. The author demonstrates, mainly from the socio-political perspective, that many 'quasi-states', which are limited in their capacity or desire to provide civil and socio-economic good for their citizens, do not satisfy many of the characteristics of empirical statehood of the older 'positive sovereignty' structure. The author considers the 'positive sovereignty' regime a crucial and overlooked institution which involves a fundamental change of assumptions about how the international system should operate. He also discusses related issues regarding decolonization, self-determination, human rights and development.

* Edited by Surya P. Subedi.

The author observes that Third World states are judicial rather than empirical entities as their emergence is mainly due to the development of international law on decolonisation and self-determination. He thinks that decolonisation has brought 'inequality' since newly independent 'quasi-states' demand and create an unprecedented form of international non-reciprocity. He further remarks that such an artificial legal levelling of a highly unequal empirical world is not only irrational but also inequitable. The author explains that the institutional rules and practices of sovereign statehood by nature work in favour of developing states and against the developed. The end result is a prevalence of the sovereign right of non-intervention over human rights, and a quest for the right of development of the Third World on a non-reciprocal basis. The author concludes that the institution of 'negative sovereignty' is a mixed blessing. To exercise the right of self-determination is not intrinsically good or bad, it all depends on the circumstances. In case of problems with the government of 'quasi-states', it is up to the populations of these states to change them. He speculates that some ex-colonial peoples may choose a reduced international status having experienced the bitterness of independence.

The institutional approach taken by the author is based on human will and not on a structural-functional analysis, nor on class analysis or any other methodology which disputes choices and their consequences. The style of the author, who is a political scientist, is sufficiently plain and the text is easy to read. The targeted group of readers are those interested in a conceptual analysis of the political theories on statehood and the inconsequential political implications on international relations. The book is useful to lawyers and students of international law as the legal concept of sovereign statehood can only be properly understood by examining not only the international legal rules, but also the international politics that helped establish them.

The readers may find chapters 3 and 4 most interesting as these survey the emergence of new sovereign states during the episode of colonization. The exposition, to some extent, reveals the social, economic and political factors that affect *opinion juris* and state practice regarding the evolvement of the legal concept of statehood, and demonstrates the existence of a tacit international legal policy on international economic law and international development. The book demonstrates how politicised an international legal institution such as sovereign statehood can be.

International lawyers who are attracted by the title of the book may be disappointed as the book is not a jurisprudential study of the, eventually changing, norms of international law on international personality. The book is not a study of legal norms and practices concerning less-than- sovereign international personalities, e.g. territories like Hong Kong, either. On the contrary the author attempts to provide empirical and sociological theoretical arguments for citizens of legally sovereign 'quasi-states', in calling for a non-sovereign status. The term 'quasi-state', therefore, is to be understood in a non-legal sense.

Despite the author's denial that colonialism and paternalism is the underlying value premise, the theme implicitly recurs throughout the book. Readers may not agree with the author's interference that domestic subjugation will necessarily happen after independence. Persons from Third World countries and colonies may find it unfair, premature or even offensive for the author to conclude the pros and cons of independence after just one generation of adjustment. Theoretically speaking, sovereign statehood may well be the best way of guaranteeing the national freedom that is necessary to secure and protect the diverse cultures and societies of the world. The author's proposed alternative arrangement is

tantamount to reviving an obsolete practice by allowing outsiders to interfere with and impose their values on 'quasi-states' and colonial peoples. The proposal may be dismissed as another form of subjugation in disguise. From the legal perspective, the international community must operate within the framework of international law. The author has not mentioned the significance of international legal policy on sovereign statehood and the rule of law at the international level. As a matter of practical consideration, the international trusteeship system has been tried before and has now been largely discarded. Few would consider revisiting the obsolete option in present circumstances. It is, therefore, unlikely that the recommended option would have any impact on the practices, norms and rules of international relations. The so-called 'quasi-states' should be given the same opportunity as their former colonial powers to develop themselves. Nothing is really clear from the post-colonial experience. If there is international political will, the adverse circumstance of 'quasi-states' may be reconciled by the right of development with the full support from developed countries.

PETER K.F. CHEUNG
Hong Kong Shue Yan College

Fundamental Rights in Sri Lanka: A Commentary by S. SHARVANANDA, B20 Stanmore Crescent, Colombo 07, 1993, pp. 447; ISBN 9559557505, Rs. 1500; US$ 40.

"When they arrested my neighbour I did not protest. When they arrested the men and women in the opposite house I did not protest and when they finally came for me, there was nobody left to protest." This very lucid expression of Pastor NEEMOLLER quoted in the introductory remarks goes very well with the subject matter of this book: the application and interpretation of fundamental rights available to the people of Sri Lanka under their Constitution of 1978. It is written by a leading jurist of Sri Lanka, who is a former Chief Justice of the Supreme Court of Sri Lanka.

The book has 12 Chapters dealing with all major aspects of fundamental rights and freedoms. It seeks to examine whether the Constitutional provisions are able to maintain a proper balance between the rights of the individual and the responsibilities of the state or society. The author rightly states that since we do not and cannot live in a world of absolute rights, from time to time the rights of the individual have to yield to a wider public interest or to the higher claim of social justice. However, he contends that the architects of the Constitution desired at the same time to prevent the abuse of executive power by providing for constitutional remedy against any infringement of the rights of the individuals by the state.

In an effort to explain this delicate balance, the author presents an analytical study of the concept of fundamental rights and of the nature and scope of various freedoms, including freedom of thought, conscience and religion, freedom from torture, freedom from discrimination, freedom from arbitrary arrest and detention, freedom of speech and association and freedom of trade and occupation. Since the Constitution of Sri Lanka seems to follow, as explained by the author, "the American and Indian models in adopting

guarantees of Fundamental Rights and providing for their enforcement by the Supreme Court" (page v), the author draws very heavily upon the case law of Indian, American and British courts in explaining the concept and nature of fundamental rights of freedoms.

The book evinces how the powers of the Supreme Court of Sri Lanka differ from and are more limited than those enjoyed or asserted by the Supreme Courts of India and the United States. It is interesting to note that the Sri Lankan Constitution does not invest the Supreme Court with a power to declare *ultra vires* a law passed by the legislature if the law is inconsistent with the provisions of the Constitution. This limitation could be regarded as a serious handicap given the history of Sri Lankan politics where several decisions of parliament have at times made a mockery of democracy. For instance, it was not long ago that the parliamentarians decided to extend their term of office by a law when the time had come for them to face the electorate. If the Supreme Court of the country is helpless even when parliament exceeds its authority and politicians use parliament to abuse their power, one has to wonder whether it is a proper democracy or whether there is a proper rule of law in the country. This is especially so in a civil-war ridden country such as Sri Lanka where the oppressed need the best judicial protection against governmental abuses of power.

In a country where the judiciary is weak, oppressed people show a tendency to resort to other forms of self-help including taking up of arms. Perhaps, this is one reason why law and order has become a far-fetched thing for many Sri Lankans for far too long. Although Justice SHARVANANDA appears critical of the provisions of the Sri Lankan Constitution under which it is parliament rather than the Supreme Court which is actually supreme in the country, he too fails to present a critical analysis of the plight of minorities and especially the inability of the Supreme Court to assert authority as the guardian of the constitution, and restrain both the executive and the legislature when they exceed their boundary. In a book which is, in fashionable terms, a human rights book, it would be quite normal to expect a critical analysis of the weaknesses of the existing constitutional framework of the country, especially if the author is a seasoned senior judicial officer who was once at the apex of the Sri Lankan judiciary. In this sense, a reader has a reason to be disappointed to a certain extent.

However, looking at it from another perspective, it is not fair to expect discussions of a politico-legal nature in a purely 'technical' legal work. The author is quite successful in achieving what he sets out to achieve in this book: it is a very competent analysis of the nature and scope of fundamental rights and freedoms available under the present Constitution and their application and interpretation by the Supreme Court of Sri Lanka within the limits of that Constitution. The book is all the more interesting by the comparison made not only of the provisions of the Sri Lankan Constitution with those of other countries, but also of the practices of the Sri Lankan courts of law with those of other democracies, mainly of India, the United Kingdom and the United States.

In sum, the book is a very useful reading for those interested in the situation of fundamental rights and freedoms in Sri Lanka as well as for those keen to get a clear comparative and analytical view on the concept of fundamental rights and freedoms and their interpretation and application in a given situation. It is rare for any retired chief justice of any small Third World country to write a comprehensive book such as the present one at his/her advanced stage both in terms of age and experience. We have plenty of books available in the market on fundamental rights and freedoms written by academics for

students of law. But there are very few books written by well-experienced judges. In this respect, the book is a welcome addition to the body of literature in this area of law.

SURYA SUBEDI
University of Hull Law School

International Law and World Order - A Critique of Contemporary Approaches by B.S. CHIMNI, Sage, New Delhi, 1993, pp 318, ISBN 8170363306 (India) and 0803994710 (US), Price Rs. 295.

A critique of the theory of international law is an important though somewhat neglected area of research and scholarship. In this regard, Dr. Chimni's book *International Law and World Order - A Critique of Contemporary Approaches* appears to have made considerable advance in filling a significant gap. The anti-theoretical approach of international law and its possible drawbacks to which Dr. CHIMNI draws our attention in his introductory remarks are indeed extremely pertinent and need a careful re-examination.

The author sets out to present a critique of a number of Western non-Marxist theories and then goes on to deal with his other task, namely that of the development of a Marxist theory of international law. His exposition of the Marxist model, particularly in the light of the hitherto rather scant attention provided to it as an alternative theoretical approach to international law is particularly welcome. In light of the apparent demise of support for Marxist ideologies, an advocacy and elaboration of Marxist tradition, although being a matter of some surprise, nonetheless present the reader with an interesting and innovative challenge.

The theories which Dr. CHIMNI has analyzed in his work are those propounded by MORGENTHAU, MC DOUGAL-LASWELL, FALK and TUNKIN. The selection of theories is a valid one for they present the most significant and influential theoretical expositions on the subject (page 17). As CHIMNI's criticism of MORGENTHAU's realist theory with its emphasis on the decentralised nature of international law and viewed through the spectrum of power politics and national interests of individual States is no doubt valid. On the other hand, it seems to be the case that in challenging MORGENTHAU's assertions, the author may have gone too far in belittling the existing political realities behind the operation of international law.

There is much to be said for the policy oriented approach as expounded by MCDOUGAL and LASWELL, with its emphasis on the inextricable relationship between law and policy. The MCDOUGAL-LASWELL approach to international law has had considerable following although, as CHIMNI's analysis reveals, it is also not immune from serious criticism. A particular source of concern with this theory has been its rather extravagant and mythical stance towards the indeterminacy of norms. This, as CHIMNI puts it, leads to the anachronistic scenario "where instead of seeking to know whether the facts or events are in accord with or in violation of a rule, the attempt is to discover the rule in the light of the contexts, both of the rule and the facts under consideration" (page 88).

A substantial portion of the book is spent on the elaboration and critique of Richard Falk's intermediate legal theory. The theory itself seems attractive since it attempts to

provide an alternative to legal formalism and policy-oriented reductionism (page 207). However, as CHIMNI's critique reveals, FALK's theory also fails to provide any comprehensive or thorough methodology for theorising international law.

Perhaps the most interesting element of the book relates to the exposition of the Marxist theory of international law. Considerable effort is made on the elaboration of the theory itself; and this exercise is an enlightening one although, at times, the author may appear to be unnecessarily descriptive. Having said that, the usage of TUNKIN's theory of international law used as a vehicle for analyzing the Marxist epistemology is intriguing. The exposition, while highlighting the inherent tensions and difficulties in the views presented by TUNKIN, nonetheless advocates the view "that the Marxist methodology and its sociological insights must be made the foundation on which to build a rational theory of international law and world order" (p. 298).

The work as a whole must be regarded as a very welcome addition to the debate surrounding the jurisprudence and critique of the theoretical precepts of international law; the volume will appeal both to international lawyers as well as to other inquisitive readers.

JAVAID REHMAN
University of Hull Law School

United Nations and the Gulf Crisis by R.P. ANAND (International Legal Studies Monograph Series: 1, published under the auspices of International Legal Studies Division of Jawaharlal Nehru University), Banyan Publications, New Delhi, 1994, pp. 110 (including appendices); Rs. 125.

Much has been written on the legal aspects of the Gulf Crisis created by the Iraqi invasion of Kuwait in 1990, the military operation that followed to expel Iraq from Kuwait and the ensuing events. However, this book is of particular interest because it attempts to present all episodes relating to the invasion and its aftermath as seen from a Third World perspective. This short monograph of four chapters, apparently based on an article published earlier by the author in the *Indian Journal of International Law* (vol. 31, 1991, pp. 1-38), is not a detailed account of the events that took place before and after the Gulf crisis but a short and succinct analysis of all major legal issues raised by the decisions of the Security Council and the military operation led by the United States.

The author queries the adequacy, wisdom, and legality of several decisions of the Security Council concerning the Gulf crisis and points out the inconsistencies of such decisions with international law. The book begins with a historical background to the dispute between Iraq and Kuwait and then goes on to narrate the nature and scope of the powers of the Security Council under the Charter of the United Nations. Next is a critical analysis of various resolutions of the Council. Perhaps, this is the most interesting part of the book where the author comes up with very original arguments for and against the rationality of certain decisions of the Security Council. This also happens to be the place where the author puts himself at times in a very controversial situation. For instance, he asserts that the validity of Resolution 678 "is seriously questionable and cannot be accepted" (p. 20). Furthermore, the author who appears to dismiss all of Iraq's claims made prior to and

during the crisis, ends up supporting the position taken by Yemen and Cuba which opposed many measures taken by the Security Council against Iraq, the aggressor State (see the author's views on p. 21).

Professor ANAND argues that the Security Council did not wait long enough for the sanctions to produce the desired effects. Given the stubbornness shown by the Iraqi regime to this date in the face of the UN sanctions in spite of the hardship suffered by the innocent ordinary Iraqi people, it is difficult to agree with the argument that sanctions could have forced Iraq to withdraw from Kuwait. Since sanctions imposed by the UN did not work for the first six months of the crisis they may not have worked for another one or two more years or even for a longer period than that. The author states that "Diplomacy to prevent war was never seriously pursued" (p. 28). It might have been proper to allow diplomacy to take its full course if there had not been a clear, serious and flagrant violation of international law by Iraq: it was a clear-cut case of aggression by a member of the UN against another, small, member and the aggressor State was not listening to the international community.

The author criticises the views of DOUGLAS HURD, the then British Foreign Secretary, who seems to have said that it was wrong to negotiate with a burglar. Even if one were to agree with the view that it is better to negotiate with a burglar when he is heavily armed and poses a grave danger, 'the burglar' in this case had been given enough time to surrender before he was attacked with overwhelming firepower. Other arguments of the author appear more convincing. For instance, he states that under the guise of the UN-authorised action the United States and its coalition partners waged a relentless and ruthless war against Iraq to the bitter end. This assertion can be supported if seen in the light of the merciless attacks by allied powers on the fleeing and even withdrawing forces of Iraq inside Iraqi territory. But we should also remember that wars are by their very nature ruthless. If the allied powers had been ruthless against Iraq and not cared about the objectives of Security Council resolutions they could have gone up to Baghdad to bring SADDAM HUSSAIN out of his military bunker. The newspaper reports suggest that the allied powers were not aiming at complete devastation of the Iraqi war machine. In fact, much of Iraq's military hardware seems to have survived the allied offensive.

All in all, this book tries to present a more impartial analysis of the events than many other works of similar nature that have appeared in the aftermath of the Gulf crisis. It is very informative, pleasant to read and convincing on many accounts. A useful collection of all major resolutions of the Security Council on the subject is included. This is a book that can be recommended to anyone interested in understanding the essentials of the Gulf crisis. It presents by and large a fair analysis of all the major legal issues raised by the crisis without going into too much detail of various aspects of the crisis.

SURYA SUBEDI
University of Hull Law School

The Law of the Sea in the Asian Pacific Region - Developments and Prospects, by J. CRAWFORD and D.R. ROTHWELL, Martinus Nijhoff Publishers, 1995, pp. 282; ISBN 079232742X, price Dfl. 195/ US$ 122/UK£ 78.

This collection of essays, which were originally presented at two conferences held in Australia in october 1991, is in the series of *Studies on the International Legal, Legal, Institutional and Policy Aspects of Ocean Development*, under the general editorship of H.E. Judge SHIGERU ODA. The contributions come from international lawyers, political scientists, and practitioners from foreign ministries of various Asian countries.

The volume contains five parts. Part I, "Regional Perspectives", includes four essays examining the practice of east Asian countries and of the South Pacific states. Part II, with two essays, deals with the question of the marine environment with regard to the South Pacific and the Southern Ocean. Part III examines the new regime of fisheries in the South Pacific, following the conclusion of the United Nations Law of the Sea Convention 1982 (the 1982 LOS Convention hereafter), and the problem of driftnet-fishing. However, the third essay of this part, oddly, reviews the 1978 Torres Strait Treaty. Part IV consists of three essays on the topics of freedom of the high seas, navigation and of confidence-building measures. Part V concludes the volume with an essay on the settlement of disputes, and a general essay summarising a number of outstanding issues in the South Pacific region.

There is little doubt as to the value for a study focused on the Asian Pacific region, as states in that area are to a varying degree reliant upon seafaring for their way of life. They have since 1945 contributed immensely to the development of the law of the sea. The concept of archipelagic state, for instance, had been practised by Indonesia and the Philippines decades before entering the 1982 LOS Convention (pp. 205-207, 273-274). Further, the practice of the South Pacific island states presents an interesting case study with regard to the effects of the 1982 LOS Convention upon their decision-making process and dealings with former colonial powers, throwing light upon the role of international law in the ordering of relations between states of unequal size and stature. The value of the study can also be seen through the thorny dispute between China (including Taiwan), Vietnam, the Philippines and Malaysia, over the ownership of the Spratley Islands (pp. 25-40). Indeed events in the region have since 1973 tested almost every aspect of the law of the sea.

By tackling significant issues in relation to the region, such as, *inter alia*, delimitation of maritime areas, navigation and coastal jurisdiction, the freedom of fisheries on the high seas and its impact upon the EEZ regime, the optional management of straddling or highly migratory fish stocks, the environmental conventions and the existing machinery for dispute settlement, the volume offers students of international relations and of the law of the sea useful insights into the way the law of the sea works in tandem with the political will, as well as the wanting in the law of exact prescription and enforcement measures. Further, it shows that the growing number of regional treaties has reflected the increasingly mature approach of the island states to maritime law. Moreover, it cannot fail in impressing upon them the contrast between the cooperation within the South Pacific Forum and the discord among the North Asian Pacific states.

