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# Asian Yearbook of International Law

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# ASIAN YEARBOOK OF INTERNATIONAL LAW

The DILA Foundation and the Yearbook are greatly saddened by the death of

*Professor Wang Tieya*

on 12 January 2003.
His advice and guidance were always available to the Foundation, and his life and work will continue to inspire all those who knew him.

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# ABBREVIATIONS

| | | |
|---|---|---|
| AJIL | - | American Journal of International Law |
| AsYIL / AsianYIL | - | Asian Yearbook of International Law |
| BYIL | - | British Yearbook of International Law |
| CTS | - | Consolidated Treaty Series (C. Parry, Ed.) |
| GATS | - | General Agreement on Trade in Services |
| GATT | - | General Agreement on Tariffs and Trade |
| Hague Receuil | - | Receuil des cours de l'Académie de droit international de la Haye |
| ICAO | - | International Civil Aviation Organization |
| ICJ | - | International Court of Justice |
| ICLQ | - | International and Comparative Law Quarterly |
| IHT | - | International Herald Tribune |
| ILM | - | International Legal Materials |
| JAIL | - | Japanese Annual of International Law |
| JP | - | The Jakarta Post |
| Kompas | - | Daily newspaper, Jakarta |
| NATO | - | North Atlantic Treaty Organization |
| TIAS | - | Treaties and other International Acts Series (US Department of State) |
| OECD | - | Organization for Economic Cooperation and Development |
| UNCLOS | - | United Nations Convention on the Law of the Sea |
| UNCTAD | - | United Nations Commission on Trade and Development |
| UNGA | - | United Nations General Assembly |
| UNTS | - | United Nations Treaty Series |
| UST | - | Treaties in Force, A List of Treaties and Other International Agreements of the United States |

# ARTICLES

# LIBERALIZATION OF AIR TRANSPORT SERVICES UNDER THE FRAMEWORK OF THE WTO: CONFRONTING THE CHALLENGE OF THE TWENTY-FIRST CENTURY*

Zhao Yun**



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* This is a revised version of a paper that was awarded the 2001 Sata Prize for young Asian scholars in the field of international law. The prize is, whenever possible, awarded every year by the Foundation for the Development of International Law in Asia (DILA).

** As of 2002, City University of Hong Kong.

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## 1. INTRODUCTION

Commerce, communications and national defence are heavily dependent on an efficient and reliable air transportation system.[1] Consequently, this has traditionally been controlled by each national State and is based on the concept of the sovereignty of the State over its airspace.[2] However, commercialization has led to a reconsideration of the monopoly. This was particularly true for more aviation-oriented states, like the United Sates of America. First, it had occurred domestically under the close supervision of national agencies with the purpose of liberalizing services, but slowly like-minded States combined to try to improve the system. Bilateral agreements were thus created and the International Air Transport Organization (the ICAO) subsequently came into being, charged with the vital task of coordinating the aviation policies of its Member States. Even so, liberalization of air transport services was not then generally accepted among most States.

Against this backdrop the US in the late 1970s initiated a process of deregulation in accordance with its long-held "open skies" philosophy.[3] This process led to markedly increased US profits in the air transport markets and was, consequently, introduced into the various bilateral air transport agreements of the US. The process was followed in other parts of the world, most

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[1] O.J.LISSITZYN, *International Air Transport and National Policy* (1942) 18-19, at 38.

[2] As early as the Paris Conference of 1910 there was already a tendency in favour of it. In the 1944 Chicago Convention the concept was regarded as one of the fundamental principles in air transport. Art.1 of the Convention recognizes that every state has complete and exclusive sovereignty over the airspace above its territory, this being the expression of customary international law. See B.CHENG, *The law of international air transport* (1962) 120; id., "Recent developments in air law", 9 *Current Legal Problems* (1956) 208; G.SCHWARZENBERGER, *International Law,* Vol.1: *International law as applied by international courts and tribunals*, 3d. edn (1957) 226; A.D.MCNAIR, *The Law of the Air*, 2nd edn (1953) 8; L.WEBER, "EEC air transport liberalization and the Chicago Convention", 17 *Annals of Air and Space Law* (1992) 247.