There are, however, some questions. First, the overlap of contents. The theme of the volume is the regional approach (Chapter 15), which has been addressed largely in Part I. However, the issue-oriented set-up dictates that issues treated in Part I be re-examined in

the subsequent parts assigned to specific aspects of the law. Secondly, it seems puzzling to find Chapter 10, which reviews the Torres Strait Treaty, in Part III which deals with the question of fisheries, for, the chapter has little bearing upon fisheries. Similarly the Antarctica Treaty, albeit declared to be out of the scope of the book, has been given solid treatment in Chapter 7. This Chapter has very little to do with the South Pacific island states, and any convention in this connection cannot be analyzed without reference to the 1959 Treaty and the regime it embodies. Thirdly, it would have been more convenient if a list of the South Pacific island states were provided in the introduction. A list containing 11 states can indeed be found at p. 123, but Chapter 6 mentions 22 (at p. 67). Fourthly, the reason why the island states are indifferent towards the 1982 LOS Convention is probably the existence of fisheries agreements and understandings with distant-water fishing nations, rather than political inertia or the like (pp. 43, 131). For the former have regulated the main concern for the states parties as far as the South Pacific region is concerned. Fifthly, the very damaging effect of driftnet fishing may be less true as far as tuna is concerned (p. 158), many stocks of which are underexploited, and more than half of the annual catch of which is taken within the EEZ where the coastal state has full jurisdiction in fisheries matters. Sixthly, the assertion of a 12-mile territorial sea as part of customary law by 1973 may be bolder than is warranted by evidence (p. 201). Some other deficiencies are mainly due to the timing of the conferences, which were soon overtaken by subsequent developments (p. 3).

Nevertheless, the essays constitute a quite comprehensive survey of law of the sea problems relating to the Asian Pacific region. The expert expositions on fisheries (Chapter 8) and deep seabed mining (Chapter 11) are particularly welcome. The volume will certainly enrich the existing literature concerning the region.

BING BING JIA
Wolfson College, Oxford, OX2 6 UD

BIBLIOGRAPHY OF INTERNATIONAL LAW CONCERNING ASIAN AFFAIRS*

EDITORIAL INTRODUCTION

Except for some minor modifications this bibliography follows the same format as in the preceding volumes: it provides information on books, articles and other materials dealing with Asian topics and, in exceptional cases, it includes other publications considered of general interest. English language publications only are cited here.

In the preparation of this bibliography good use has been made of book review sections of established professional journals in international law, Asian studies and 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 in The Hague, The Netherlands.

For the full name of frequently listed journals, see List of Abbreviations on p. ix of this Yearbook.

The headings used in this year's bibliography are:

1. General
2. States and groups of states
3. Territory and jurisdiction
4. Sea and rivers
5. Air and space
6. Environment
7. International conflicts and disputes
8. War, peace, neutrality and non-alignment; armed conflict and peace-keeping
9. International criminal law
10. Peaceful settlement of international disputes
11. Diplomatic and consular relations
12. Individuals and groups of persons - human rights
13. Decolonization and self-determination
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17. United Nations and other international/regional organizations

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SELECTED DOCUMENTS

AGREED FRAMEWORK BETWEEN THE UNITED STATES OF AMERICA AND THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA
Geneva, 21 October 1994

Delegations of the Governments of the United States of America (US) and the Democratic People's Republic of Korea (DPRK) held talks in Geneva from September 23 to October 21, 1994, to negotiate an overall resolution of the nuclear issue on the Korean Peninsula.

Both sides reaffirmed the importance of attaining the objectives contained in the August 12, 1994 Agreed Statement between the US and the DPRK and upholding thee principles of the June 11, 1993 Joint Statement of the US and the DPRK to achieve peace and security on a nuclear-free Korean peninsula. The US and the DPRK decided to take the following actions for the resolution of the nuclear issue:

I. Both sides will cooperate to replace the DPRK's graphite-moderated reactors and related facilities with light-water reactor (LWR) power plants.

(1) In accordance with the October 20, 1994 letter of assurance from the US President, the US will undertake to make arrangements for the provision to the DPRK of a LWR project with a total generating capacity of approximately 2,000 MW(e) by a target date of 2003.
   - The US will organize under its leadership an international consortium to finance and supply the LWR project to be provided to the DPRK. The US, representing the international consortium, will serve as the principal point of contact with the DPRK for the LWR project.
   - The US, representing the consortium, will make best efforts to secure the conclusion of a supply contract with the DPRK within six months of the date of this Document for the provision of the LWR project. Contract talks will begin as soon as possible after the date of this Document.
   - As necessary, the US and the DPRK will conclude a bilateral agreement for cooperation in the field of peaceful uses of nuclear energy.

(2) In accordance with the October 20, 1994 letter of assurance from the US President, the US, representing the consortium, will make arrangements to offset the energy foregone due to the freeze of the DPRK's graphite-moderated reactors and related facilities, pending completion of the first LWR unit.
   - Alternative energy will be provided in the form of heavy oil for heating and electricity production.

Asian Yearbook of International Law, Volume 5 (Ko Swan Sik *et al.*, eds.; 90-411-0375-9
, pp. 545-618

- Deliveries of heavy oil will begin within three months of the date of this Document and will reach a rate of 500,000 tons annually, in accordance with an agreed schedule of deliveries.

(3) Upon receipt of US assurances for the provision of LWR's and for arrangements for interim energy alternatives, the DPRK will freeze its graphite-moderated reactors and related facilities and will eventually dismantle these reactors and related facilities.
- The freeze on the DPRK's graphite-moderated reactors and related facilities will be fully implemented within one month of the date of this Document. During this one-month period, and throughout the freeze, the International Atomic Energy Agency (IAEA) will be allowed to monitor this freeze, and the DPRK will provide full cooperation to the IAEA for this purpose.
- Dismantlement of the DPRK's graphite-moderated reactors and related facilities will be completed when the LWR project is completed.
- The US and the DPRK will cooperate in finding a method to store safely the spent fuel from the 5 MW(e) experimental reactor during the construction of the LWR project, and to dispose of the fuel in a safe manner that does not involve reprocessing in the DPRK.

(4) As soon as possible after the date of this Document US and DPRK experts will hold two sets of experts talks.
- At one set of talks, experts will discuss issues related to alternative energy and the replacement of the graphite-moderated reactor program with the LWR project.
- At the other set of talks, experts will discuss specific arrangements for spent fuel storage and ultimate disposition.

II. The two sides will move toward full normalization of political and economic relations.

(1) Within three months of the date of this Document, both sides will reduce barriers to trade and investment, including restrictions on telecommunications services and financial transactions.

(2) Each side will open a liaison office in the other's capital following resolution of consular and other technical issues through expert level discussions.

(3) As progress is made on issues of concern to each side, the US and the DPRK will upgrade bilateral relations to the Ambassadorial level.

III. Both sides will work together for peace and security on a nuclear-free Korean peninsula.

(1) The US will provide formal assurances to the DPRK, against the threat or use of nuclear weapons by the US.

(2) The DPRK will consistently take steps to implement the North-South Joint Declaration on the Denuclearization of the Korean Peninsula.

(3) The DPRK will engage in North-South dialogue, as this Agreed Framework will help create an atmosphere that promotes such dialogue.

IV. Both sides will work together to strengthen the international nuclear non-proliferation regime.

(1) The DPRK will remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NTP) and will allow implementation of its safeguards agreement under the Treaty.

(2) Upon conclusion of the supply contract for the provision of the LWR project, ad hoc and routine inspections will resume under the DPRK's safeguards agreement with the IAEA with respect to the facilities not subject to the freeze. Pending conclusion of the supply contract, inspections required by the IAEA for the continuity of safeguards will continue at the facilities not subject to the freeze.

(3) When a significant portion of the LWR project is completed, but before delivery of key nuclear components, the DPRK will come into full compliance with its safeguards agreement with the IAEA (INFCIRC/403), including taking all steps that may be deemed necessary by the IAEA, following consultations with the Agency with regard to verifying the accuracy and completeness of the DPRK's initial report on all nuclear material in the DPRK.

AGREEMENT ON THE ESTABLISHMENT OF THE KOREAN PENINSULA ENERGY DEVELOPMENT ORGANIZATION (KEDO)
New York, 9 March 1995

The Government of the United States of America (US), the Government of Japan, and the Government of the Republic of Korea:

. . .

Wishing to cooperate in taking the steps necessary to implement the Agreed Framework, consistent with the Charter of the United Nations, the Treaty on the Non-Proliferation of Nuclear Weapons, and the Statute of the International Atomic Energy Agency; and

Convinced of the need to establish an organization, as contemplated in the Agreed Framework, to coordinate cooperation among interested parties and to facilitate the financing and execution of projects needed to implement the Agreed Framework;

Have agreed as follows:

ARTICLE I

The Korean Peninsula Energy Development Organization (hereinafter referred to as 'KEDO' or 'the Organization') is established upon the terms and conditions hereinafter set forth.

ARTICLE II

(a) The purpose of the organization shall be to:

(1) provide for the financing and supply of a light-water reactor (hereinafter referred to as 'LWR') project in North Korea (hereinafter referred to as 'the DPRK'), consisting of the two reactors of the Korean standard nuclear plant model with a capacity of approximately 1,000 MW(e) each, pursuant to a supply agreement to be concluded between the Organization and the DPRK;

(2) provide for the supply of interim energy alternatives in lieu of the energy from the DPRK's graphite-moderated reactors pending construction of the first light-water reactor unit; and

(3) provide for the implementation of any other measures deemed necessary to accomplish the foregoing or otherwise to carry out the objectives of the Agreed Framework.

(b) The Organization shall fulfill its purpose with a view toward ensuring the full implementation by the DPRK of its undertakings as described in the Agreed Framework.

ARTICLE III

In carrying out these purposes, the Organization may do any of the following:

(a) Evaluate and administer projects designed to further the purposes of the Organization;

(b) Receive funds from members of the Organization or other states or entities for financing projects designed to further the purposes of the Organization, manage

and disburse such funds, and retain for Organization purposes any interest that accumulates on such funds;

(c) Receive in-kind contributions from members of the Organization or other states or entities for projects designed to further the purposes of the Organization;

(d) Receive funds or other compensation from the DPRK in payment for the LWR project and other goods and services provided by the Organization;

(e) Cooperate and enter into agreements, contracts, or other arrangements with appropriate financial institutions, as may be agreed upon, for the handling of funds received by the Organization or designated for projects of the Organization;

(f) Acquire any property, facilities, equipment, or goods necessary for achieving the purposes of the Organization;

(g) Conclude or enter into agreements, contracts, or other arrangements, including loan agreements, with states, international organizations, or other appropriate entities, as may be necessary for achieving the purposes and exercising the functions of the Organization;

(h) Coordinate with and assist states, local authorities and other public entities, national and international institutions, and private parties in carrying out activities that further the purposes of the Organization, including activities promoting nuclear safety;

(i) Dispose of any receipts, funds, accounts, or other assets of the organization and distribute the proceeds in accordance with the financial obligations of the Organization, with any remaining assets or proceeds therefrom to be distributed in an equitable manner according to the contributions of each member of the Organization, as may be determined by the Organization; and

(j) Exercise such other powers as shall be necessary in furtherance of its purpose and functions, consistent with this Agreement.

ARTICLE IV

(a) Activities undertaken by the Organization shall be carried out consistent with the Charter of the United Nations, the Treaty on the Non-Proliferation of Nuclear Weapons, and the Statute of the International Atomic Energy Agency.

(b) Activities undertaken by the Organization shall be subject to the DPRK's compliance with the terms of all agreements between the DPRK and KEDO and to the

DPRK acting in a manner consistent with the Agreed Framework. In the event that these conditions are not satisfied, the Organization may take appropriate steps.

(c) The Organization shall obtain formal assurance from the DPRK that nuclear materials, equipment, or technology transferred to the DPRK in connection with projects undertaken by the Organization shall be used exclusively for such projects, only for peaceful purposes, and in a manner that ensures the safe use of nuclear energy.

ARTICLE V

(a) The original members of the Organization shall be the United States of America, Japan, and the Republic of Korea (hereinafter referred to as the 'original Members').

(b) Additional states that support the purposes of the Organization and offer assistance, such as providing funds, goods, or services to the Organization, may, with the approval of the Executive Board, also become members of the Organization (hereinafter jointly with the original Members referred to as 'Members') in accordance with the procedures in Article XIV(b).

ARTICLE VI

(a) The authority to carry out the functions of the Organization shall be vested in the Executive Board.

(b) The Executive Board shall consist of one representative of each of the original Members.

(c) The Executive Board shall select a Chair from among the representatives serving on the Executive Board for a term of two years.

(d) The Executive Board shall meet whenever necessary at the request of the Chair of the Executive Board, the Executive Director, or any representative serving on the Executive Board, in accordance with rules of procedure it shall adopt.

(e) Decisions of the Executive Board shall be made by a consensus of the representatives of all the original Members.

(f) The Executive Board may approve such rules and regulations as may be necessary or appropriate to achieve the purposes of the Organization.

(g) The Executive Board may take any necessary action on any matter relating to the functions of the Organization.

ARTICLE VII

(a) The General Conference shall consist of representatives of all the Members.

(b) The General Conference shall be held annually to consider the annual report, as referred to in Article XII.

(c) Extraordinary meetings of the General Conference shall be held at the direction of the Executive Board to discuss matters submitted by the Executive Board.

(d) The General Conference may submit a report containing recommendations to the Executive Board for its consideration.

ARTICLE VIII

(a) The staff of the Organization shall be headed by an Executive Director. The Executive Director shall be appointed by the Executive Board as soon as possible after this Agreement enters into force.

(b) The Executive Director shall be the chief administrative officer of the Organization and shall be under the authority and subject to the control of the Executive Board. The Executive Director shall exercise all the powers delegated to him or her by the Executive Board and shall be responsible for conducting the ordinary business of the Organization, including the organization and direction of a headquarters and a staff, the preparation of annual budgets, the procurement of financing, and the approval, execution and administration of contracts to achieve the purposes of the Organization. The Executive Director may delegate such powers to other officers or staff members as he or she deems appropriate. The Executive Director shall perform his or her duties in accordance with all rules and regulations approved by the Executive Board.

. . .

(g) The Executive Director shall report to the Executive Board and the General Conference on the activities and finances of the Organization. The Executive Director shall promptly bring to the notice of the Executive Board any matter that may require Executive Board action.

(h) The Executive Director, with the advice of the Deputy Executive Directors, shall prepare rules and regulations consistent with this Agreement and the purposes of the Organization. The rules and regulations shall be submitted to the Executive Board for its approval prior to implementation.

(i) In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action that might reflect on their position as international officials responsible only to the Organization. Each Member undertakes to respect the exclusively international character of the responsibilities of the Executive Director and the staff and not to seek to influence them in the discharge of their responsibilities.

ARTICLE IX

(a) The Executive Board shall establish Advisory Committees to provide advice to the Executive Director and the Executive Board, as appropriate, on specific projects being carried out by the Organization. Advisory Committees shall be established for the light-water reactor project, the project for the provision of interim energy alternatives, and such other projects as the Executive Board may determine.

(b) Each Advisory Committee shall include representatives of the original Members and other Members that support the project for which the Advisory Committee was established.

. . .

ARTICLE X

(a) The budget for each fiscal year shall be prepared by the Executive Director and shall be approved by the Executive Board. The Organization's fiscal year shall be from 1 January to 31 December.

(b) Each Member may make voluntary contributions to the Organization by providing or making available such funds as it deems appropriate. Such contributions may be made directly to the Organization or by paying the Organization's contractors. Contributions shall be made by cash deposit, escrow, letter of credit, promissory note, or by such other legal means and in such currency as may be agreed between the Organization and the contributor.

(c) The Organization may seek contributions from such other public or private sources as it deems appropriate.

(d) The Organization shall establish an account or accounts to receive funds from Members or other sources, including independent accounts for those funds to be reserved for specific projects and the administration of the Organization. Interest or dividends accruing on such accounts shall be reinvested for activities of the Organization. Excess funds shall be redistributed as set forth in Article III(i).

. . .

ARTICLE XI

(a) Members may make available to the Organization or its contractors goods, services, equipment, and facilities that may be of assistance in achieving the purposes of the Organization.

(b) The Organization may accept from such other public or private sources as it deems appropriate any goods, services, equipment, and facilities that may be of assistance in achieving the purposes of the Organization

. . .

ARTICLE XII

The Executive Director shall submit to the Executive Board for its approval an annual report on the activities of the Organization, which shall include a description of the status of the LWR project and other projects, a comparison of planned activities to completed activities, and an audited statement of the Organization's account.

. . .

ARTICLE XIII

(a) To carry out its purposes and functions, the Organization shall possess legal capacity and, in particular, the capacity to: (1) contract; (2) lease or rent real property; (3) acquire and dispose of personal property; and (4) institute legal proceedings. Members may accord the Organization such legal capacity in accordance with their respective laws and regulations where necessary for the Organization to carry out its purposes and functions.

(b) No Member shall be liable, by reason of its status or participation as a Member, for acts, omissions, or obligations of the Organization.

(c) Information provided to the Organization by a Member shall be used exclusively for the purposes of the Organization and shall not be publicly disclosed without the express consent of that Member.

(d) Implementation of this Agreement in the Members' territories shall be in accordance with the laws and regulations, including budgetary appropriations, of such Members.

ARTICLE XIV

(a) This Agreement shall enter into force upon signature by the original Members.

(b) States approved by the Executive Board for membership in accordance with Article V(b) may become Members by submitting an instrument of acceptance of this Agreement to the Executive Director, which shall become effective on the date of receipt by the Executive Director.

(c) This Agreement may be amended by written agreement of the original Members.

(d) This Agreement may be terminated or suspended by written agreement of the original Members.

ARTICLE XV

A Member may withdraw from this Agreement at any time by giving written notice of withdrawal to the Executive Director. The withdrawal shall become effective ninety days after receipt of the notice of withdrawal by the Executive Director.

AGREEMENT ON SUPPLY OF A LIGHT-WATER REACTOR PROJECT TO THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA BETWEEN THE KOREAN PENINSULA ENERGY DEVELOPMENT ORGANIZATION AND THE GOVERNMENT OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA

New York City, 15 December 1995

The Korean Peninsula Energy Development Organization (hereinafter referred to as 'KEDO') and the Government of the Democratic People's Republic of Korea (the Democratic People's Republic of Korea is hereinafter referred to as the 'DPRK'),

Recognizing that KEDO is an international organization to finance and supply a light-water reactor project (hereinafter referred to as the 'LWR project') to the DPRK as specified in the Agreed Framework between the United States of America and the Democratic People's Republic of Korea of October 21, 1994 (hereinafter referred to as the 'US-DPRK Agreed Framework'),

Recognizing that the US-DPRK Agreed Framework and the June 13, 1995, US-DPRK Joint Press Statement specify that the US will serve as the principal point of contact with the DPRK for the LWR project, and

Reaffirming that the DPRK shall perform its obligations under the relevant provisions of the US-DPRK Agreed Framework and shall accept the LWR project as specified in the June 13, 1995, US-DPRK Joint Press Statement,

Have agreed as follows:

ARTICLE I
SCOPE OF SUPPLY

1. KEDO shall provide the LWR project, consisting of two pressurized light-water reactor (LWR) units with two coolant loops and a generating capacity of approximately 1,000 MW(e) each, to the DPRK on a turnkey basis. The reactor model, selected by KEDO, will be the advanced version of US-origin design and technology currently under production.