[3] See further B.STOCKFISH, "Opening closed skies: the prospects for further liberalization of trade in international air transport services", 57 *Journal of Air Law and Commerce* (1992) 600.

significantly in the European Community (EC).[4] The system during that period could still be characterized as bilateralism or, at best, regionalism, as shown by the negotiations among the EC Member States.

The situation has changed considerably since then. For the time being the various forces at work are still pulling in opposite directions, but both national regulation and ICAO control may be eroding as a result of collectivization and thus the time may have arrived for the ICAO to adjust its policies, ensuring that the worldwide uniformity and freedom from political considerations essential for achieving proper standards of safety in civil aviation[5] also conform to the world trend of liberalization. It was not until the launch of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), however, that air transport services were discussed at a more universal multilateral level.

Among the various agreements reached at the Uruguay Round, the General Agreement on Trade in Services (GATS) stands out distinctly as covering all service-related issues. Air transport services were contemplated to be covered and a special Annex on the matter was later appended to the GATS. Disappointingly, however, only a very limited number of areas was covered and it is not to be expected that this situation will improve in the near future under the GATS institutional umbrella. The Annex was up for review in a round of negotiations that was scheduled to be launched in late 1999 at Seattle yet was abandoned as a result of strong opposition from different interest groups.

The present paper purports to examine the effects of the Uruguay Round on the matter of air transport services and their further liberalization. It will first address the motives underlying the inclusion of air transport services in the multilateral trade negotiations (section 2). The next section (3) will be devoted to the examination of the relevant WTO rules dealing with the liberalization of air transport services; after which (in section 4) we shall proceed to comment on possible areas of further liberalization in the WTO framework. Finally, the paper will evaluate liberalization within the WTO framework and offer some tentative conclusions.

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[4] The US-style liberalization was characterized by a wave of new entrants, unbridled competition, shake-outs, mergers, bankruptcies, the formation of hubs and spokes, increased airline concentration leading to the creation of mega-carriers, and most recently, the challenge of low-cost, no-frills transport which is forcing mega-carriers to respond by adopting similar measures. See further J.M.BRUNEAU, "Concentration within the U.S. airline industry: a 'natural phenomenon' or an 'ordinary' monopoly/oligopoly resulting from the behaviors of competitors?", 17 *Annals of Air and Space Law* (1992) 123. However, the EU opted for another type of liberalization, so-called "controlled liberalization", characterized by a gradual relaxation of routes and fares controls.

[5] A.KEAN, "Air law past and future: the challenges of the XXIst century", 17 *Annals of Air and Space Law* (1992) 13.

## 2. MOTIVES UNDERLYING THE INCLUSION OF AIR TRANSPORT SERVICES IN THE NEGOTIATIONS AND THE RELEVANT REGULATORY PROBLEMS

Air transport services as an important element of the economic infrastructure were included in the GATS and further elaborated in a special Annex. Against the planners' hopes and expectations, however, only a marginal part of the sector was covered by the agreement. There existed strong opposition to the air transport services' being included into plurilateral negotiations or, more specifically, into the WTO framework.

### 2.1. Liberalization *versus* Deregulation

The retreat of national governments from intervention in the national economy has been a significant trend in recent years. This phenomenon is widely termed "liberalization" or "deregulation". It was essentially meant to leave economic performance totally or at least increasingly to the manipulation of market forces and proved successful, as shown in the experience of post-war economic development.