2. KEDO shall be responsible for the scope of supply for the LWR project, specified in Annex 1 to the Agreement. The DPRK shall be responsible for other tasks and items necessary for the LWR project, specified in Annex 2 to the Agreement.

3. The LWR project shall conform to a set of codes and standards equivalent to those of the IAEA and the US and applied to the reactor model referred to in paragraph 1 of this Article. The set of codes and standards shall apply to the design, manufacture, construction, testing, commissioning, and operation and maintenance of the LWR plants, including safety, physical protection, environmental protection, and storage and disposal of radioactive waste.

ARTICLE II
TERMS OF REPAYMENT

1. KEDO shall finance the cost of the tasks and items specified in Annex 1 to the Agreement to be repaid by the DPRK on a long-term, interest-free basis.

2. The amount to be repaid by the DPRK will be jointly determined by KEDO and the DPRK based on examination by each side of the technical description of the LWR project specified in the commercial supply contract for the LWR project, the fair and reasonable market value of the LWR project, and the contract price payable by KEDO to its contractors and subcontractors under the commercial supply contracts for the tasks and items specified in Annex 1 to the Agreement. With respect to the tasks and items specified in Annex 1 to the Agreement, the DPRK shall not be responsible for

any additional costs, other than those that result from actions by the DPRK or from its failure to take actions for which it is responsible, in which case the repayment amount shall be increased by an amount jointly determined by KEDO and the DPRK, based on actual added cost to the LWR project payable by KEDO.

3. The DPRK shall repay KEDO for each LWR plant in equal, semiannual installments, free of interest, over a 20-year term after completion of each LWR plant. The DPRK may pay KEDO in cash, cash equivalents, or through the transfer of goods. In the event that the DPRK pays in cash equivalents or goods (such payment is hereinafter referred to as 'in-kind payment'), the value of such in-kind payment shall be determined jointly by KEDO and the DPRK, based on an agreed formula for determining fair and reasonable market price.

4. Details concerning the amount and terms of repayment shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

ARTICLE III
DELIVERY SCHEDULE

1. KEDO shall develop a delivery schedule for the LWR project aimed at achieving a completion date of 2003. The schedule of relevant steps to be performed by the DPRK under the US-DPRK Agreed Framework, as specified in Annex 3 to the Agreement, shall be integrated with the delivery schedule for the LWR project with the aim of achieving the performance of such steps by 2003 and the smooth implementation of the LWR project. As specified in the US-DPRK Agreed Framework, the provision of the LWR project and the performance of the steps specified in Annex 3 to the Agreement are mutually conditional.

2. For purposes of the Agreement, 'completion' of an LWR plant means completion of performance tests that is satisfactory in accordance with the set of codes and standards specified in Article I(3). Upon completion of each plant, the DPRK shall issue to KEDO a take-over certificate for each respective plant.

3. Details concerning the schedule for the delivery of the LWR project and the performance of the steps specified in Annex 3 to the Agreement, including mutually agreed procedures for any necessary changes and completion of a significant portion of the LWR project as specified in Annex 4 to the Agreement, shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

ARTICLE IV
IMPLEMENTING ARRANGEMENTS

1. The DPRK may designate a DPRK firm as its agent and authorize the firm to enter into implementing arrangements as necessary to facilitate the LWR project.

2. KEDO shall select a prime contractor to carry out the LWR project and shall conclude a commercial supply contract with this prime contractor. A US firm will serve as program coordinator to assist KEDO in supervising overall implementation of the LWR project, and KEDO will select the program coordinator.

3. KEDO and the DPRK shall facilitate practical arrangements that both sides deem necessary, including efficient contacts and cooperation among the participants in the LWR project, to ensure the expeditious and smooth implementation of the LWR project.

4. Written communications required for the implementation of the Agreement may be executed in the English or Korean language. Existing documents and data may be used or transmitted in their original languages.

5. KEDO, its contractors and subcontractors shall be permitted to operate offices at the project site and other directly related locations such as the nearby port or airport as shall be agreed between KEDO and the DPRK, as the progress of the LWR project may require.

6. The DPRK shall recognize KEDO's independent juridical status and shall accord KEDO and its staff such privileges and immunities in the territory of the DPRK as necessary to carry out the functions entrusted to KEDO. KEDO's juridical status and privileges and immunities shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

7. The DPRK shall take steps to protect the safety of all personnel sent to the DPRK by KEDO, its contractors and subcontractors, and their respective property. Appropriate consular protection in conformity with established international practice shall be allowed for all such personnel. Necessary consular arrangements shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

8. KEDO shall take steps to ensure that all personnel sent to the DPRK by KEDO, its contractors and subcontractors shall undertake to respect the relevant laws of the DPRK, as shall be agreed between KEDO and the DPRK, and to conduct themselves at all times in a decent and professional manner.

9. The DPRK shall not interfere with the repatriation, in accordance with customs clearance procedures, by KEDO, its contractors and subcontractors of construction equipment and remaining materials from the LWR project.

10. The DPRK shall seek recovery solely from the property and assets of KEDO for the satisfaction of any claims arising under the Agreement or from any of the acts and ommissions, liabilities, or obligations of KEDO, its contractors and subcontractors

in direct connection with the Agreement, protocols and contracts pursuant to the Agreement.

ARTICLE V
SITE SELECTION AND STUDY

1. KEDO shall conduct a study of the preferred Kumho area near Sinpo City, South Hamgyong Province to ensure that the site satisfies appropriate site selection criteria as shall be agreed between KEDO and the DPRK and to identify the requirements for construction and operation of the LWR plants, including infrastructure improvements.

2. To facilitate this study, the DPRK shall cooperate and provide KEDO with access to the relevant available information, including the results of the studies that were performed previously at this site. In the event that such data is not sufficient, KEDO shall make arrangements to obtain additional information or to conduct the necessary site studies.

3. Details concerning site access and the use of the site shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

ARTICLE VI
QUALITY ASSURANCE AND WARRANTIES

1. KEDO shall be responsible for design and implementation of a quality assurance program in accordance with the set of codes and standards specified in Article I(3). The quality assurance program shall include appropriate procedures for design, materials, manufacture and assembly of equipment and components, and quality of construction.

2. KEDO shall provide the DPRK with appropriate documentation on the quality assurance program, and the DPRK shall have the right to participate in the implementation of the quality assurance program, which will include appropriate inspections, tests, commissioning and review by the DPRK of the results thereof.

3. KEDO shall guarantee that the generating capacity of each LWR plant at the time of completion, as defined in Article III(2), will be approximately 1,000 MW(e). KEDO shall guarantee that the major components provided by relevant contractors and subcontractors will be new and free from defects in design, workmanship, and material for a period of two years after completion, but in no event longer than five years after the date of shipment of such major components. The LWR fuel for the initial loading for each LWR plant shall be guaranteed in accordance with standard nuclear industry practice. KEDO shall guarantee that the civil construction work for the LWR project will be free of defects in design, workmanship, and material for a period of two years after completion.

4. Details concerning the provisions of this Article and the content and procedures for issuance and receipt of warranties shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

ARTICLE VII
TRAINING

1. KEDO shall design and implement a comprehensive training program in accordance with standard nuclear industry practice for the DPRK's operation and maintenance of the LWR plants. Such training shall be held at mutually agreeable locations as soon as practicable. The DPRK shall be responsible for providing a sufficient number of qualified candidates for this program.

2. Details concerning the training program shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

ARTICLE VIII
OPERATION AND MAINTENANCE

1. KEDO shall assist the DPRK to obtain LWR fuel, other than that provided pursuant to Annex 1 to the Agreement, through commercial contracts with a DPRK-preferred supplier for the useful life of the LWR plants.

2. KEDO shall assist the DPRK to obtain spare and wear parts, consumables, special tools, and technical services for the operation and maintenance of the LWR plants, other than those provided pursuant to Annex 1 to the Agreement, through commercial contracts with a DPRK-preferred supplier for the useful life of the LWR plants.

3. KEDO and the DPRK shall cooperate to ensure the safe storage and disposition of the spent fuel from the LWR plants. If requested by KEDO, the DPRK shall relinquish any ownership rights over the LWR spent fuel and agree to the transfer of the spent fuel out of its territory as soon as technically possible after the fuel is discharged, through appropriate commercial contracts.

4. Necessary arrangements for the transfer of LWR spent fuel out of the DPRK shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

ARTICLE IX
SERVICES

1. The DPRK shall process for approval all applications necessary for completion of the LWR project expeditiously and free of charge. These approvals shall include all

permits issued by the DPRK nuclear regulatory authority, customs clearance, entry and other permits, licenses, site access rights, and site take-over agreements. In the event that any such approval is delayed beyond the normally required time or denied, the DPRK shall notify KEDO promptly of the reasons therefor, and the schedule and cost for the LWR project may be adjusted as appropriate.

2. KEDO, its contractors and subcontractors, and their respective personnel shall be exempt from DPRK taxes, duties, charges and fees as shall be agreed between KEDO and the DPRK, and expropriation in connection with the LWR project.

3. All personnel sent to the DPRK by KEDO, its contractors and subcontractors shall be allowed unimpeded access to the project site and to appropriate and efficient transportation routes, including air and sea links, to and from the project site as designated by the DPRK and agreed between KEDO and the DPRK. Additional routes will be considered as the progress of the LWR project may require.

4. The DPRK shall, to the extent possible, make available at a fair price port services, transportation, labor, potable water, food, off-site lodging and offices, communications, fuel, electrical power, materials, medical services, currency exchanges and other financial services, and other amenities necessary for living and working by personnel sent to the DPRK by KEDO, its contractors and subcontractors.

5. KEDO, its contractors and subcontractors, and their respective personnel shall be allowed unimpeded use of available means of communications in the DPRK. In addition, KEDO, its contractors and subcontractors shall be permitted by the DPRK to establish secure and independent means of communications for their offices, based on a timely and case-by-case review of equipment requests and in accordance with relevant telecommunications regulations of the DPRK.

6. Details concerning the above-referenced services shall be specified, as appropriate, in one or more separate protocols between KEDO and the DPRK pursuant to the Agreement.

ARTICLE X
NUCLEAR SAFETY AND REGULATION

1. KEDO shall be responsible for assuring that design, manufacture, construction, testing, and commissioning of the LWR plants are in compliance with nuclear safety and regulatory codes and standards specified in Article I(3).

2. . . . .

3. The DPRK shall be responsible for the safe operation and maintenance of the LWR plants, appropriate physical protection, environmental protection, and, consistent

with Article VIII(3), the safe storage and disposal of radioactive waste, including spent fuel, in conformity with the set of codes and standards specified in Article I(3). In this regard, the DPRK shall assure that appropriate nuclear regulatory standards and procedures are in place to ensure the safe operation and maintenance of the LWR plants.

4. Prior to the shipment of any fuel assemblies to the DPRK, the DPRK shall observe the provisions set forth in the Convention on Nuclear Safety (done at Vienna, September 20, 1994), the Convention on Early Notification of a Nuclear Accident (adopted at Vienna, September 26, 1986), the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (adopted at Vienna, September 26, 1986), and the Convention on the Physical Protection of Nuclear Material (opened for signature at Vienna and New York, March 3, 1980).

5. After the completion of the LWR plants, KEDO and the DPRK shall conduct safety reviews to ensure the safe operation and maintenance of the LWR plants. In this regard, the DPRK shall provide necessary assistance to enable such reviews to be conducted as expeditiously as possible and shall give due consideration to the results of such reviews. Details concerning the schedule and procedures for conducting the safety reviews shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

6. In the event of a nuclear emergency or accident, the DPRK shall permit immediate access to the site and information by personnel sent by KEDO, its contractors and subcontractors to determine the extent of safety concerns and to provide safety assistance.

ARTICLE XI
NUCLEAR LIABILITY

1. The DPRK shall ensure that a legal and financial mechanism is available for meeting claims brought within the DPRK for damages in the event of a nuclear incident (as defined in the Vienna Convention on Civil Liability for Nuclear Damage, done at Vienna, May 21, 1963) in connection with the LWR plants. The legal mechanism shall include the channeling of liability in the event of a nuclear incident to the operator on the basis of absolute liability. The DPRK shall ensure that the operator is able to satisfy such liabilities.

2. Prior to the shipment of any fuel assemblies to the DPRK, the DPRK shall enter into an indemnity agreement with KEDO, and shall secure nuclear liability insurance or other financial security to protect KEDO, its contractors and subcontractors, and their respective personnel in connection with any third party claims in any court or forum arising from activities undertaken pursuant to the Agreement in the event of nuclear damage or loss occurring inside or outside the territory of the DPRK as a result

of a nuclear incident in connection with the LWR plants. Details concerning the indemnity agreement and insurance or other financial security shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

3. The DPRK shall bring no claims against KEDO, its contractors and subcontractors, and their respective personnel arising out of any nuclear damage or loss.

4. This Article shall not be construed as acknowledging the jurisdiction of any court or forum or as waiving any immunity of either side.

5. The domestic legal system of the DPRK may provide that, if the operator proves that the nuclear damage resulted wholly or partly either from the gross negligence of the person suffering the damage or from an act or omission of such person done with intent to cause damage, the operator may be relieved wholly or partly from his obligation to pay compensation in respect of the damage suffered by such person. The operator shall have a right of recourse only if the damage caused by a nuclear incident results from an act or omission done with intent to cause damage, against the individual acting or omitting to act with such intent. For purposes of this paragraph, the terms 'person' and 'individual' shall have the same meaning as in the Vienna Convention on Civil Liability for Nuclear Damage (done at Vienna, May 21, 1963).

ARTICLE XII
INTELLECTUAL PROPERTY

1. In the course of performing its obligations under the Agreement, each side may receive, directly or indirectly, information relating to the intellectual property of the other side. All such information and any materials or documents containing such information (collectively, the 'Intellectual Property') are proprietary and confidential to such other side, whether or not protected by patent or copyright law. Each side agrees to protect the confidentiality of the other side's Intellectual Property and to use it only for the purposes of the LWR project as provided for in the Agreement and in accordance with international norms, including practices established by the Paris Convention on the Protection of Industrial Property Rights.

2. Except as otherwise agreed between the two sides, neither side shall replicate, copy, or otherwise reproduce any of the equipment or technology of the other side provided in connection with the LWR project.

ARTICLE XIII
ASSURANCES

1. The DPRK shall use the reactors, technology, and nuclear material (as defined in accordance with international practice) transferred pursuant to the Agreement, as

well as any nuclear mateRial used therein or produced through the use of such items, exclusively for peaceful, non-explosive purposes.

2. The DPRK shall ensure that the reactors, technology, and nuclear material transferred pursuant to the Agreement, as well as any nuclear material used therein or produced through the use of such items, are used properly and exclusively for the purposes of the LWR project.

3. The DPRK shall provide effective physical protection in accordance with international standards with respect to the reactors and nuclear material transferred pursuant to the Agreement, as well as any nuclear material used therein or produced through the use of such items for the useful life of such reactors and nuclear material.

4. The DPRK shall apply IAEA safeguards to the reactors and nuclear material transferred pursuant to the Agreement, as well as any nuclear material used therein or produced through the use of such items, for the useful life of such reactors and nuclear material.

5. The DPRK shall at no time reprocess or increase the enrichment level of any nuclear material transferred pursuant to the Agreement, or any nuclear material used in or produced through the use of any reactor or nuclear material transferred in the LWR project.

6. The DPRK shall not transfer any nuclear equipment or technology or nuclear material transferred pursuant to the Agreement, or any nuclear material used therein or produced through the use of such items, outside the territory of the DPRK unless otherwise agreed between KEDO and the DPRK, except as provided for in Article VIII(3).

7. The above-referenced assurances may be supplemented by DPRK assurances, through appropriate arrangements, to KEDO members that provide to the DPRK any components controlled under the Export Trigger List of the Nuclear Suppliers Group for the LWR project, if and when such KEDO member or members and the DPRK deem it necessary.

ARTICLE XIV
FORCE MAJEURE

Either side's performance shall be considered excusably delayed if such delay is due to one or more events that are internationally accepted to constitute force majeure. Each such event is herein referred to as an event of 'Force Majeure'. The side whose performance is delayed by an event of Force Majeure shall provide notice of such delay to the other side promptly after such event has occurred and shall use such efforts as are reasonable in the circumstances to mitigate such delay and the effect thereof on

such side's performance. The two sides shall then consult with each other promptly and in good faith to determine whether alternative performance and the adjustment of the schedule and cost of the LWR project are necessary.

ARTICLE XV
DISPUTE RESOLUTION

1. Any disputes arising out of the interpretation or implementation of the Agreement shall be settled through consultations between KEDO and the DPRK, in conformity with the principles of international law. KEDO and the DPRK shall organize a coordinating committee composed of three people from each side to help settle disputes that may arise in the process of implementing the Agreement.

2. Any dispute that cannot be resolved in this manner shall, at the request of either side and with the consent of the other side, be submitted to an arbitral tribunal composed as follows: KEDO and the DPRK shall each designate one arbitrator, and the two arbitrators so designated shall elect a third, who shall be the Chairman. If, within thirty days of the mutual agreement for arbitration, either KEDO or the DPRK has not designated an arbitrator, either KEDO or the DPRK may request the President of the International Court of Justice to appoint an arbitrator. The same procedure shall apply if, within thirty days of the designation or appointment of the second arbitrator, the third arbitrator has not been elected. A majority of the members of the arbitral tribunal shall constitute a quorum, and all decisions shall require the concurrence of two arbitrators. The arbitral procedure shall be fixed by the tribunal. The decisions of the tribunal shall be binding on KEDO and the DPRK. Each side shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the Chairman in discharging his duties and the remaining costs of the arbitral tribunal shall be borne equally by both sides.

ARTICLE XVI
ACTIONS IN THE EVENT OF NONCOMPLIANCE

1. KEDO and the DPRK shall perform their respective obligations in good faith to achieve the basic objectives of the Agreement.

2. In the event that either side fails to take its respective steps specified in the Agreement, the other side shall have the right to require the immediate payment of any amounts due and financial losses in connection with the LWR project.

3. In the event of late payment or nonpayment by either side with respect to financial obligations to the other side incurred in implementing the Agreement, the other side shall have the right to assess and apply penalties against that side. Details concerning the assessment and application of such penalties shall be specified in a separate protocol between KEDO and the DPRK pursuant to the Agreement.

ARTICLE XVII
AMENDMENTS

1. The Agreement may be amended by written agreement between the two sides.

2. Any amendment shall enter into force on the date of its signature.

ARTICLE XVIII
ENTRY INTO FORCE

1. The Agreement shall constitute an international agreement between KEDO and the DPRK, and shall be binding on both sides under international law.

2. The Agreement shall enter into force on the date of its signature.

3. The Annexes to the Agreement shall be an integral part of the Agreement.

4. The protocols pursuant to the Agreement shall enter into force on the date of their respective signature.

[The text of Annexes 1, 2 and 4 are not reproduced]

ANNEX 3

The relevant steps to be performed by the DPRK in connection with the supply of the LWR project under the US-DPRK Agreed Framework, as referenced in Article III(1) of the Agreement, consist of the following:

1. The DPRK will remain a party to the Treaty on the Non-Proliferation of Nuclear Weapons and will allow implementation of its safeguards agreement under the Treaty, as specified in the US-DPRK Agreed Framework.

2. The DPRK will continue the freeze on its graphite-moderated reactors and related facilities and provide full cooperation to the IAEA in its monitoring of the freeze.

3. The DPRK will refrain from the construction of new graphite-moderated reactors and related facilities.

4. In the event that US firms will be providing any key nuclear components, the US and the DPRK will conclude a bilateral agreement for peaceful nuclear cooperation prior to the delivery of such components. Such agreement will not be implemented until a significant portion of the LWR project is completed, as specified in Annex 4 to the Agreement. For purposes of the Agreement, 'key nuclear components' are

the components controlled under the Export Trigger List of the Nuclear Suppliers Group.

5. The DPRK will continue cooperation on safe storage and ultimate disposition of spent fuel from the 5MW(e) experimental reactor.

6. Upon the signing of the Agreement, the DPRK will permit resumption of ad hoc and routine inspections under the DPRK's safeguards agreement with the IAEA with respect to facilities not subject to the freeze.

7. When a significant portion of the LWR project is completed, but before delivery of key nuclear components, the DPRK will come into full compliance with its IAEA safeguards agreement, including taking all steps that may be deemed necessary by the IAEA.

8. When the first LWR plant is completed, the DPRK will begin dismantlement of its frozen graphite-moderated reactors and related facilities, and will complete such dismantlement when the second LWR plant is completed.

9. When delivery of the key nuclear components for the first LWR plant begins, the transfer from the DPRK of spent fuel from the 5 MW(e) experimental reactor for ultimate disposition will begin and will be completed when the first LWR plant is completed.

JOINT DECLARATION OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE QUESTION OF HONG KONG

Beijing, 19 December 1984*

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China have reviewed with satisfaction the friendly relations existing between the two Governments and peoples in recent years and agreed that a proper negotiated settlement of the question of Hong Kong, which is left over from the past, is conducive to the maintenance of the prosperity and stability of Hong Kong and to the further strengthening and development of the relations between the two countries on a new basis. To this end, they have, after talks between the delegations of the two Governments, agreed to declare as follows:

1. The Government of the People's Republic of China declares that to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories, hereinafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of

JOINT DECLARATION OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE REPUBLIC OF PORTUGAL ON THE QUESTION OF MACAO

Beijing, 26 March 1987*

The Government of the People's Republic of China and the Government of the Republic of Portugal have reviewed with satisfaction the development of the friendly relations between the two Governments and peoples since the establishment of diplomatic relations between the two countries and agreed that a proper negotiated settlement by the two Governments of the question of Macao, which is left over from the past, is conducive to the economic growth and social stability of Macao and to the further strengthening of the friendly relations and cooperation between the two countries. To this end, they have, after talks between the delegations of the two Governments, agreed to declare as follows:

1. The Government of the People's Republic of China and the Government of the Republic of Portugal declare that the Macao area (including the Macao Peninsula, Taipa Island and Coloane Island, hereinafter referred to as Macao) is Chinese territory, and that the Government of the People's Republic of China will resume the exercise of sovereignty over Macao with effect from 20 December 1999.

* Editorial Note:
The reversion of Hongkong and Macao to China constitute the last cases of formal decolonization in Asia and deserve proper recording. The official English version of the Joint Declaration on Hong Kong and a non-official English version of the Joint Declaration on Macao are here reproduced in parallel columns, including the Exchanges of Memoranda and Annex I containing the Elaboration by the Chinese Government. Annex II (entitled "Sino-British Joint Liaison Group" in the case of Hong Kong and "Arrangements for the Transnational period" in the case of Macao) and Annex III (only in the case of Hong Kong and entitled "Land Leases") are not included.

sovereignty over Hong Kong with effect from 1 July 1997.

2. The Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997.

3. The Government of the People's Republic of China declares that the basic policies of the People's Republic of China regarding Hong Kong are as follows:

(1) Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the People's Republic of China has decided to establish, in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, a Hong Kong Special Administrative Region upon resuming the exercise of sovereignty over Hong Kong.

(2) The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.

(3) The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.

(4) The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. Principal officials will be

2. The Government of the People's Republic of China declares that in line with the principle of 'one country, two systems', the People's Republic of China will pursue the following basic policies regarding Macao:

(1) in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, the People's Republic of China will establish a Macao Special Administrative Region of the People's Republic of China upon resuming the exercise of sovereignty over Macao.

(2) The Macao Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China, and will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government. The Macao Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication.

(3) Both the Government and the legislature of the Macao Special Administrative Region will be composed of local inhabitants. The chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held in Macao. Officials holding principal posts will be nominated by the chief executive of the Macao Special Administrative Region for appointment by the Central People's Government. Public servants (including police) of Chinese nationality and Portuguese and other foreign nationalities previously serving in Macao may remain in employment. Portuguese and other foreign nationals may be appointed or employed to hold certain public posts in the Macao Special Administrative Region.

(4) The current social and economic systems in Macao will remain unchanged, and so

nominated by the chief executive of the Hong Kong Special Administrative Region for appointment by the Central People's Government. Chinese and foreign nationals previously working in the public and police services in the government departments of Hong Kong may remain in employment. British and other foreign nationals may also be employed to serve as advisers or hold certain public posts in government departments of the Hong Kong Special Administrative Region.

(5) The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.

(6) The Hong Kong Special Administrative Region will retain the status of a free port and a separate customs territory.

(7) The Hong Kong Special Administrative Region will retain the status of an international financial centre, and its markets for foreign exchange, gold, securities and futures will continue. There will be free flow of capital. The Hong Kong dollar will continue to circulate and remain freely convertible.

(8) The Hong Kong Special Administrative Region will have independent finances. The Central People's Government will not levy taxes on the Hong Kong Special Administrative Region.

will the life-style. The laws currently in force in Macao will remain basically unchanged. All rights and freedoms of the inhabitants and other persons in Macao, including those of the person, of speech, of the press, of assembly, of association, of travel and movement, of strike, of choice of occupation, of academic research, of religion and belief, of communication and the ownership of property will be ensured by law in the Macao Special Administrative Region.

(5) The Macao Special Administrative Region will on its own decide policies in the fields of culture, education, science and technology and protect cultural relics in Macao according to law.
In addition to Chinese, Portuguese may also be used in organs of government and in the legislature and the courts in the Macao Special Administrative Region.

(6) The Macao Special Administrative Region may establish mutually beneficial economic relations with Portugal and other countries. Due regard will be given to the economic interests of Portugal and other countries in Macao. The interests of the inhabitants of Portuguese descent in Macao will be protected by law.

(7) Using the name 'Macao, China', the Macao Special Administrative Region may on its own maintain and develop economic and cultural relations and in this context conclude agreements with states, regions and relevant international organizations.
The Macao Special Administrative Region Government may on its own issue travel documents for entry into and exit from Macao.

(8) The Macao Special Administrative Region will remain a free port and a separate customs territory in order to develop its economic activities. There will be free flow of capital. The Macao Pataca, as the legal tender of the Macao Special Administrative Region, will

(9) The Hong Kong Special Administrative Region may establish mutually beneficial economic relations with the United Kingdom and other countries, whose economic interests in Hong Kong will be given due regard.

(10) Using the name of 'Hong Kong, China', the Hong Kong Special Administrative Region may on its own maintain and develop economic and cultural relations and conclude relevant agreements with states, regions and relevant international organisations.
The Government of the Hong Kong Special Administrative Region may on its own issue travel documents for entry into and exit from Hong Kong.

(11) The maintenance of public order in the Hong Kong Special Administrative Region will be the responsibility of the Government of the Hong Kong Special Administrative Region.

(12) The above-stated basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.

4. The Government of the United Kingdom and the Government of the People's Republic of China declare that, during de transitional period between the date of the entry into force of this Joint Declaration and 30 June 1997, the Government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and that the Government of continue to circulate and remain freely convertible.

(9) The Macao Special Administrative Region will continue to have independent finances. The Central People's Government will not levy taxes on the Macao Special Administrative Region.

(10) The maintenance of public order in the Macao Special Administrative Region will be the responsibility of the Macao Special Administrative Region Government.

(11) Apart from displaying the national flag and national emblem of the People's Republic of China, the Macao Special Administrative Region may use a regional flag and emblem of its own.

(12) The above-stated basic policies and the elaboration of them in Annex I to this Joint Declaration will be stipulated in a Basic Law of the Macao Special Administrative Region of the People's Republic of China by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.

3. The Government of the People's Republic of China and the Government of the Republic of Portugal declare that, during the transitional period between the date of the entry into force of this Joint Declaration and 19 December 1999, the Government of the Republic of Portugal will be responsible for the administration of Macao. The Government of the Republic of Portugal will continue to promote the economic growth of Macao and maintain its social stability, and the Government of the People's Republic of China will give its cooperation in this connection.

4. The Government of the People's Republic of China and the Government of the Republic of Portugal declare that in order to ensure the effective implementation of this Joint Declaration and create appropriate conditions for the

the People's Republic of China will give its cooperation in this connection.

5. The Government of the United Kingdom and the Government of the People's Republic of China declare that, in order to ensure a smooth transfer of government in 1997, and with a view to the effective implementation of this Joint Declaration, a Sino-British Joint Liaison Group will be set up when this Joint Declaration enters into force; and that it will be established and will function in accordance with the provisions of Annex II to this Joint Declaration.

6. The Government of the United Kingdom and the Government of the People's Republic of China declare that land leases in Hong Kong and other related matters will be dealt with in accordance with the provisions of Annex III to this Joint Declaration.

7. The Government of the United Kingdom and the Government of the People's Republic of China agree to implement the preceding declarations and the Annexes to this Joint Declaration.

8. This Joint Declaration is subject to ratification and shall enter into force on the date of the exchange of instruments of ratification, which shall take place in Beijing before 30 June 1985. This Joint Declaration and its Annexes shall be equally binding.

Done in duplicate at Beijing on 19 December 1984 in the English and Chinese languages, both texts being equally authentic.

. . .

transfer of government in 1999, a Sino-Portuguese Joint Liaison Group will be set up when this Joint Declaration enters into force, and that it will be established and will function in accordance with the relevant provisions of Annex II to this Joint Declaration.

5. The Government of the People's Republic of China and the Government of the Republic of Portugal declare that land leases in Macao and other related matters will be dealt with in accordance with the relevant provisions of the Annexes to this Joint Declaration.

6. The Government of the People's Republic of China and the Government of the Republic of Portugal agree to implement all the preceding declarations and the Annexes which are a component part of the Joint Declaration.

7. This Joint Declaration and its Annexes shall enter into force on the date of the exchange of instruments of ratification, which shall take place in Beijing. This Joint Declaration and its Annexes shall be equally binding.

Done in duplicate at Beijing on 26 March 1987 in the Chinese and Portuguese languages, both texts being equally authentic.

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ANNEX I

ELABORATION BY THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA OF ITS BASIC POLICIES REGARDING HONG KONG

The Government of the People's Republic of China elaborates the basic policies of the People's Republic of China regarding Hong Kong as set out in paragraph 3 of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong as follows:

I

The Constitution of the People's Republic of China stipulates in Article 31 that "the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by laws enacted by the National People's Congress in the light of the specific conditions". In accordance with this Article, the People's Republic of China shall, upon the resumption of the exercise of sovereignty over Hong Kong on 1 July 1997, establish the Hong Kong Special Administrative Region of the People's Republic of China. The National People's Congress of the People's Republic of China shall enact and promulgate a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as the Basic Law) in accordance with the Constitution of the People's Republic of China, stipulating that after the establishment of the Hong Kong Special Administrative Region the socialist system and socialist policies shall not be practised in the Hong Kong Special Administrative Region and that Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years.

ANNEX I

ELABORATION BY THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA OF ITS BASIC POLICIES REGARDING MACAO

The Government of the People's Republic of China elaborates the basic policies of the People's Republic of China regarding Macao as set out in paragraph 2 of the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao as follows:

I

The Constitution of the People's Republic of China stipulates in Article 31 that "the state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by laws enacted by the National People's Congress in the light of the specific conditions". In accordance with this Article, the People's Republic of China shall, upon the resumption of the exercise of sovereignty over Macao on December 20, 1999, establish the Macao Special Administrative Region of the People's Republic of China. The National People's Congress of the People's Republic of China shall enact and promulgate a Basic Law of the Macao Special Administrative Region of the People's Republic of China (hereinafter referred to as the Basic Law) in accordance with the Constitution of the People's Republic of China, stipulating that after the establishment of the Macao Special Administrative Region the socialist system and socialist policies shall not be practised in the Macao Special Administrative Region and that the current social and economic systems and life-style in Macao shall remain unchanged for 50 years.

The Macao Special Administrative Region shall be directly under the authority

The Hong Kong Special Administrative Region shall be directly under the authority of the Central People's Government of the People's Republic of China and shall enjoy a high degree of autonomy. Except for foreign and defence affairs which are the responsibilities of the Central People's Government, the Hong Kong Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication. The Central People's Government shall authorise the Hong Kong Special Administrative Region to conduct on its own those external affairs specified in Section XI of this Annex.

The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants. The chief executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. Principal officials (equivalent to Secretaries) shall be nominated by the chief executive of the Hong Kong Special Administrative Region and appointed by the Central People's Government. The Legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature.

In addition to Chinese, English may also be used in organs of government and in the courts in the Hong Kong Special Administrative Region.

Apart from displaying the national flag and national emblem of the People's Republic of China, the Hong Kong Special Administrative Region may use a regional flag and emblem of its own.

II

After the establishment of the Hong Kong Special Administrative Region, the laws pre-

of the Central People's Government of the People's Republic of China, and shall enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government. The Macao Special Administrative Region shall be vested with executive, legislative and independent judicial power, including that of final adjudication. The Central People's Government shall authorize the Macao Special Administrative Region to conduct on its own those external affairs specified in Section VIII of this Annex.

II

The executive power of the Macao Special Administrative Region shall be vested in the government of the Macao Special Administrative Region. The government of the Macao Special Administrative Region shall be composed of local inhabitants. The chief executive of the Macao Special Administrative Region shall be appointed by the Central People's Government on the basis of the results of elections or consultations to be held in Macao. Officials holding principal posts (equivalent to assistant-secretaries, procurator-general and principal officer of the police service) shall be nominated by the chief executive of the Macao Special Administrative Region for appointment by the Central People's Government.

The executive authorities shall abide by the law and shall be accountable to the legislature.

III

The legislative power of the Macao Special Administrative Region shall be vested in the legislature of the Macao Special Administrative Region. The legislature shall be composed of local inhabitants, and the majority of its members shall be elected.

After the establishment of the Macao Special Administrative Region, the laws, decrees, administrative regulations and other

viously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature.

The legislative power of the Hong Kong Special Administrative Region shall be vested in the legislature of the Hong Kong Special Administrative Region. The legislature may on its own authority enact laws in accordance with the provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People's Congress for the record. Laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid.

The laws of the Hong Kong Special Administrative Region shall be the Basic Law, and the Laws previously in force in Hong Kong and laws enacted by the Hong Kong Special Administrative Region legislature as above.

III

After the establishment of the Hong Kong Special Administrative Region, the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication.

Judicial power in the Hong Kong Special Administrative Region shall be vested in the courts of the Hong Kong Special Administrative Region. The courts shall exercise judicial power independently and free from any interference. Members of the judiciary shall be immune from legal action in respect of their judicial functions. The courts shall decide cases in accordance with the laws of

normative acts previously in force in Macao shall be maintained, save for whatever therein may contravene the Basic Law or subject to any amendment by the Macao Special Administrative Region legislature.

The legislature of the Macao Special Administrative Region may enact laws in accordance with the provisions of the Basic Law and legal procedures, and such laws shall be reported to the Standing Committee of the National People's Congress of the People's Republic of China for the record. Laws enacted by the legislature of the Macao Special Administrative Region which are in accordance with the Basic Law and legal procedures shall be regarded as valid.

The legal system of the Macao Special Administrative Region shall consist of the Basic Law, the laws previously in force in Macao and the laws enacted by the Macao Special Administrative Region as above.

IV

Judicial power in the Macao Special Administrative Region shall be vested in the courts of the Macao Special Administrative Region. The power of final adjudication shall be exercised by the court of final appeal in the Macao Special Administrative Region. The courts shall exercise judicial power independently and free from any interference, and shall be subordinated only to the law. The judges shall enjoy the immunities appropriate to the performance of their functions.

Judges of the Macao Special Administrative Region courts shall be appointed by the chief executive of the Macao Special Administrative Region acting in accordance with the recommendation of an independent commission composed of local judges, lawyers and noted public figures. Judges shall be chosen by reference to their professional qualifications. Qualified judges of foreign nationalities may also be invited to serve as judges in the Macao Special Administrative Region. A judge may only be removed for inability to

the Hong Kong Special Administrative Region and may refer to precedents in other common law jurisdictions.

Judges of the Hong Kong Special Administrative Region courts shall be appointed by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons. Judges shall be chosen by reference to their judicial qualities and may be recruited from other common law jurisdictions. A judge may only be removed for inability to discharge the functions of this office, or for misbehaviour, by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of a tribunal appointed by the chief judge of the court of final appeal, consisting of not fewer than three local judges. Additionally, the appointment or removal of principal judges (i.e. those of the highest rank) shall be made by the chief executive with the endorsement of the Hong Kong Special Administrative Region legislature and reported to the Standing Committee of the National People's Congress for the record. The system of appointment and removal of judicial officers other than judges shall be maintained.

The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdictions to sit on the court of final appeal.

A prosecuting authority of the Hong Kong Special Administrative Region shall control criminal prosecutions free from any interference.

On the basis of the system previously operating in Hong Kong, the Hong Kong Special Administrative Region Government discharge the functions of this office, or for behaviour incompatible with the post he holds, by the chief executive acting in accordance with the recommendation of a tribunal appointed by the president of the court of final appeal, consisting of no fewer than three local judges. The removal of judges of the court of final appeal shall be decided upon by the chief executive in accordance with the recommendation of a review committee consisting of members of the Macao Special Administrative Region legislature. The appointment and removal of judges of the court of final appeal shall be reported to the Standing Committee of the National People's Congress for the record.

The prosecuting authority of the Macao Special Administrative Region shall exercise procuratorial functions as vested by law, independently and free from any interference.

The system previously in force in Macao for appointment and removal of supporting members of the judiciary shall be maintained.

On the basis of the system previously operating in Macao, the Macao Special Administrative Region Government shall make provisions for local lawyers and lawyers from outside Macao to practise in the Macao Special Administrative Region.

The Central People's Government shall assist or authorize the Macao Special Administrative Region Government to make appropriate arrangements for reciprocal juridical assistance with foreign states.