Liberalization and deregulation are seemingly identical concepts. However, it is necessary to draw a distinction between them when discussing issues from a plurilateral angle. Deregulation of various industries, governed by a system of economic, public utility-type government regulations, is first and foremost a US phenomenon that began to appear in the mid-1970s[6] and gained pace in other States at whatever respective stage of economic development. A State has the right to decide for itself upon the issue of deregulation and act accordingly. It is both within its sovereignty and internationally a purely unilateral act, though sometimes drawing protest from other States.[7]

It might be said that deregulation takes the form of a network of bilateral or regional agreements; it is here suggested, however, that the applicability of international agreements in the municipal sphere depends on relevant

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[6] P.HAANAPPEL, "Air transport deregulation in jurisdictions other than the United States", 13 *Annals of Air and Space Law* (1988) 79; See also *idem*, "Deregulation of air transportation in North America and Western Europe", in J.STORM VAN 'S GRAVESAND and A.VAN DER VEEN VONK (eds.), *Air worthy* (1985) 89, 93, and id., "IATA tariff co-ordination and competition law", 20 *Air & Space Law* (1995) 82. From 1946 until approximately thirty years later, when the airline deregulation movement was initiated, the international air transport pricing system was essentially one of regulated competition. Note, however, the difference from the EU-type of controlled liberalization, see *supra* n.4.

[7] The newly revised Enforcement Guidelines of the US Dept. of Justice extend extraterritorial jurisdiction of the US antitrust laws far beyond any previously seen or known. In line with this position, two recent US court cases are noteworthy. In *Virgin Atlantic Ltd.* v. *British Airways plc*, as well as in *US* v. *General Electric*, and in *Eskofot* v. *Du Pont*, US courts accepted jurisdiction in essentially Europe-related anti-trust suits. See further L.WEBER, "Modern trends in the antitrust/competition law governing the aviation industry", 20 *Air & Space Law* (1995) 101-109.

national legislation on and for their transformation into national law or their determination as being directly applicable. In other words, the applicability of agreements depends on the consent of the national authority. Therefore, deregulation normally has its effects in the context of one specific jurisdiction, that is, domestically, e.g. within the US (or within the EC market).[8] Meanwhile, spreading the deregulation gospel at the international level became an instrument of national policy with the purpose of breaking through the long-established negotiated and mutually agreed system of mutual advantages and common government-sanctioned rules.[9]

As to liberalization: a State may, of course, decide on its own whether or not to adhere to a liberalization policy. However, liberalization may also be realized in other ways, namely, bilaterally and multilaterally. Instead of unilaterally introducing measures of liberalization, a State may negotiate bilateral or multilateral measures with other interested States and achieve agreement on mutual benefits. The effect of liberalization could thus be more extensive. This has been proven by the experience of liberalization through the GATT. Contrary to deregulation as a national policy-setting act, liberalization is a universal trend that is difficult for individual governments to resist. As already referred to above, in the field of air transport services liberalization came initially in the form of unilateral deregulation in the US,[10] while multilateral liberalization formally entered the stage only at the Uruguay Round of negotiations.

Liberalization as a process usually stems from deregulation. Deregulation of the air transport industry, in its various forms, results in the creation of international and large domestic air transport markets that are more competitive than before. This induces national governments to liberalize beyond national borders in other than a unilateral way. Liberalization *per se* does not, however, necessarily imply deregulation in the strict sense of the word; it could imply introducing new regulations on a voluntary basis. Regulation may be conducive to realizing liberalization. One should not set aside all

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[8] See further H.A.WASSENBERGH, "New aspects of national aviation policies and the future of international air transport regulation", 13 *Air Law* (1988) 20. In Europe, however, the term air transport 'liberalization' rather than 'deregulation' is consistently used. See P.HAANAPPEL, "Europe 1992 and airline (de)regulation", 17 *Annals of Air and Space Law* (1992) 272; id., "Recent regulatory developments in Europe", 16 *Annals of Air and Space Law* (1991) 107, note 1. This also proves that 'deregulation' is used within a national context. The use of the term 'liberalization' in the context of Europe implies that the aim of one EEC market has not yet been achieved, though it is one of the major players in world commerce. For an analysis of an interesting recent case on the external competence of the European Community, see C.RIVOAL, "Opinion of the European Court of Justice on the WTO Agreement (15 November 1995)", 21 *Air & Space Law* (1996) 25-27.