V

The Macao Special Administrative Region shall, according to law, ensure the rights and freedoms of the inhabitants and other persons in Macao as provided for by the laws previously [in force] in Macao, including freedom of the person, of speech, of the press, of assembly, of demonstration, of association (e.g., to form and join non-official associations), to form and join trade unions, of travel and movement, of choice of

shall on its own make provision for local lawyers and lawyers from outside the Hong Kong Special Administrative Region to work and practise in the Hong Kong Special Administrative Region.

The Central People's Government shall assist or authorise the Hong Kong Special Administrative Region Government to make appropriate arrangements for reciprocal juridical assistance with foreign states.

IV

After the establishment of the Hong Kong Special Administrative Region, public servants previously serving in Hong Kong in all government departments, including the police department, and members of the judiciary may all remain in employment and continue their service with pay, allowances, benefits and conditions of service no less favourable than before. The Hong Kong Special Administrative Region Government shall pay to such persons who retire or complete their contracts, as well as to those who have retired before 1 July 1997, or to their dependants, all pensions, gratuities, allowances and benefits due to them on terms no less favourable than before, and irrespective of their nationality or place of residence.

The Hong Kong Special Administrative Region Government may employ British and other foreign nationals previously serving in the public service in Hong Kong, and may recruit British and other foreign nationals holding permanent identity cards of the Hong Kong Special Administrative Region to serve as public servants at all levels, except as heads of major government departments (corresponding tot branches or departments at Secretary level) including the police department, and as deputy heads of some of those departments. The Hong Kong Special Administrative Region Government may also employ British and other foreign nationals as

occupation and work, of strike, of religion and belief, of education and academic research; inviolability of the home and of communication, and the right to have access to law and court; rights concerning the ownership of private property and of enterprises and their transfer and inheritance, and to obtain appropriate compensation for lawful deprivation paid without undue delay; freedom to marry and the right to form and raise a family freely.

The inhabitants and other persons in the Macao Special Administrative Region shall all be equal before the law, and shall be free from discrimination, irrespective of nationality, descent, sex, race, language, religion, political or ideological belief, educational level, economic status or social conditions.

The Macao Special Administrative Region shall protect, according to law, the interests of residents of Portuguese descent in Macao and shall respect their customs and cultural traditions.

Religious organizations and believers in the Macao Special Administrative Region may carry out activities as before for religious purposes and within the limits as prescribed by law, and may maintain relations with religious organizations and believers outside Macao. Schools, hospitals and charitable institutions attached to religious organizations may continue to operate as before. The relationship between religious organizations in the Macao Special Administrative Region and those in other parts of the People's Republic of China shall be based on the principles of non-subordination, non-interference and mutual respect.

VI

After the establishment of the Macao Special Administrative Region, public servants (including police) of Chinese nationality and Portuguese and other foreign nationalities previously serving in Macao may all remain in employment and continue their service

advisers to government departments and, when there is a need, may recruit qualified candidates from outside the Hong Kong Special Administrative Region to professional and technical posts in government departments. The above shall be employed only in their individual capacities and, like other public servants, shall be responsible to the Hong Kong Special Administrative Region Government.

The appointment and promotion of public servants shall be on the basis of qualifications, experience and ability. Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service (including special bodies for appointment, pay and conditions of service) shall, save for any provisions providing privileged treatment for foreign nationals, be maintained.

V

The Hong Kong Special Administrative Region shall deal on its own with financial matters, including disposing of its financial resources and drawing up its budgets and its final accounts. The Hong Kong Special Administrative Region shall report its budgets and final accounts to the Central People's Government for the record.

The Central People's Government shall not levy taxes on the Hong Kong Special Administrative Region. The Hong Kong Special Administrative Region shall use its financial revenues exclusively for its own purposes and they shall not be handed over to the Central People's Government. The systems by which taxation and public expenditure must be approved by the legislature, and by which there is accountability to the legislature for all public expenditure, and the system for auditing public accounts shall be maintained.

with pay, allowances and benefits no less favourable than before. Those of the above-mentioned public servants who have retired after the establishment of the Macao Special Administrative Region shall, in accordance with regulations currently in force, be entitled to pensions and allowances on terms no less favourable than before, and irrespective of their nationality or place of residence.

The Macao Special Administrative Region may appoint Portuguese and other foreign nationals previously serving in the public service in Macao or currently holding Permanent Identity Cards of the Macao Special Administrative Region to public posts (except certain principal official posts). The Macao Special Administrative Region may also invite Portuguese and other foreign nationals to serve as advisers or hold professional and technical posts. The Portuguese and other foreign nationals holding public posts in the Macao Special Administrative Region shall be employed only in their individual capacities and shall be responsible exclusively to the Macao Special Administrative Region.

The appointment and promotion of public servants shall be on the basis of qualifications, experience and ability. Macao's previous system of employment, discipline, promotion and normal rise in rank for the public service shall remain basically unchanged.

VII

The Macao Special Administrative Region shall on its own decide policies in the fields of culture, education, science and technology, such as policies regarding the languages of instruction (including Portuguese) and the system of academic qualifications and the recognition of academic degrees. All educational institutions may remain in operation and retain their autonomy. They may continue to recruit teaching and administrative staff and use teaching materials from outside Macao. Students shall enjoy freedom to pursue their education

VI

The Hong Kong Special Administrative Region shall maintain the capitalist economic and trade systems previously practised in Hong Kong. The Hong Kong Special Administrative Region Government shall decide its economic and trade polices on its own. Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law.

The Hong Kong Special Administrative Region shall retain the status of a free port and continue a free trade policy, including the free movement of goods and capital. The Hong Kong Special Administrative Region may on its own maintain and develop economic and trade relations with all states and regions.

The Hong Kong Special Administrative Region shall be a separate customs territory. It may participate in relevant international organisations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles. Export quotas, tariff preferences and other similar arrangements obtained by the Hong Kong Special Administrative Region shall be enjoyed exclusively by the Hong Kong Special Administrative Region. The Hong Kong Special Administrative Region shall have authority to issue its own certificates of origin for products manufactured locally, in accordance with prevailing rules of origin.

The Hong Kong Special Administrative Region may, as necessary, establish official and semi-official economic and trade missions in foreign countries, reporting the establishment to the Central People's Government for the record.

VII

The Macao Special Administrative Region shall maintain the capitalist economic and trade systems previously practised in Macao. The Macao Special Administrative Region Government shall decide its economic and trade policies on its own. Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law.

The Macao Special Administrative Region shall retain the status of a free port and continue a free trade policy, including the free movement of goods and capital. The Macao Special Administrative Region may on its own maintain and develop economic and trade relations with all states and regions.

The Macao Special Administrative Region shall be a separate customs territory. It may participate in relevant international organisations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles. Export quotas, tariff preferences and other similar arrangements obtained by the Macao Special Administrative Region shall be enjoyed exclusively by the Macao Special Administrative Region. The Macao Special Administrative Region shall have authority to issue its own certificates of origin for products manufactured locally, in accordance with prevailing rules of origin.

The Macao Special Administrative Region may, as necessary, establish official and semi-official economic and trade missions in foreign countries, reporting the establishment to the Central People's Government for the record.

VIII

Subject to the principle that foreign affairs are the responsibility of the Central People's Government, the Macao Special Administrative Region may on its own, using the name 'Macao, China', maintain and develop relations and conclude and implement agreements with states, regions and relevant international or regional organizations in the appropriate fields, such as the economy, trade, finance, shipping, communications, tourism, culture, science and technology and sports. Representatives of the Macao Special Administrative Region Government may participate, as members of the delegations of the Government of the People's Republic of China, in international organizations or conferences in appropriate fields limited to states and affecting the Macao Special Administrative Region, or may attend in such other capacity as may be permitted by the Central People's Government and the organization or conference concerned, and may express their views in the name of 'Macao, China'. The Macao Special Administrative Region may, using the name 'Macao, China', participate in international organizations and conferences not limited to states.

Representatives of the Macao Special Administrative Region Government may participate, as members of delegations of the Government of the People's Republic of China, in negotiations conducted by the Central People's Government at the diplomatic level directly affecting the Macao Special Administrative Region.

The application to the Macao Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances of each case and the needs of the Macao Special

ment of such missions to the Central People's Government for the record.

VII

The Hong Kong Special Administrative Region shall retain the status of an international financial centre. The monetary and financial systems previously practised in Hong Kong, including the systems of regulation and supervision of deposit taking institutions and financial markets, shall be maintained.

The Hong Kong Special Administrative Region Government may decide its monetary and financial policies on its own. It shall safeguard the free operation of financial business and the free flow of capital within, into and out of the Hong Kong Special Administrative Region. No exchange control policy shall be applied in the Hong Kong Special Administrative Region. Markets for foreign exchange, gold, securities and futures shall continue.

The Hong Kong dollar, as the local legal tender, shall continue to circulate and remain freely convertible. The authority to issue Hong Kong currency shall be vested in the Hong Kong Special Administrative Region Government. The Hong Kong Special Administrative Region Government may authorise designated banks to issue or continue to issue Hong Kong currency under statutory authority, after satisfying itself that any issue of currency will be soundly based and that the arrangements for such issue are consistent with the object of maintaining the stability of the currency. Hong Kong currency bearing references inappropriate to the status of Hong Kong as a Special Administrative Region of the People's Republic of China shall be progressively replaced and withdrawn from circulation.

Administrative Region and after seeking the views of the Macao Special Administrative Region Government. International agreements to which the People's Republic of China is not a party but which are implemented in Macao may remain implemented in the Macao Special Administrative Region. The Central People's Government shall, according to the circumstances and the needs, authorize or assist the Macao Special Administrative Region Government to make appropriate arrangements for the application to the Macao Special Administrative Region of other relevant international agreements.

The Central People's Government shall, in accordance with the circumstances of each case and the needs of the Macao Special Administrative Region, take steps to ensure that the Macao Special Administrative Region shall continue to retain its status in appropriate capacity in those international organizations of which the People's Republic of China is a member and in which Macao participates in one capacity or another. The Central People's Government shall, according to the circumstances and the needs, facilitate the continued participation of the Macao Special Administrative Region in an appropriate capacity in those international organizations in which Macao is a participant in once capacity or another, but of which the People's Republic of China is not a member.

Foreign consular and other official or semi-official missions may be established in the Macao Special Administrative Region with the approval of the Central People's Government Consular and other official missions established in Macao by states which have established formal diplomatic relations with the People's Republic of China may be maintained. According to the circumstances of each case, consular and other official missions in Macao of states having no formal diplomatic relations with the People's Republic of China may either be maintained or changed to semi-official missions. States not recognized by the People's Republic of China can only establish non-governmental institutions.

The Exchange Fund shall be managed and controlled by the Hong Kong Special Administrative Region Government, primarily for regulating the exchange value of the Hong Kong dollar.

VIII

The Hong Kong Special Administrative Region shall maintain Hong Kong's previous systems of shipping management and shipping regulation, including the system for regulating conditions of seamen. The specific functions and responsibilities of the Hong Kong Special Administrative Region Government in the field of shipping shall be defined by the Hong Kong Special Administrative Region Government on its own. Private shipping businesses and shipping-related businesses and private container terminals in Hong Kong may continue to operate freely.

The Hong Kong Special Administrative Region shall be authorised by the Central People's Government to continue to maintain a shipping register and issue related certificates under its own legislation in the name of 'Hong Kong, China'.

With the exception of foreign warships, access for which requires the permission of the Central People's Government, ships shall enjoy access to the ports of the Hong Kong Special Administrative Region in accordance with the laws of the Hong Kong Special Administrative Region.

IX

The Hong Kong Special Administrative Region shall maintain the status of Hong Kong as a centre of international and regional aviation. Airlines incorporated and having their principal place of business in Hong Kong and civil aviation related businesses may continue to operate. The Hong Kong

The Republic of Portugal may establish a Consulate-General in the Macao Special Administrative Region.

IX

The following categories of persons shall have the right of abode in the Macao Special Administrative Region and be qualified to obtain Permanent Identity Cards of the Macao Special Administrative Region:
- the Chinese nationals who were born or who have ordinarily resided in Macao before or after the establishment of the Macao Special Administrative Region for a continuous period of 7 years or more, and persons of Chinese nationality born outside Macao of such Chinese nationals;
- the Portuguese who were born in Macao or who have ordinarily resided in Macao before or after the establishment of the Macao Special Administrative Region for a continuous period of 7 years or more and who, in either case, have taken Macao as their place of permanent residence; and
- the other persons who have ordinarily resided in Macao for a continuous period of 7 years or more and have taken Macao as their place of permanent residence before or after the establishment of the Macao Special Administrative Region, and persons under 18 years of age who were born of such persons in Macao before or after the establishment of the Macao Special Administrative Region.

The Central People's Government shall authorize the Macao Special Administrative Region Government to issue, in accordance with the law, passports of the Macao Special Administrative Region of the People's Republic of China to all Chinese nationals who hold Permanent Identity Cards of the Macao Special Administrative Region, and other travel documents of the Macao Special Administrative Region of the People's Republic of China to all other persons lawfully residing in the Macao Special Administrative Region.

The above passports and travel documents of the Macao Special Administrative Region shall be valid for all states and

Special Administrative Region shall continue the previous systems of evil aviation management in Hong Kong, and keep its own aircraft register in accordance with provisions laid down by the Central People's Government concerning nationality marks and registration marks of aircraft. The Hong Kong Special Administrative Region shall be responsible on its own for matters of routine business and technical management of civil aviation, including the management of airports, the provision of air traffic services within the flight information region of the Hong Kong Special Administrative Region, and the discharge of other responsibilities allocated under the regional air navigation procedures of the International Civil Aviation Organisation.

The Central People's Government shall, in consultation with the Hong Kong Special Administrative Region Government, make arrangements providing for air services between the Hong Kong Special Administrative Region and other parts of the People's Republic of China for airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region and other airlines of the People's Republic of China. All Air Service Agreements providing for air services between other parts of the People's Republic of China and other states and regions with stops at the Hong Kong Special Administrative Region and air services between the Hong Kong Special Administrative Region and other states and regions with stops at other parts of the People's Republic of China shall be concluded by the Central People's Government. For this purpose the Central People's Government shall take account of the special conditions and economic interests of the Hong Kong Special Administrative Region and consult the Hong Kong Special Administrative Region Government. Representatives of the Hong Kong Special Administrative Region Government may participate as members of delegations of the Government of the regions and shall record the holders' right to return to the Macao Special Administrative Region.

For the purpose of travelling to and from the Macao Special Administrative Region, inhabitants of the Macao Special Administrative Region may use travel documents issued by the Macao Special Administrative Region Government, or by other competent authorities of the People's Republic of China, or of other states. Holders of Permanent Identity Cards of the Macao Special Administrative Region may have this fact stated in their travel documents as evidence that the holders have the right of abode in the Macao Special Administrative Region.

Entry into the Macao Special Administrative Region by inhabitants of other parts of China shall be regulated in an appropriate way.

The Macao Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Macao Special Administrative Region by persons from foreign states and regions.

Unless restrained by law, holders of valid travel documents shall be free to leave the Macao Special Administrative Region without special authorization.

The Central People's Government shall assist or authorize the Macao Special Administrative Region Government to negotiate and conclude visa abolition agreements with the states and regions concerned.

X

The Macao Special Administrative Region shall decide its economic and trade policies on its own. As a free port and a separate customs territory, it shall maintain and develop economic and trade relations with all states and regions and continue to participate in relevant international organizations and international trade agreements, such as the General Agreement on Tariffs and Trade and agreements regarding international

People's Republic of China in air service consultations with foreign governments concerning arrangements for such services.

Acting under specific authorizations from the Central People's Government, the Hong Kong Special Administrative Region Government may:
- renew or amend Air Service Agreements and arrangements previously in force; in principle, all such Agreements and arrangements may be renewed or amended with the rights contained in such previous Agreements and arrangements being as far as possible maintained;
- negotiate and conclude new Air Service Agreements providing routes for airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region and rights for overflights and technical stops; and
- negotiate and conclude provisional arrangements where no Air Service Agreement with a foreign state or other region is in force.

All scheduled air services to, from or through the Hong Kong Special Administrative Region which do not operate to, from or through the mainland of China shall be regulated by Air Service Agreements or provisional arrangements referred to in this paragraph.

The Central People's Government shall give the Hong Kong Special Administrative Region Government the authority to:
- negotiate and conclude with other authorities all arrangements concerning the implementation of the above Air Service Agreements and provisional arrangements;
- issue licences to airlines incorporated and having their principal place of business in the Hong Kong Special Administrative Region;
- designate such airlines under the above Air Service Agreements and provisional arrangements; and

trade in textiles. Export quotas, tariff preferences and other similar arrangements obtained by the Macao Special Administrative Region shall be enjoyed exclusively by the Macao Special Administrative Region. The Macao Special Administrative Region shall have authority to issue its own certificates of origin for products manufactured locally, in accordance with prevailing rules of origin.

The Macao Special Administrative Region shall protect foreign investments in accordance with the law.

The Macao Special Administrative Region may, as necessary, establish official and semi-official economic and trade missions in foreign countries, reporting the establishment of such missions to the Central People's Government for the record.

XI

After the establishment of the Macao Special Administrative Region, the monetary and financial systems previously practised in Macao shall remain basically unchanged. The Macao Special Administrative Region shall decide its monetary and financial policies on its own. It shall safeguard the free operation of the financial institutions and the free flow of capital within, into and out of the Macao Special Administrative Region. No exchange control policy shall be applied in the Macao Special Administrative Region.

The Macao pataca, as the legal tender of the Macao Special Administrative Region, shall continue to circulate and remain freely convertible. The authority to issue Macao currency shall be vested in the Macao Special Administrative Region Government. The Macao Special Administrative Region Government may authorize designated banks to perform or continue to perform the functions of its agents in the issuance of Macao currency. Macao currency bearing references inappropriate to the status of Macao as a special administrative region of the People's Republic of China shall be progressively replaced and withdrawn from circulation.

– issue permits to foreign airlines for services other than those to, from or through the mainland of China.

X

The Hong Kong Special Administrative Region shall maintain the educational system previously practised in Hong Kong. The Hong Kong Special Administrative Region Government shall on its own decide policies in the fields of culture, education, science and technology, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational and technological qualifications. Institutions of all kind, including those run by religious and community organisations, may retain their autonomy. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region. Students shall enjoy freedom of choice of education and freedom to pursue their education outside the Hong Kong Special Administrative Region.

XI

Subject to the principle that foreign affairs are the responsibility of the Central People's Government, representatives of the Hong Kong Special Administrative Region Government may participate, as members of delegations of the Government of the People's Republic of China, in negotiations at the diplomatic level directly affecting the Hong Kong Special Administrative Region conducted by the Central People's Government. The Hong Kong Special Administrative Region may on its own, using the name 'Hong Kong, China', maintain and develop relations and conclude and implement agreements with states, regions and relevant international organisations in the appropriate

XII

The Macao Special Administrative Region shall draw up on its own its budget and taxation policy. The Macao Special Administrative Region shall report its budgets and final accounts to the Central People's Government for the record. The Macao Special Administrative Region shall use its financial revenues exclusively for its own purposes and they shall not be handed over to the Central People's Government. The Central People's Government shall not levy taxes on the Macao Special Administrative Region.