[9] K.HAMMARSKJÖLD, "Deregulation – idealism, ideology or power politics? Focus – Europe", 12 *Annals of Air and Space Law* (1987) 66.

[10] It was followed by the United Kingdom, with the creation in 1971 of the Civil Aviation Authority (CAA) by the Civil Aviation Act. This was some kind of forerunner of a domestic airline deregulation outside the US.

regulations merely for the sake of deregulation, but instead abolish only those that prevent or hinder the development of competition. The final conclusion is that the ultimate goal of deregulation is liberalization, a much broader concept than "deregulation".

## 2.2. General considerations for liberalization of air transport services

Air transport services have traditionally been under the exclusive control of States because of the various considerations of vital national interests involved. Most of all, the firmly held principle of national sovereignty over airspace has succeeded in deterring liberalization, while considerations of national security have also served as an effective excuse. However, with the expansion and maturity of the air transport industry, new trends favouring liberalization have arisen.

First, technological development has brought about drastic increases in aviation ability and capacity. The evolving technology of air transport was one of the key factors that led to the need for regulatory adjustment and spurred fundamental economic change,[11] such as the fact that the success of JetBlue Airways threatens further to undermine the network airline pricing model. Startling developments in the field of aeronautics have challenged the effectiveness of State sovereignty in this area. The use of telecommunication satellites and the incorporation of the ubiquitous electronic developments have played their role in the modernization of the air transport industry. Actually, from a technical point of view, technical borders between states no longer exist.

Secondly, air transport serves as a kind of infrastructure for other services, such as tourism and commercial transactions, which depend on good transport conditions. To take another example: we have witnessed the rapid development of electronic commerce through the Internet in recent years, simplifying some ways of doing business and facilitating direct business with the consumer. Yet these business transactions do not end with the web-site operation, as they still require the transportation of the goods to the consumer. The goal of electronic commerce is achieved only when the goods reach the consumer properly and more expeditiously. Without an adequate transport web and, even more significant, a liberalized and reliable transport system, the rapid and healthy development of electronic commerce is in fact unthinkable. The same is the case with other services.

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[11] L.GIALLORETO, "A retrospective on the reinvention of international civil air transport economic regulation: circa 1994-2004", 19 *Annals of Air and Space Law* (1994) 327. See also P.FLINT, "Lessons to be Learned and Unlearned", http://www.atwonline.com.

In modern society, air transport is becoming increasingly important, compared with other means of transportation.[12] While the regulation of air transport has initially occurred in isolation from that of other modes of transportation, the economic developments between 1944 and 1994 have brought air transport into a broader, common, transportation context.[13] Accordingly, the liberalization of air transport has become very important also for the liberalization of other modes of transportation; a lack of liberalization in one sector hampers the liberalization of other services. In fact, progress and development in the air transport sector has often served as a catalyst for greater economic prosperity, both domestically and internationally.[14]

Thirdly, the success of liberalization in the US and other Western States has offered a good example. The economic prosperity brought about by liberalization has attracted many other states to adopt the same ideas and policies, and the resulting internationalization and globalization of trade in goods and services has become a major theme in international economics. For its part, this development has further strengthened the vital role of air transport services in the national economy. On the one hand, the increased prosperity implies greater utilization and employment opportunities; on the other hand, it means a greater dependence of various economic sectors on air transport services.

Fourthly, the ICAO became aware of the need to include the economic side of the air transport sector into its multilateral regime. In April 1992, the World-wide Air Transport Colloquium was convened by the ICAO to allow the exchange of views on a number of fundamental issues, including on the possible application to international air transport of trade concepts and principles. While there was still some support for bilateralism, high expectations were already expressed in favour of supplementing it with multilateral agreements.[15] Later on, in a 1994 colloquium, the idea of multilateral arrangement received wide support from representatives of various States. Since then, the ICAO has been working vigorously to realize the liberalization of the air transport sector.

Finally, the significance of market forces and the theory of economic efficiency are being widely acknowledged. Governments have increasingly

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[12] Both shippers and passengers now rely to a much larger extent on air transport services, as a result of changing production methods of goods and the development of tourism.

[13] See further P.B.LARSEN, "Air transportation in an intermodal setting", 21 *Annals of Air and Space Law* (1995) 431.

[14] P.S.DEMPSEY, "The prospectus for survival and growth in commercial aviation", 19 *Annals of Air and Space Law* (1994) 163-164.

[15] See the outcome of the ICAO World-Wide Air Transport Colloquium of April 1992, A29-WP/32, EC/5, at 4. The Colloquium reiterated the inapplicability of the MFN Principle, but did bring about a perception of changes towards greater liberalism, which strongly implied multilateralism in air transport.

come to recognize the direct benefits of allowing airlines to operate freely in a market-responsive manner, and the indirect benefits that will spin off for other industries.[16]

An overwhelming impetus for trade liberalization comes from the necessity for countries to improve the functioning of their services market, and thus to raise economic efficiency and promote growth and development.[17] Further economic development requires decreasing costs and increasing reliability of transportation. A proper economic climate and improvement in transportation can become catalysts for economic expansion.[18] The market forces, as an invisible hand, adjust supply and demand and have compelled the aviation industry[19] as well as the State aviation authorities to increase their efforts to succeed in the market place.[20] Formerly, political considerations took priority in matters of type of services, quantity, and so on, thereby sacrificing economic efficiency. This was apparent in the stringent national regulations. Considerations of so-called protection of national security raised costs for domestic consumers and thus rendered domestic services less competitive. This adversely affected the air transport suppliers' ability to make profits and they in turn grew reluctant to improve their services.

With the initiation of liberalization by the US, the question of how to attain maximum economic efficiency in air transport has been taken to a new stage. More and more people readily accept the idea of letting private entrepreneurs free to do what they can do in a much better, cheaper and more efficient way, to the consumer's benefit.[21] [22]

To sum up, it hardly seems necessary to discuss whether to liberalize air transport or not, thus we shall focus our attention instead on finding an optimum way of liberalizing.

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[16] G.LIPMAN, "Multilateral liberalization – the travel and tourism dimension", 19 *Air & Space Law* (1994) 152.

[17] A.SAPIR, "The General Agreement on Trade in Services: from 1994 to the year 2000", 33 *Journal of World Trade Law* (1999) 63.

[18] *Transportation and economic development – a summary of key issues being explored on transportation options and economic development – Wisconsin Translinks* 21, see http://www.bts.gov/smart/cat/ted.html.

[19] The airline industry will strive for the *optimum optimorum* that, due to market dynamics, represents a moving target. See H.B.ROOS and N.W.SNEEK, "Some remarks on predatory pricing and monopolistic competition in air transport", 22 *Air & Space Law* (1997) 156.

[20] See further K.BÖCKSTIEGEL, "Current challenges in the legal regulation of civil aviation", 21 *Annals of Air and Space Law* (1995) 139.

[21] K.C.BERNAUW, "Air courier services and the debate on the postal monopoly", 16 *Annals of Air and Space Law* (1991) 29.

[22] Concerning fair allocation of scarce resources, in particular allocation of slots, see P.HAANAPPEL, "Airport slots and market access: some basic notions and solutions", 19 *Air & Space Law* (1994) 205.

## 2.3. An appropriate arena for the liberalization of air transport services

While many, if not most, States have come to adhere to a common pursuit of liberalizing air transport services, the remaining issue is: by what means: unilateral, bilateral or multilateral?

The unilateral way has been used by almost all States, with any differences in application lying in the extent of liberalization. The beneficial effects have been rather restricted, since arrangements on an international topic imply, as a rule, some balancing of mutual rights and obligations, while usually a State will not unilaterally confer a benefit on other States. Consequently, there has been a preference for bilateral means.