XIII

The Central People's Government shall be responsible for the defence of the Macao Special Administrative Region.

The maintenance of public order in the Macao Special Administrative Region shall be the responsibility of the Macao Special Administrative Region Government.

XIV

Legal leases of land granted or decided upon before the establishment of the Macao Special Administrative Region and extending beyond December 19, 1999, and all rights in relation to such leases shall be recognized and protected according to law by the Macao Special Administrative Region. Land leases approved or renewed after the establishment of the Macao Special Administrative Region shall be dealt with in accordance with the relevant land laws and policies of the Macao Special Administrative Region.

ANNEX II
ARRANGEMENTS FOR THE TRANSITIONAL PERIOD

. . .

fields, including the economic, trade, financial and monetary, shipping, communications, touristic, cultural and sporting fields. Representatives of the Hong Kong Special Administrative Region Government may participate, as members of delegations of the Government of the People's Republic of China, in international organisations or conferences in appropriate fields limited to states and affecting the Hong Kong Special Administrative Region, or may attend in such other capacity as may be permitted by the Central People's Government and the organisation or conference concerned, and may express their views in the name of 'Hong Kong, China'. The Hong Kong Special Administrative Region may, using the name 'Hong Kong, China', participate in international organisations and conferences not limited to states.

The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Hong Kong Special Administrative Region, and after seeking the views of the Hong Kong Special Administrative Region Government. International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorise or assist the Hong Kong Special Administrative Region Government to make appropriate arrangements for the application to the Hong Kong Special Administrative Region of other relevant international agreements. The Central People's Government shall take the necessary steps to ensure that the Hong Kong Special Administrative Region shall continue to retain its status in an appropriate capacity in those international organisations of which the People's Republic of China is a member and in which Hong Kong participates in one capacity or another.

The Central People's Government shall, where necessary, facilitate the continued participation of the Hong Kong Special Administrative Region in an appropriate capacity in those international organisations in which Hong Kong is a participant in one capacity or another, but of which the People's Republic of China is not a member.

Foreign consular and other official or semi-official missions may be established in the Hong Kong Special Administrative Region with the approval of the Central People's Government. Consular and other official missions established in Hong Kong by states which have established formal diplomatic relations with the People's Republic of China may be maintained. According to the circumstances of each case, consular and other official missions of states having no formal diplomatic relations with the People's Republic of China may either be maintained or changed to semi-official missions. States not recognised by the People's Republic of China can only establish non-governmental institutions.

The United Kingdom may establish a Consulate-General in the Hong Kong Special Administrative Region.

XII

The maintenance of public order in the Hong Kong Special Administrative Region shall be the responsibility of the Hong Kong Special Administrative Region Government. Military forces sent by the Central People's Government to be stationed in the Hong Kong Special Administrative Region for the purpose of defence shall not interfere in the internal affairs of the Hong Kong Special Administrative Region. Expenditure for these military forces shall be borne by the Central People's Government.

XIII

The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons in the Hong Kong Special Administrative Region according to law. The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, of the press, of assembly, of association, to form and join trade unions, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to marry and the right to raise a family freely.

Every person shall have the right to confidential legal advice, access to the courts, representation in the courts by lawyers of his choice, and to obtain judicial remedies. Every person shall have the right to challenge the actions of the executive in the courts.

Religious organisations and believers may maintain their relations with religious organisations and believers elsewhere, and schools, hospitals and welfare institutions run by religious organisations may be continued. The relationship between religious organisations in the Hong Kong Special Administrative Region and those in other parts of the People's Republic of China shall be based on the principles of non-subordination, non-interference and mutual respect.

The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.

XIV

The following categories of persons shall have the right of abode in the Hong Kong Special Administrative Region, and, in accordance with the law of the Hong Kong Special Administrative Region, be qualified to obtain permanent identity cards issued by the Hong Kong Special Administrative Region Government, which state their right of abode:
- all Chinese nationals who were born or who have ordinarily resided in Hong Kong before of after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more, and persons of Chinese nationality born outside Hong Kong of such Chinese nationals;
- all other persons who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more and who have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region, and persons under 21 years of age who were born of such persons in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
- any other persons who had the right of abode only in Hong Kong before the establishment of the Hong Kong Special Administrative Region.

The Central People's Government shall authorise the Hong Kong Special Administrative Region Government to issue, in accordance with the law, passports of the Hong Kong Special Administrative Region of the People's Republic of China to all Chinese nationals who hold permanent identity cards of the Hong Kong Special Administrative Region, and travel documents of the Hong Kong Special Administrative Region of the People's Republic of China to all other persons lawfully residing in the Hong Kong Special Administrative Region. The above passports and documents shall be valid for all

states and regions and shall record the holder's right to return to the Hong Kong Special Administrative Region.

For the purpose of travelling to and from the Hong Kong Special Administrative Region, residents of the Hong Kong Special Administrative Region may use travel documents issued by the Hong Kong Special Administrative Region Government, or by other competent authorities of the People's Republic of China, or of other states. Holders of permanent identity cards of the Hong Kong Special Administrative Region may have this fact stated in their travel documents as evidence that the holders have the right of abode in the Hong Kong Special Administrative Region.

Entry into the Hong Kong Special Administrative Region of persons from other parts of China shall continue to be regulated in accordance with the present practice.

The Hong Kong Special Administrative Region Government may apply immigration controls on entry, stay in and departure from the Hong Kong Special Administrative Region by persons from foreign states and regions.

Unless restrained by law, holders of valid travel documents shall be free to leave the Hong Kong Special Administrative Region without special authorisation.

The Central People's Government shall assist or authorise the Hong Kong Special Administrative Region Government to conclude visa abolition agreements with states or regions.

ANNEX II

SINO-BRITISH JOINT LIAISON GROUP

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ANNEX III
LAND LEASES

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EXCHANGE OF MEMORANDA,
19 December 1984

(United Kingdom memorandum)

In connection with the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the question of Hong Kong to be signed this day, the Government of the United Kingdom declares that, subject to the completion of the necessary amendments to the relevant United Kingdom legislation:

(a) All persons who on 30 June 1997 are, by virtue of a connection with Hong Kong, British Dependent Territories citizens (BDTCs) under the law in force in the United Kingdom will cease to be BDTCs with effect from 1 July 1997, but will be eligible to retain an appropriate status which, without conferring the right of abode in the United Kingdom, will entitle them to continue to use passports issued by the Government of the United Kingdom. This status will be acquired by such persons only if they hold or are included in such a British passport issued before 1 July 1997, except that eligible persons born on or after 1 January 1997 but before 1 July 1997 may obtain or be included in such a passport up to 31 December 1997.

(b) No person will acquire BDTC status on or after 1 July 1997 by virtue of a connection with Hong Kong. No person born on or after 1 July 1997 will acquire the status referred to as being appropriate in sub-paragraph (a).

EXCHANGE OF MEMORANDA,
13 April 1987

(Chinese Memorandum)

In connection with the Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao signed this day, the Government of the People's Republic of China declares:

The inhabitants in Macao who come under the provisions of the Nationality law of the People's Republic of China, whether they are holders of the Portuguese travel or identity documents or not, have Chinese citizenship. Taking account of the historical background of Macao and its realities, the competent authorities of the Government of the People's Republic of China will permit Chinese nationals in Macao previously holding Portuguese travel documents to continue to use these documents for travelling to other states and regions after the establishment of the Macao Special Administrative Region. The above mentioned Chinese nationals will not be entitled to Portuguese consular protection in the Macao Special Administrative Region and other parts of the People's Republic of China.

(Portuguese Memorandum)

In connection with the Joint Declaration of the Government of the Republic of Portugal and the Government of the People's Republic of China on the Question of Macao signed this day, the Government of the Republic of Portugal declares:

In conformity with the Portuguese legislation, the inhabitants in Macao who, having Portuguese citizenship, are holders of a Portuguese passport on 19 December 1999

(c) United Kingdom consular officials in the Hong Kong Special Administrative Region and elsewhere may renew and replace passports of persons mentioned in sub-paragraph (a) and may also issue them to persons, born before 1 July 1997 of such persons, who had previously been included in the passport of their parent.

(d) Those who have obtained or been included in passports issued by the Government of the United Kingdom under sub-paragraphs (a) and (c) will be entitled to receive, upon request, British consular services and protection when in third countries.

(Chinese memorandum)

The Government of the People's Republic of China has received the memorandum from the Government of the United Kingdom of Great Britain and Northern Ireland dated 19 December 1984.

Under the Nationality Law of the People's Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the "British Dependent Territories citizens' Passport" or not, are Chinese nationals.

Taking account of the historical background of Hong Kong and its realities, the competent authorities of the Government of the People's Republic of China will, with effect from 1 July 1997, permit Chinese nationals in Hong Kong who were previously called "British Dependent Territories citizens" to use travel documents issued by the Government of the United Kingdom for the purpose of travelling to other states and regions.

The above Chinese nationals will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding the above-mentioned British travel documents.

may continue to use it after this date. No person may acquire Portuguese citizenship as from 20 December 1999 by virtue of his or her connection with Macao.

AGREEMENT ON THE COOPERATION FOR THE SUSTAINABLE DEVELOPMENT OF THE MEKONG RIVER BASIN
Chiang Rai, 5 April 1995

The Governments of The Kingdom of Cambodia, The Lao People's Democratic Republic, The Kingdom of Thailand, and The Socialist Republic of Viet Nam, being equally desirous of continuing to cooperate in a constructive and mutually beneficial manner for sustainable development, utilization, conservation and management of the Mekong River Basin water and related resources, have resolved to conclude this Agreement setting forth the framework for cooperation acceptable to all parties hereto to accomplish these ends, . . .

CHAPTER I. PREAMBLE

RECALLING the establishment of the Committee for the Coordination of Investigations of the Lower Mekong Basin on 17 September 1957 by the Governments of these countries by Statute endorsed by the United Nations,

. . .

ACKNOWLEDGING the great political, economic and social changes that have taken place in these countries of the region during this period of time which necessitate these efforts to re-assess, re-define and establish the future framework for cooperation,

. . .

REAFFIRMING the determination to continue to cooperate and promote in a constructive and mutually beneficial manner in the sustainable development, utilization, conservation and management of the Mekong River Basin water and related resources for navigational and non-navigational purposes, for social and economic development and the well-being of all riparian States, consistent with the needs to protect, preserve, enhance and manage the environmental and aquatic conditions and maintenance of the ecological balance exceptional to this river basin,

AFFIRMING to promote or assist in the promotion of interdependent sub-regional growth and cooperation among the community of Mekong nations, taking into account the regional benefits that could be derived and/or detriments that could be avoided or mitigated from activities within the Mekong River Basin undertaken by this framework of cooperation,

REALIZING the necessity to provide an adequate, efficient and functional joint organizational structure to implement this Agreement and the projects, programs and

activities taken thereunder in cooperation and coordination with each member and the international community, and to address and resolve issues and problems that may arise from the use and development of the Mekong River Basin water and related resources in an amicable, timely and good neighbourly manner,

PROCLAIMING further the following specific objectives, principles, institutional framework and ancillary provisions in conformity with the objectives and principles of the Charter of the United Nations and international law:

CHAPTER II. DEFINITIONS OF TERMS

For the purposes of this Agreement, it shall be understood that the following meanings to the underlined terms shall apply except were otherwise inconsistent with the context:

Agreement under Article 5: A decision of the Joint Committee resulting from prior consultation and evaluation on any proposed use for inter-basin diversions during the wet season from the mainstream as well as for intra-basin use or inter-basin diversions of these waters during the dry season. The objective of this agreement is to achieve an optimum use and prevention of waste of the waters through a dynamic and practical consensus in conformity with the Rules for Water Utilization and Inter-Basin Diversions set forth in Article 26.

Acceptable minimum monthly natural flow: The acceptable minimum monthly natural flow during each month of the dry season.

Acceptable natural reverse flow: The wet season flow level in the Mekong River at Kratie that allows the reverse flow of the Tonle Sap to an agreed upon optimum level of the Great Lake.

Basin Development Plan: The general planning tool and process that the Joint Committee would use as a blueprint to identify, categorize and prioritize the projects and programs to seek assistance for and to implement the plan at the basin level.

Environment: The conditions of water and land resources, air, flora and fauna that exist in a particular region.

Notification: Timely providing information by a riparian to the Joint Committee on its proposed use of water according to the format, content and procedures set forth in the Rules for Water Utilization and Inter-Basin Diversions under Article 26.

Prior consultation: Timely notification plus additional data and information to the Joint Committee as provided in the Rules for Water Utilization and Inter-Basin Diversion

under Article 26, that would allow the other member riparians to discuss and evaluate the impact of the proposed use upon their uses of water and any other affects, which is the basis for arriving at an agreement. Prior consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians' rights.

Proposed use: Any proposal for a definite use of the waters of the Mekong River system by any riparian, excluding domestic and minor uses of water not having a significant impact on mainstream flows.

CHAPTER III. OBJECTIVES AND PRINCIPLES OF COOPERATION

The parties agree:

ARTICLE 1
AREAS OF COOPERATION

To cooperate in all fields of sustainable development, utilization, management and conservation of the water and related resources of the Mekong River Basin including, but not limited to irrigation, hydro-power, navigation, flood control, fisheries, timber floating, recreation and tourism, in an manner to optimize the multiple-use and mutual benefits of all riparians and to minimize the harmful effects that might result from natural occurrences and man-made activities.

ARTICLE 2
PROJECTS, PROGRAMS AND PLANNING

To promote, support, cooperate and coordinate in the development of the full potential of sustainable benefits to all riparian States and the prevention of wasteful use of Mekong River Basin waters, with emphasis and preference on joint and/or basin-wide development projects and basin programs through the formulation of a basin development plan, that would be used to identify, categorize and prioritize the projects and programs to seek assistance for and to implement at the basin level.

ARTICLE 3
PROTECTION OF THE ENVIRONMENT AND ECOLOGICAL BALANCE

To protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from any development plans and uses of water and related resources in the Basin.

ARTICLE 4
SOVEREIGN EQUALITY AND TERRITORIAL INTEGRITY

To cooperate on the basis of sovereign equality and territorial integrity in the utilization and protection of the water resources of the Mekong River Basin.

ARTICLE 5
REASONABLE AND EQUITABLE UTILIZATION

To utilize the waters of the Mekong River system in a reasonable and equitable manner in their respective territories, pursuant to all relevant factors and circumstances, the Rules for Water Utilization and Inter-basin Diversion provided for under Article 26 and the provisions of A and B below:

A. On tributaries of the Mekong River, including Tonle Sap, intra-basin uses and inter-basin diversions shall be subject to notification to the Joint Committee.
B. On the mainstream of the Mekong River:
   1. During the wet season:
      a) Intra-basin use shall be subject to notification to the Joint Committee.
      b) Inter-basin diversion shall be subject to prior consultation which aims at arriving at an agreement by the Joint Committee.

   2. During the dry season:
      a) Intra-basin use shall be subject to prior consultation which aims at arriving at an agreement by the Joint Committee.
      b) Any inter-basin diversion project shall be agreed upon by the Joint Committee through a specific agreement for each project prior to any proposed diversion. However, should there be a surplus quantity of water available in excess of the proposed uses of all parties in any dry season, verified and unanimously confirmed as such by the Joint Committee, an inter-basin diversion of the surplus could be made subject to prior consultation.

ARTICLE 6
MAINTENANCE OF FLOWS ON THE MAINSTREAM

To cooperate in the maintenance of the flows on the mainstream from diversions, storage releases, or other actions of a permanent nature; except in the cases of historically severe droughts and/or floods:

A. Of not less than the acceptable minimum monthly natural flow during each month of the dry season;
B. To enable the acceptable natural reverse flow of the Tonle Sap to take place during the wet season; and,
C. To prevent average daily peak flows greater than what naturally occur on the average during the flood season.

The Joint Committee shall adopt guidelines for the locations and levels of the flows, and monitor and take action necessary for their maintenance as provided in Article 26.

ARTICLE 7
PREVENTION AND CESSATION OF HARMFUL EFFECTS

To make every effort to avoid, minimize and mitigate harmful effects that might occur to the environment, especially the water quantity and quality, the aquatic (ecosystem) conditions, and ecological balance of the river system, from the development and use of the Mekong River Basin water resources or discharge of wastes and return flows. Where one or more States is notified with proper and valid evidence that it is causing substantial damage to one or more riparians from the use of and/or discharge to water of the Mekong River, that State or States shall cease immediately the alleged cause of harm until such cause of harm is determined in accordance with Article 8.

ARTICLE 8
STATE RESPONSIBILITY FOR DAMAGES

Where harmful effects cause substantial damage to one or more riparians from the use of and/or discharge to waters of the Mekong River by any riparian State, the Party(ies) concerned shall determine all relative factors, the cause, extent of damage and responsibility for damages caused by that State in conformity with the principles of international law relating to state responsibility, and to address and resolve all issues, differences and disputes in an amicable and timely manner by peaceful means as provided in Articles 34 and 35 of this Agreement, and in conformity with the Charter of the United Nations.

ARTICLE 9
FREEDOM OF NAVIGATION

On the basis of equality of right, freedom of navigation shall be accorded throughout the mainstream of the Mekong River without regard to the territorial boundaries, for transportation and communication to promote regional cooperation and to satisfactorily implement projects under this Agreement. The Mekong River shall be kept free from obstructions, measures, conduct and actions that might directly or indirectly impair navigability, interfere with this right or permanently make it more difficult. Navigational uses are not assured any priority over other uses, but will be incorporated into any mainstream project. Riparians may issue regulations for the portions of the Mekong River within their territories, particularly in sanitary, customs and immigration matters, police and general security.

ARTICLE 10
EMERGENCY SITUATIONS

Whenever a Party becomes aware of any special water quantity or quality problems constituting an emergency that requires an immediate response, it shall notify and consult directly with the party(ies) concerned and the Joint Committee without delay in order to take appropriate remedial action.

CHAPTER IV. INSTITUTIONAL FRAMEWORK

A. MEKONG RIVER COMMISSION

ARTICLE 11
STATUS

The institutional framework for cooperation in the Mekong River Basin under this Agreement shall be called the Mekong River Commission and shall, for the purpose of the exercise of its functions, enjoy the status of an international body, including entering into agreements and obligations with the donor or international community.

ARTICLE 12
STRUCTURE OF MEKONG RIVER COMMISSION

The Commission shall consist of three permanent bodies:
- Council,
- Joint Committee, and
- Secretariat.

ARTICLE 13
ASSUMPTION OF ASSETS, OBLIGATIONS AND RIGHTS

The Commission shall assume all the assets, rights and obligations of the Committee for the Coordination of Investigations of the Lower Mekong Basin (Mekong Committee/Interim Mekong Committee) and Mekong Secretariat.