As we have seen, multilateral efforts to introduce liberalization into the field of air transport services have not succeeded. The 1944 Chicago Convention[23] failed to bring about a common commercial framework.[24] Instead, the bilateral way remained a great success.[25] In the bilateral system both parties treat each other as equals. Typically, there are no special concessions making allowances for the respective stage of economic development of the parties.[26] Only when the interests of the two States coincide will they reach an agreement. The application of bilateral agreements enables each State to protect its own airlines to whatever extent it considers necessary and to the extent permitted by its wider interests.

Differences in the contents of the various bilateral air transport agreements have given rise to inequalities in the levels of liberalization in respective air transport services, in the sense that the agreements vary from country-pair to country-pair, reflecting in each case the specific balance of interests and power between the two states concerned.[27] Such an outcome shows the valuable nature of traffic rights.

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[23] Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295, ICAO Doc. 7300/6, 1944 CTS 36. The Convention entered into force on 4 April 1947 and is presently adhered to by approximately 175 States.

[24] Art.6 of the Chicago Convention was regarded as the starting point for the present restrictive bilateralism in the exchange of operational and traffic rights for international scheduled air services. See further H.A.WASSENBERGH, "Parallels and differences in the development of air, sea and space law in the light of Grotius' heritage", 9 *Annals of Air and Space Law* (1984) 163.

[25] The first liberal bilateral air transport agreement was the Protocol to US-Netherlands Air Transport Agreement of 1957, 29 UST 3089, TIAS 8998 (entered into force on 31 March 1978). The US concluded liberal agreements with a wide variety of countries between 1978 and 1982-83. Later several countries other than the US began to adopt bilateral agreements as a possible negotiating strategy. Up till now there are almost 3000 bilateral agreements.

[26] R.EBDON, "A consideration of GATS and of its compatibility with the existing regime for air transport", 20 *Air & Space Law* (1995) 71.

[27] Remarks by K.VEENSTRA, Deputy Secretary General of AEA, at the European Services Network-Meeting of 26 January 1999.

Until recently, the bilateral method has been regarded as the most appropriate means of liberalization of air transport services, given its specific features. It is now being realized, however, that it can be time-consuming, causing unbalanced structures in international air transport; consequently, the bilateral system has come under increasing strain in recent years. It no longer responds adequately to the challenges of a fast changing international business environment and a rapidly integrating and globalizing market.[28] The adoption of "open skies" policies and the progressive liberalization of the international regulatory regime of air transportation have begun to cause some erosion of the traditional bilateralism.[29]

In its stead a multilateral means was suggested, combining the liberal air agreements into one multilateral agreement among the parties to such liberal bilateral air agreements. Nevertheless, such a multilateral agreement may still prove to be some sort of multilateral Bermuda 4 agreement.[30] When we look for the essence of such an arrangement, it is at best a loose regional liberalization; at worst, it is of various bilateral agreements a combination that differs little from genuine bilateralism. While acknowledging its advantages, we cannot deny that it would still entail the shortcomings of bilateralism.[31]

In fact, efforts to liberalize air transport services in a multilateral framework have continued since the 1940s, as the construction of a seamless and waterproof structure for the future of international air transport is possible only by multilateral means. At the time of the drafting of the Chicago Convention the ICAO was suggested as the arena for the accomplishment of this task; efforts to find a multilateral solution to the problem of the economic regulation of air transport failed in 1947.[32] Paradoxically, should the ICAO truly have succeeded, this would have created significant institutional obstacles to the comprehensive liberalization of trade in services.[33] More important

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[28] A.GIL, "The outcome of the 4th ICAO Air Transport Conference and its implications for airports", 20 *Air & Space Law* (1995) 76.

[29] H.A.WASSENBERGH, "The 'sixth' freedom revisited", 21 *Air & Space Law* (1996) 285.