ARTICLE 14
BUDGET OF THE MEKONG RIVER COMMISSION

The budget of the Commission shall be drawn up by the Joint Committee and approved by the Council and shall consist of contributions from member countries on an equal basis unless otherwise decided by the Council, from the international community (donor countries), and from other sources.

B. COUNCIL

ARTICLE 15
COMPOSITION OF COUNCIL

The Council shall be composed of one member from each participating riparian State at the Ministerial and Cabinet level, (no less than Vice-Minister level) who would be empowered to make policy decisions on behalf of his/her government.

ARTICLE 16
CHAIRMANSHIP OF COUNCIL

The Chairmanship of the Council shall be for a term of one year and rotate according to the alphabetical listing of the participating countries.

ARTICLE 17
SESSIONS OF COUNCIL

The Council shall convene at least one regular session every year and may convene special sessions whenever it considers it necessary or upon the request of a member State. It may invite observers to its sessions as it deems appropriate.

ARTICLE 18
FUNCTIONS OF COUNCIL

The functions of the Council are:

A. To make policies and decisions and provide other necessary guidance concerning the promotion, support, cooperation and coordination in joint activities and projects in a constructive and mutually beneficial manner for the sustainable development, utilization, conservation and management of the Mekong River Basin waters and related resources, and protection of the environment and aquatic conditions in the Basin as provided for under this Agreement;

B. To decide any other policy-making matters and make decisions necessary to successfully implement this Agreement, including but not limited to approval of the Rules of Procedures of the Joint Committee under Article 25, Rules of Water Utilization and Inter-Basin Diversions proposed by the Joint Committee under Article 26, and the basin development plan and major component projects/programs; to establish guidelines for financial and technical assistance of development projects and programs; and if considered necessary, to invite the donors to coordinate their support through a Donor Consultative Group; and,

C. To entertain, address and resolve issues, differences and disputes referred to it by any Council member, the Joint Committee, or any member State on matters arising under this Agreement.

ARTICLE 19
RULES OF PROCEDURES

The Council shall adopt its own Rules of Procedures, and may seek technical advisory services as it deems necessary.

ARTICLE 20
DECISIONS OF COUNCIL

Decisions of the Council shall be by unanimous vote except as otherwise provided for in its Rules of Procedures.

C. JOINT COMMITTEE

ARTICLE 21
COMPOSITION OF JOINT COMMITTEE

The Joint Committee shall be composed of one member from each participating riparian State at no less than Head of Department level.

ARTICLE 22
CHAIRMANSHIP OF JOINT COMMITTEE

The Chairmanship of the Joint Committee will rotate according to the reverse alphabetical listing of the member countries and the Chairperson shall serve a term of one year.

ARTICLE 23
SESSIONS OF JOINT COMMITTEE

The Joint Committee shall convene at least two regular sessions every year and may convene special sessions whenever it considers it necessary or upon the request of a member State. It may invite observers to its sessions as it deems appropriate.

ARTICLE 24
FUNCTIONS OF THE JOINT COMMITTEE

The functions of the Joint Committee are:

A. To implement the policies and decisions of the Council and such other tasks as may be assigned by the Council.

B. To formulate a basin development plan, which would be periodically reviewed and revised as necessary; to submit to the Council for approval the basin development plan and joint development projects/programs to be implemented in connection with it; and to confer with donors, directly or through their consultative group, to obtain the financial and technical support necessary for project/program implementation.
C. To regularly obtain, update and exchange information and data necessary to implement this Agreement.
D. To conduct appropriate studies and assessments for the protection of the environment and maintenance of the ecological balance of the Mekong River Basin.
E. To assign tasks and supervise the activities of the Secretariat as is required to implement this Agreement and the policies, decisions, projects and programs adopted thereunder, including the maintenance of databases and information necessary for the Council and Joint Committee to perform their functions, and approval of the annual work program prepared by the Secretariat.
F. To address and make every effort to resolve issues and differences that may arise between regular sessions of the Council, referred to it by any Joint Committee member or member state on matters arising under this Agreement, and when necessary to refer the matter to the Council.
G. To review and approve studies and training for the personnel of the riparian member countries involved in Mekong River Basin activities as appropriate and necessary to strengthen the capability to implement this Agreement.
H. To make recommendations to the Council for approval on the organizational structure, modifications and restructuring of the Secretariat.

ARTICLE 25
RULES OF PROCEDURES

The Joint Committee shall propose its own Rules of Procedures to be approved by the Council. It may form ad hoc and/or permanent sub-committees or working groups as considered necessary, and may seek technical advisory services except as may be provided for in the Council's Rules of Procedures or decisions.

ARTICLE 26
RULES FOR WATER UTILIZATION AND INTER-BASIN DIVERSIONS

The Joint Committee shall prepare and propose for approval of the Council, inter alia, Rules for Water Utilization and Inter-Basin Diversions pursuant to Articles 5 and 6, including but not limited to: 1) establishing the time frame for the wet and dry seasons; 2) establishing the location of hydrological stations, and determining and maintaining the flow level requirements at each station; 3) setting out criteria for determining surplus quantities of water during the dry season on the mainstream; 4) improving upon the mechanism to monitor intra-basin use; and, 5) setting up a mechanism to monitor inter-basin diversions from the mainstream.

ARTICLE 27
DECISIONS OF THE JOINT COMMITTEE

Decisions of the Joint Committee shall be by unanimous vote except as otherwise provided for in its Rules of Procedures.

D. SECRETARIAT

ARTICLE 28
PURPOSE OF SECRETARIAT

The Secretariat shall render technical and administrative services to the Council and Joint Committee, and be under the supervision of the Joint Committee.

ARTICLE 29
LOCATION OF SECRETARIAT

The location and structure of the permanent office of the Secretariat shall be decided by the Council, and if necessary, a headquarters agreement shall be negotiated and entered into with the host government.

ARTICLE 30
FUNCTIONS OF THE SECRETARIAT

The functions and duties of the Secretariat will be to:

A. Carry out the decisions and tasks assigned by the Council and Joint Committee under the direction of and directly responsible to the Joint Committee;
B. Provide technical services and financial administration and advise as requested by the Council and Joint Committee;
C. Formulate the annual work program, and prepare all other plans, project and program documents, studies and assessments as may be required;
D. Assist the Joint Committee in the implementation and management of projects and programs as requested;
E. Maintain databases of information as directed;
F. Make preparations for sessions of the Council and Joint Committee; and,
G. Carry out all other assignments as may be requested.

ARTICLE 31
CHIEF EXECUTIVE OFFICER

The Secretariat shall be under the direction of a Chief Executive Officer (CEO), who shall be appointed by the Council from a short-list of qualified candidates selected by the Joint Committee. The Terms of Reference of the CEO shall be prepared by the Joint Committee and approved by the Council.

ARTICLE 32
ASSISTANT CHIEF EXECUTIVE OFFICER

There will be one Assistant to the CEO, nominated by the CEO and approved by the Chairman of the Joint Committee. Such Assistant will be of the same nationality as the Chairman of the Joint Committee and shall serve for a co-terminus one-year term.

ARTICLE 33
RIPARIAN STAFF

Riparian technical staff of the Secretariat are to be recruited on a basis of technical competence, and the number of posts shall be assigned on an equal basis among the members. Riparian technical staff shall be assigned to the Secretariat for no more than two three-year terms, except as otherwise decided by the Joint Committee.

CHAPTER V. ADDRESSING DIFFERENCES AND DISPUTES

ARTICLE 34
RESOLUTION BY MEKONG RIVER COMMISSION

Whenever any difference or dispute may arise between two or more parties to this Agreement regarding any matters covered by this Agreement and/or actions taken by the implementing organization through its various bodies, particularly as to the interpretations of the Agreement and the legal rights of the parties, the Commission shall first make every effort to resolve the issue as provided in Articles 18.C and 24.F.

ARTICLE 35
RESOLUTION BY GOVERNMENTS

In the event the Commission is unable to resolve the difference or dispute within a timely manner, the issue shall be referred to the Governments to take cognizance of the matter for resolution by negotiation through diplomatic channels within a timely manner, and may communicate their decision to the Council for further proceedings as may be necessary to carry out such decision. Should the Governments find it necessary or beneficial to facilitate the resolution of the matter, they may, by mutual agreement, request the assistance of mediation through an entity or party mutually agreed upon, and thereafter to proceed according to the principles of international law.

CHAPTER VI. FINAL PROVISIONS

ARTICLE 36
ENTRY INTO FORCE AND PRIOR AGREEMENTS

This Agreement shall:

A. Enter into force among all parties, with no retroactive effect upon activities and projects previously existing, on the date of signature by the appointed plenipotentiaries.

B. Replace the Statute of the Committee for Coordination of Investigations of the Lower Mekong Basin of 1957 as amended, the Joint Declaration of Principles for Utilization of the Waters of the Lower Mekong Basin of 1975, the Declaration Concerning the Interim Committee for Coordination of Investigations of the Lower Mekong Basin of 1978, and all Rules of Procedures adopted under such agreements. This Agreement shall not replace or take precedence over any other treaties, acts or agreements entered into by and among any of the parties hereto, except that where a conflict in terms, areas of jurisdiction of subject matter or operation of any entities created under existing agreements occurs with any provisions of this Agreement, the issues shall be submitted to the respective governments to address and resolve.

ARTICLE 37
AMENDMENTS, MODIFICATION, SUPERSESSION AND TERMINATION

This Agreement may be amended, modified, superseded or terminated by the mutual agreement of all parties hereto at the time of such action.

ARTICLE 38
SCOPE OF AGREEMENT

This Agreement shall consist of the Preamble and all provisions thereafter and amendments thereto, the Annexes, and all other agreements entered into by the Parties under this Agreement. Parties may enter into bi- or multi-lateral special agreements or arrangements for implementation and management of any programs and projects to be undertaken within the framework of this Agreement, which agreements shall not be in conflict with this Agreement and shall not confer any rights or obligations upon the parties not signatories thereto, except as otherwise conferred under this Agreement.

ARTICLE 39
ADDITIONAL PARTIES TO AGREEMENT

Any other riparian State, accepting the rights and obligations under this Agreement, may become a party with the consent of the parties.

ARTICLE 40
SUSPENSION AND WITHDRAWAL

Any party to this Agreement may withdraw or suspend their participation under present Agreement by giving written notice to the Chairman of the Council of the Mekong River Commission, who shall acknowledge receipt thereof and immediately communicate it to the Council representatives of all remaining parties. Such notice of withdrawal or suspension shall take effect one year after the date of acknowledgment or receipt unless such notice is withdrawn beforehand or the parties mutually agree otherwise. Unless mutually agreed upon to the contrary by all remaining parties to this Agreement, such notice shall not be prejudicial to nor relieve the noticing party of any commitments entered into concerning programs, projects, studies or other recognized rights and interests of any riparians, or under international law.

ARTICLE 41
UNITED NATIONS AND INTERNATIONAL COMMUNITY INVOLVEMENT

The member countries to this Agreement acknowledge the important contribution in the assistance and guidance of the United Nations, donors and the international community and wish to continue the relationship under this Agreement.

ARTICLE 42
REGISTRATION OF AGREEMENT

This Agreement shall be registered and deposited, in English and French, with the Secretary General of the United Nations.

. . .

DONE on 5 April 1995 at Chiang Rai, Thailand, in English and French, both texts being equally authentic. In the case of any inconsistency, the text in the English language, in which language the Agreement was drawn up, shall prevail.

PROTOCOL TO THE AGREEMENT ON THE COOPERATION FOR THE SUSTAINABLE DEVELOPMENT OF THE MEKONG RIVER BASIN FOR THE ESTABLISHMENT AND COMMENCEMENT OF THE MEKONG RIVER COMMISSION
Chiang Rai, 5 April 1995

The Governments of The Kingdom of Cambodia, The Lao People's Democratic Republic, The Kingdom of Thailand, and The Socialist Republic of Viet Nam, have

signed on this day the AGREEMENT ON THE COOPERATION FOR THE SUSTAINABLE DEVELOPMENT OF THE MEKONG RIVER BASIN.

Said AGREEMENT provides for in Chapter IV the establishment of the Mekong River Commission as the institutional framework through which the Agreement will be implemented.

BY THIS PROTOCOL, the signatory parties to the agreement do hereby declare the establishment and commencement of the MEKONG RIVER COMMISSION, consisting of three permanent bodies, the COUNCIL, JOINT COMMITTEE and SECRETARIAT, effective on this date with the full authority and responsibility set forth under the AGREEMENT.

. . .

DONE on 5 April 1995 at Chiang Rai, Thailand.

THE ASEAN ATTORNEYS GENERAL CONSENSUS ON COOPERATION IN THE LEGAL FIELD (JAKARTA CONSENSUS)
Jakarta, 25 July 1995

. . .

RECALLING (1) The Seventeenth ASEAN Ministerial Meeting, Jakarta 9-10 July 1984; (2) The ASEAN Ministerial Understanding on the Organizational Arrangement for Cooperation in the Legal Field, Bali, 12 April 1986; (3) The Informal meeting of the ASEAN Attorneys General, Denpasar, 9 December 1989;

RECOGNIZING the mutual need for cooperation in the legal field which has to be carried our with respect to the national legal systems in the respective ASEAN member countries, due to the diversity of legal systems present in such countries;

DESIRING to facilitate cooperation in the legal field for the mutual benefit of the ASEAN member countries;

DO HEREBY STATE the following points on which we have reached consensus:

1. Exchange of Information:
   a. To facilitate the exchange of information in capital cases in conformity with the laws, regulations and practices and subject to any public interest consideration of the requested ASEAN member country.

b. The exchange of information may be handled directly between the Attorney General's Offices.

2. Legal Education and Training
   a. Cooperation in the field of education and training for officials of the Attorney General's Offices is to be accomplished through exchange of trainees, lecturers, instructors, educational material, and study visits.
   b. The Attorney General's Offices will cooperate in informing each other if they have legal education or training programmes suitable for participation by legal officers of other ASEAN member countries, specifying the name of the programme, objective, curriculum and criteria for participation.

3. Legal Research
   a. An Attorney General's Office may make available to another member country the legislation and results of findings of any legal research which it deems to be of mutual benefit.

   b. An Attorney General's Office may initiate legal research programmes on certain cases or legal issues to be conducted bilaterally or multilaterally.

4. Communication
   To facilitate the realization of this consensus, communication will be conducted directly among the offices of the Attorneys General.

5. Meeting
   The Attorneys General shall meet at such appropriate intervals as is convenient, but not at longer intervals than once in 3 (three) years.

TREATY ON THE SOUTHEAST ASIA NUCLEAR WEAPON-FREE ZONE
Bangkok, 15 December 1995

The States Parties to this Treaty:

DESIRING to contribute to the realization of the purposes and principles of the Charter of the United Nations.

DETERMINED to take concrete action which will contribute to the progress towards general and complete disarmament of nuclear weapons, and to the promotion of international peace and security;

REAFFIRMING the desire of the Southeast Asian States to maintain peace and stability in the region in the spirit of peaceful coexistence and mutual understanding and cooperation as enunciated in various communiques, declarations and other legal instruments;

RECALLING the Declaration on the Zone of Peace, Freedom and Neutrality (ZOPFAN) signed in Kuala Lumpur on 27 November 1971 and the Programme of Action on ZOPFAN adopted at the 26th ASEAN Ministerial Meeting in Singapore in July 1993;

CONVINCED that the establishment of a Southeast Asia Nuclear Weapon-Free Zone, as an essential component of the ZOPFAN, will contribute towards strengthening the security of States within the Zone and towards enhancing international peace and security as a whole;

REAFFIRMING the importance of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in preventing the proliferation of nuclear weapons and in contributing towards international peace and security;

RECALLING Article VII of the NPT which recognizes the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories;

RECALLING the Final Document of the Tenth Special Session of the United Nations General Assembly which encourages the establishment of nuclear weapon-free zones;

RECALLING the Principles and Objectives for Nuclear Non-Proliferation and Disarmament, adopted at the 1995 Review and Extension Conference of the Parties to the NPT, that the cooperation of all the nuclear-weapon States and their respect and support for the relevant protocols is important for the maximum effectiveness of this nuclear weapon-free zone treaty and its relevant protocols.

DETERMINED to protect the region from environmental pollution and the hazards posed by radioactive wastes and other radioactive material;

HAVE AGREED as follows:

ARTICLE 1
USE OF TERMS

For the purpose of this Treaty and its Protocol:

(a) 'Southeast Asia Nuclear Weapon-Free Zone', hereinafter referred to as the 'Zone', means the area compromising the territories of all States in Southeast Asia, namely, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia,

Myanmar, Philippines, Singapore, Thailand and Vietnam, and their respective continental shelves and Exclusive Economic Zones (EEZ);

(b) 'territory' means the land territory, internal waters, territorial sea, archipelagic waters, the seabed and the sub-soil thereof and the airspace above them;

(c) 'nuclear weapon' means any explosive device capable of releasing nuclear energy in an uncontrolled manner but does not include the means of transport or delivery of such device if separable from and not an indivisible part thereof;

(d) 'station' means to deploy, emplace, implant, install, stockpile or store;

(e) 'radioactive material' means material that contains radionuclides above clearance or exemption levels recommended by the International Atomic Energy Agency (IAEA);

(f) 'radioactive wastes' means material that contains or is contaminated with radionuclides at concentrations or activities greater than clearance levels recommended by the IAEA and for which no use is foreseen; and

(g) 'dumping' means

(i) any deliberate disposal at sea, including seabed and subsoil insertion, of radioactive wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea, and

(ii) any deliberate disposal at sea, including seabed and subsoil insertion, of vessels, aircraft, platforms or other man-made structures at sea, containing radioactive material,

but does not include the disposal of wastes or other matter incidental to, or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment, other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or structures.

ARTICLE 2
APPLICATION OF THE TREATY

1. This Treaty and its Protocol shall apply to the territories, continental shelves, and EEZ of the States Parties within the Zone in which the Treaty is in force.

2. Nothing in this Treaty shall prejudice the rights or the exercise of these rights by any State under the provisions of the United Nations Convention on the Law of the Sea of 1982, in particular with regard to freedom of the high seas, rights of innocent passage, archipelagic sea lanes passage or transit passage of ships and aircraft, and consistent with the Charter of the United Nations.

ARTICLE 3
BASIC UNDERTAKINGS

1. Each State Party undertakes not to, anywhere inside or outside the Zone:
   (a) develop, manufacture or otherwise acquire, possess or have control over nuclear weapons;
   (b) station or transport nuclear weapons by any means; or
   (c) test or use nuclear weapons.
2. Each State Party also undertakes not to allow, in its territory, any other State to:
   (a) develop, manufacture or otherwise acquire, possess or have control over nuclear weapons;
   (b) station nuclear weapons; or
   (c) test or use nuclear weapons.

3. Each State Party also undertakes not to:
   (a) dump at sea or discharge into the atmosphere anywhere within the Zone any radioactive material or wastes;
   (b) dispose radioactive material or wastes on land in the territory of or under the jurisdiction of other States except as stipulated in Paragraph 2(e) of Article 4; or
   (c) allow, within its territory, any other State to dump at sea or discharge into the atmosphere any radioactive material or wastes.

4. Each State Party undertakes not to:
   (a) seek or receive any assistance in the commission of any act in violation of the provisions of Paragraphs 1, 2 and 3 of this Article; or
   (b) take any action to assist or encourage the commission of any act in violation of the provisions of Paragraphs 1, 2 and 3 of this Article.

ARTICLE 4
USE OF NUCLEAR ENERGY FOR PEACEFUL PURPOSES

1. Nothing in this Treaty shall prejudice the right of the States Parties to use nuclear energy, in particular for their economic development and social progress.

2. Each State Party therefore undertakes:
   (a) to use exclusively for peaceful purposes nuclear material and facilities which are within its territory and areas under its jurisdiction and control;
   (b) prior to embarking on its peaceful nuclear energy programme, to subject its programme to rigorous nuclear safety assessment conforming to guidelines and standards recommended by the IAEA for the protection of health and minimization of danger to life and property in accordance with Paragraph 6 of Article III of the Statute of the IAEA;

(c) upon request, to make available to another State Party the assessment except information relating to personal data, information protected by intellectual property rights or by industrial or commercial confidentiality, and information relating to national security;
(d) to support the continued effectiveness of the international non-proliferation system based on the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the IAEA safeguard system; and
(e) to dispose radioactive wastes and other radioactive material in accordance with IAEA standards and procedures on land within its territory or on land within the territory of another State which has consented to such disposal.

3. Each State Party further undertakes not to provide source or special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material to:
(a) any non-nuclear-weapon State except under conditions subject to the safeguards required by Paragraph 1 of Article III of the NPT; or
(b) any nuclear-weapon State except in conformity with applicable safeguards agreements with the IAEA.

ARTICLE 5
IAEA SAFEGUARDS

Each State Party which has not done so shall conclude an agreement with the IAEA for the application of full scope safeguards to its peaceful nuclear activities not later than eighteen months after the entry into force for that State Party of the Treaty.

ARTICLE 6
EARLY NOTIFICATION OF A NUCLEAR ACCIDENT

Each State Party which has not acceded to the Convention on Early Notification of a Nuclear Accident shall endeavour to do so.

ARTICLE 7
FOREIGN SHIPS AND AIRCRAFT

Each State Party, on being notified, may decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships through its territorial sea or archipelagic waters and overflight of foreign aircraft above those waters in a manner not governed by the rights of innocent passage, archipelagic sea lanes passage or transit passage.

ARTICLE 8
ESTABLISHMENT OF THE COMMISSION FOR THE SOUTHEAST ASIA NUCLEAR WEAPON-FREE ZONE

1. There is hereby established a Commission for the Southeast Asia Nuclear Weapon-Free Zone, hereinafter referred to as the 'Commission'.

2. All States Parties are *ipso facto* members of the Commission. Each State Party shall be represented by its Foreign Minister or his representative accompanied by alternates and advisers.

3. The function of the Commission shall be to oversee the implementation of this Treaty and ensure compliance with its provisions.

4. The Commission shall meet as and when necessary in accordance with the provisions of this Treaty including upon the request of any State Party. As far as possible, the Commission shall meet in conjunction with the ASEAN Ministerial Meeting.

5. At the beginning of each meeting, the Commission shall elect its Chairman and such other officers as may be required. They shall hold office until a new Chairman and other officers are elected at the next meeting.

6. Unless otherwise provided for in this Treaty, two-thirds of the members of the Commission shall be present to constitute a quorum.

7. Each member of the Commission shall have one vote.

8. Except as provided for in this Treaty, decisions of the Commission shall be taken by consensus or, failing consensus, by a two-thirds majority of the members present and voting.

9. The Commission shall, by consensus, agree upon and adopt rules of procedure for itself as well as financial rules governing its funding and that of its subsidiary organs.

ARTICLE 9
THE EXECUTIVE COMMITTEE

1. There is hereby established, as a subsidiary organ of the Commission, the Executive Committee.

2. The Executive Committee shall be composed of all States Parties to this Treaty. Each State Party shall be represented by one senior official as its representative, who may be accompanied by alternates and advisers.

3. The functions of the Executive Committee shall be to:
   (a) ensure the proper operation of verification measures in accordance with the provisions on the Control Systems as stipulated in Article 10;
   (b) consider and decide on requests for clarification and for a fact-finding mission;
   (c) set up a fact-finding mission in accordance with the Annex of this Treaty;
   (d) consider and decide on the findings of a fact-finding mission and report to the Commission;
   (e) request the Commission to convene a meeting when appropriate and necessary;
   (f) conclude such agreements with the IAEA or other international organizations as referred to in Article 18 on behalf of the Commission after being duly authorized to do so by the Commission; and
   (g) carry out such other tasks as may, from time to time, be assigned by the Commission.

4. The Executive Committee shall meet as and when necessary for the efficient exercise of its functions. As far as possible, the Executive Committee shall meet in conjunction with the ASEAN Senior Officials Meeting.

5. The Chairman of the Executive Committee shall be the representative of the Chairman of the Commission. Any submission or communication made by a State Party to the Chairman of the Executive Committee shall be disseminated to the other members of the Executive Committee.

6. Two-thirds of the members of the Executive Committee shall be present to constitute a quorum.

7. Each member of the Executive Committee shall have one vote.

8. Decisions of the Executive Committee shall be taken by consensus or, failing consensus, by a two-thirds majority of the members present and voting.

ARTICLE 10
CONTROL SYSTEM

1. There is hereby established a control system for the purpose of verifying compliance with the obligations of the States Parties under this Treaty.

2. The Control System shall comprise:
   (a) the IAEA safeguards system as provided for in Article 5;
   (b) report and exchange of information as provided for in Article 11;
   (c) request for clarification as provided for in Article 12; and
   (d) request and procedures for a fact-finding mission as provided for in Article 13.

ARTICLE 11
REPORT AND EXCHANGE OF INFORMATION

1. Each State Party shall submit reports to the Executive Committee on any significant event within its territory and areas under its jurisdiction and control affecting the implementation of this Treaty.

2. The States Parties may exchange information on matters arising under or in relation to this Treaty.

ARTICLE 12
REQUEST FOR CLARIFICATION

1. Each State Party shall have the right to request another State Party for clarification concerning any situation which may be considered ambiguous or which may give rise to doubts about the compliance of that State Party with this Treaty. It shall inform the Executive Committee of such a request. The requested State Party shall duly respond by providing without delay the necessary information and inform the Executive Committee of its reply to the requesting State Party.

2. Each State Party shall have the right to request the Executive Committee to seek clarification from another State Party concerning any situation which may be considered ambiguous or which may give rise to doubts about compliance of that State Party from which clarification is sought for the purpose of obtaining the clarification requested.

ARTICLE 13
REQUEST FOR A FACT-FINDING MISSION

A State Party shall have the right to request the Executive Committee to send a fact-finding mission to another State Party in order to clarify and resolve a situation which may be considered ambiguous or which may give rise to doubts about compliance with the provisions of this Treaty, in accordance with the procedure contained in the Annex to this Treaty.

ARTICLE 14
REMEDIAL MEASURES

1. In case the Executive Committee decides in accordance with the Annex that there is a breach of this Treaty by a State Party, that State Party shall, within a reasonable time, take all steps necessary to bring itself in full compliance with this Treaty and shall promptly inform the Executive Committee of the action taken or proposed to be taken by it.

2. Where a State Party fails or refuses to comply with the provisions of Paragraph 1 of this Article, the Executive Committee shall request the Commission to convene a meeting in accordance with the provisions of Paragraph 3 (e) of Article 9.

3. At the meeting convened pursuant to Paragraph 2 of this Article, the Commission shall consider the emergent situation and shall decide on any measure it deems appropriate to cope with the situation, including the submission of the matter to the IAEA and, where the situation might endanger international peace and security, the Security Council and the General Assembly of the United Nations.

4. In the event of breach of the Protocol attached to this Treaty by a State Party to the Protocol, the Executive Committee shall convene a special meeting of the Commission to decide on appropriate measures to be taken.

ARTICLE 15
SIGNATURE, RATIFICATION, ACCESSION, DEPOSIT AND REGISTRATION

1. This Treaty shall be open for signature by all States in Southeast Asia, namely, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

2. This Treaty shall be subject to ratification in accordance with the constitutional procedure of the signatory States. The instruments of ratification shall be deposited with the Government of the Kingdom of Thailand which is hereby designated as the Depositary State.

3. This Treaty shall be open for accession. The instruments of accession shall be deposited with the Depositary State.

4. The Depositary State shall inform the other States Parties to this Treaty on the deposit of instruments of ratification or accession.

5. The Depositary State shall register this Treaty and its Protocol pursuant to Article 102 of the Charter of the United Nations.

ARTICLE 16
ENTRY INTO FORCE

1. This Treaty shall enter into force on the date of the deposit of the seventh instrument of ratification and/or accession.

2. For States which ratify or accede to this Treaty after the date of the seventh instrument of ratification or accession, the Treaty shall enter into force on the date of deposit of its instrument of ratification or accession.

ARTICLE 17
RESERVATIONS

This Treaty shall not be subject to reservations.

ARTICLE 18
RELATIONS WITH OTHER INTERNATIONAL ORGANIZATIONS

The Commission may conclude such agreements with the IAEA or other international organizations as it considers likely to facilitate the efficient operation of the Control System established by this Treaty.

ARTICLE 19
AMENDMENTS

1. Any State Party may propose amendments to this Treaty and its Protocol and shall submit its proposals to the Executive Committee, which shall transmit them to all the other States Parties. The Executive Committee shall immediately request the Commission to convene a meeting to examine the proposed amendments. The quorum required for such a meeting shall be all the members of the Commission. Any amendment shall be adopted by a consensus decision of the Commission.

2. Amendments adopted shall enter into force 30 days after the receipt by the Depositary State of the seventh instrument of acceptance from the States Parties.

ARTICLE 20
REVIEW

Ten years after this Treaty enters into force, a meeting of the Commission shall be convened for the purpose of reviewing the operation of the Treaty. A meeting of the Commission for the same purpose may also be convened at any time thereafter if there is consensus among all its members.

ARTICLE 21
SETTLEMENT OF DISPUTES

Any dispute arising from the interpretation of the provisions of this Treaty shall be settled by peaceful means as may be agreed upon by the States Parties to the dispute. If within one month, the parties to the dispute are unable to achieve a peaceful settlement of the dispute by negotiation, mediation, enquiry or conciliation, any of the parties concerned shall, with the prior consent of the other parties concerned, refer the dispute to arbitration or to the International Court of Justice.

ARTICLE 22
DURATION AND WITHDRAWAL

1. This Treaty shall remain in force indefinitely.

2. In the event of a breach by any State Party of this Treaty essential to the achievement of the objectives of the Treaty, every other State Party shall have the right to withdraw from the Treaty.

3. Withdrawal under Paragraph 2 of Article 22, shall be effected by giving notice twelve months in advance to the members of the Commission.

ANNEX

PROCEDURE FOR A FACT-FINDING MISSION

1. The State Party requesting a fact-finding mission as provided in Article 13, hereinafter referred to as the 'requesting State', shall submit the request to the Executive Committee specifying the following:
   (a) the doubts or concerns and the reasons for such doubts or concerns;
   (b) the location in which the situation which gives rise to doubts has allegedly occurred;
   (c) the relevant provisions of the Treaty about which doubts of compliance have arisen; and
   (d) any other relevant information.

2. Upon receipt of a request for a fact-finding mission, the Executive Committee shall:
   (a) immediately inform the State Party to which the fact-finding mission is requested to be sent, hereinafter referred to as the 'receiving State', about the receipt of the request; and
   (b) not later than 3 weeks after receiving the request, decide if the request complies with the provisions of Paragraph 1 and whether or not it is frivolous, abusive or clearly beyond the scope of the Treaty. Neither the requesting nor receiving State Party shall participate in such decisions.

3. In case the Executive Committee decides that the request does not comply with the provisions of Paragraph 1, or that it is frivolous, abusive or clearly beyond the scope of the Treaty, it shall take no further action on the request and inform the requesting State and the receiving State accordingly.

4. In the event that the Executive Committee decides that the request complies with the provisions of Paragraph 1, and that it is not frivolous, abusive or clearly beyond the

scope of the Treaty, it shall immediately forward the request for a fact-finding mission to the receiving State, indicating, *inter alia*, the proposed date for sending the mission. The proposed date shall not be later than 3 weeks from the time the receiving State receives the request for a fact-finding mission. The Executive Committee shall also immediately set up a fact-finding mission consisting of 3 inspectors from the IAEA who are neither nationals of the requesting nor receiving State.

5. The receiving State shall comply with the request for a fact-finding mission referred to in Paragraph 4. It shall cooperate with the Executive Committee in order to facilitate the effective functioning of the fact-finding mission, *inter alia*, by promptly providing unimpeded access of the fact-finding mission to the location in question. The receiving State shall accord to the members of the fact-finding mission such privileges and immunities as are necessary for them to exercise their functions effectively, including inviolability of all papers and documents and immunity from arrest, detention and legal process for acts done and words spoken for the purpose of the mission.

6. The receiving State shall have the right to take measures to protect sensitive installations and to prevent disclosures of confidential information and data not related to this Treaty.

7. The fact-finding mission, in the discharge of its functions, shall:
   (a) respect the laws and regulations of the receiving State;
   (b) refrain from activities inconsistent with the objectives and purposes of this Treaty;
   (c) submit preliminary or interim reports to the Executive Committee; and
   (d) complete its task without undue delay and shall submit its final report to the Executive Committee within a reasonable time upon completion of its work.

8. The Executive Committee shall:
   (a) consider the reports submitted by the fact-finding mission and reach a decision on whether or not there is a breach of the Treaty;
   (b) immediately communicate its decision to the requesting State and the receiving State; and
   (c) present a full report on its decision to the Commission.

9. In the event that the receiving State refuses to comply with the request for a fact-finding mission in accordance with Paragraph 4, the requesting State through the Executive Committee shall have the right to request for a meeting of the Commission. The Executive Committee shall immediately request the Commission to convene a meeting in accordance with Paragraph 3(e) of Article 9.

PROTOCOL TO THE TREATY ON SOUTHEAST ASIA NUCLEAR WEAPON-FREE ZONE
Bangkok, 15 December 1995

The States Parties to this Protocol,

DESIRING to contribute to efforts towards achieving general and complete disarmament of nuclear weapons, and thereby ensuring international peace and security, including in Southeast Asia;

NOTING the Treaty on the Southeast Asia Nuclear Weapon-Free Zone;

HAVE AGREED as follows:

ARTICLE 1

Each State Party undertakes to respect the Treaty on the Southeast Asia Nuclear Weapon-Free Zone, hereinafter referred to as the 'Treaty', and not to contribute to any act which constitutes a violation of the Treaty or its Protocol by States Parties to them.

ARTICLE 2

Each State Party undertakes not to use or threaten to use nuclear weapons against any State Party to the Treaty. It further undertakes not to use or threaten to use nuclear weapons within the Southeast Asia Nuclear Weapon-Free Zone.

ARTICLE 3

This Protocol shall be open for signature by the People's Republic of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

ARTICLE 4

Each State Party undertakes, by written notification to the Depositary State, to indicate its acceptance or otherwise of any alteration to its obligation under the Protocol that may be brought about by the entry into force of an amendment to the Treaty pursuant to Article 19 thereof.

ARTICLE 5

This Protocol is of a permanent nature and shall remain in force indefinitely, provided that each State Party shall, in exercising its national sovereignty, have the

right to withdraw from this Protocol if it decides that extraordinary events, related to the subject-matter of this Protocol, have jeopardized its supreme national interests. It shall give notice of such withdrawal to the Depositary State twelve months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme national interests.

ARTICLE 6

This Protocol shall be subject to ratification.

ARTICLE 7

This Protocol shall enter into force for each State Party on the date of its deposit of its instrument of ratification with the Depositary State. The Depositary State shall inform the other States Parties to the Treaty and to this Protocol on the deposit of instruments of ratification.

INDEX

ERRATA TO VOLUMES 3 AND 4

Volume 3

1. On p. iv: The affiliations of Professor Mochtar Kusuma-Atmadja should read: Mochtar, Karuwin & Komar, Jakarta; Professor of International Law, Pajajaran University, Bandung; member of the International Law Commission of the United Nations.

2. On p. 3: The first (editorial) footnote to "The International Court of Justice - Retrospective and Prospects" referred to the presence of Judge Shigeru Oda at the Kampala session of the Asian-African Legal Consultative Committee "as an observer representing the International Court of Justice". Judge Oda in fact attended the Kampala session by invitation as an observer, but did not represent the International Court of Justice.

3. On p. 523: The acknowledgement of the subvention received from the Netherlands Ministry of Development Cooperation for the production and distribution of Volume One of the *Yearbook,* which was included in that Volume, was erroneously reproduced in Volume Three.

Volume 4

1. On p. 300: The reference to the "Announcement of 18 February 1993" should refer to: "Announcement of the Office of the Prime Minister concerning the Straight Baselines and Internal Waters of Thailand, No. 2, 2 February 1993".

   In footnote 58 reference should also be made to: *The Law of the Sea - Current Developments in State Practice,* No. IV (UN Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, 1995), p. 124.

The Editors and Publishers wish to apologize for the above errors, and for the omission in Volume 4 of the errata to Volume 3.

GENERAL INFORMATION

Editorial address:
ASIAN YEARBOOK OF INTERNATIONAL LAW
c/o Karin Arts, Institute of Social Studies
P.O. Box 29776, 2502 LT The Hague, The Netherlands.
Fax: 31-70-4260799 ; *E-mail:* ARTS@ISS.NL
or:
c/o Professor Ko Swan Sik,
52 Cesar Franckrode, 2717 BE Zoetermeer, The Netherlands.
Fax: 31-79-3211195 ; *E-mail:* KOSWANSIK@STA.FRG.EUR.NL

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 25 offprints free of charge. Contributors of other materials will receive 10 offprints of the *Yearbook*-section in which their materials are included.

Submission of manuscripts and other materials

The regular schedule of the *Yearbook* provides for publication in June of each year.

The final date of submission of manuscripts for articles and notes is 1 July. The final date of submission of other materials is 31 August.

Submission of a manuscript should be accompanied by information whether it has been published, submitted, or accepted elsewhere, or whether it is a translation.

Submission of manuscripts implies the readiness to consider editorial suggestions for change and, as the case may be, to introduce revisions. It also implies the author's agreement with linguistic revision by native speakers so far as these services are available to the Editors.

Authors are requested to submit one copy of their manuscript accompanied by a 3,5" disk (typed on IBM-compatible computer, with MS-DOS 3.0 / Windows 3.11 or higher, and wordprocessing packages Wordperfect 5.0 or higher or Word for Windows), or three copies of the manuscript typed and triple-spaced. The *Yearbook's* stylesheet may be obtained from the Editors.

Authors are requested to submit data about their current affiliations. No academic titles or past affiliations will be included in references.