[30] See H.A.WASSENBERGH, "New aspects of national aviation policies and the future of international air transport regulation", 13 *Air Law* (1988) 31-32. The so-called Bermuda Formula is actually a gradual liberalization of the bilateral system.

[31] Concerning the shortcomings of the bilateralism, see ICAO Working Paper No.WATC-5.1 of 6 April 1992. See also H.A.WASSENBERGH, "Commercial aviation law 1998, multilateralism *versus* bilateralism", 23 *Air & Space Law* (1998) 23-24.

[32] See further H.A.WASSENBERGH, "The future of multilateral air transport regulation in the regional and global context", 8 *Annals of Air and Space Law* (1983) 263-264; see also Doc.5230, A2-EC/10, (*ICAO Records of the Commission on Multilateral Agreement on Commercial Rights*, Geneva 1947).

[33] If this sector were left to the disposal of a special agency instead of falling under a general regime, the same exception could be claimed by other services sectors. For example, The International Telecommunications Union could be given charge of the telecommunications services. This could lead to the breakdown of the GATS structure. See further R.JANDA, "Passing the torch: why ICAO should leave economic regulation of international air transport to the WTO", 21 *Annals of Air and Space Law* (1995) 416.

is the fact that the ICAO has, during its history, successfully coordinated technical policy, even though not being directly involved with the economic aspects of air transport.

On its part the WTO, with the GATS in particular, has through its activities developed a vast body of experience in dealing with the commercial transactions in many sectors. Other modes of transport have already been successfully included in the GATS, and the losses of one branch would certainly constitute a benefit to other branches.[34] Actually, the Annex on Air Transport Services specifies that the Council for Trade in Services shall periodically review developments and operations with a view to considering the possible further application of the GATS in the sector.[35] In its turn, GATS will, through the WTO dispute settlement mechanism, generate precedent and procedure of great relevance to air transport liberalization.[36]

## 3. THE PRESENT SITUATION OF AIR TRANSPORT SERVICES WITHIN THE FRAMEWORK OF THE WTO

### 3.1. An overview of the framework

Serving as an important infrastructure for other services, air transport services are inseparable from trade in goods. Although the GATT, as the predecessor of the WTO, dealt with the liberalization of trade in goods and although it was not specifically intended to regulate air transport services, it did to a certain extent touch on this sector, such as in its impact on the trading of aircraft. Some "horizontal" WTO initiatives are important for the air transport area, such as trade facilitation,[37] competition, the environment, and government procurement.[38] Liberalization of these areas will have a significant impact on the air transport services, thus due account is to be taken of the areas when dealing with the liberalization of air transport.

The GATS, although being the agreement specifically to deal with all sorts of services, is currently excluded from the regulation of air transport services except the items covered by the Annex on Air Transport Services. This Annex limits the application of the GATS to three types of services in the sector, although the member states are free to offer further commitments,

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[34] G.WINTER, "On integration of environmental protection into air transport law: a German and EC perspective", 21 *Air & Space Law* (1996) 141.

[35] See para.5 of the Annex.

[36] Loc.cit.n.33.

[37] See *Trade facilitation, issues relating to the physical movement of consignments (transport and transit) & payment, insurance and other financial questions affecting cross-border trade in goods in the European Community* (Council for Trade in Goods of World Trade Organization, G/C/W/133 (98-4853), 3 December 1998).

[38] *GATS 2000 and Air Transport Services* (European Commission non-paper).

which then become binding upon them. Thus, the present legal framework is rather loose and we are still far from full liberalization of air transport services under the WTO. In the following discussion, we shall analyse the agreed rules and arrangements in order to discern how trade in this sector is so far being carried out.

## 3.2. General analysis of the WTO system for air transport services

### *3.2.1. General analysis of the GATS framework for air transport services*[39]

Contrary to trade in goods where there are two types of visible barriers that are easy to detect, trade in services is characterized by a vast number of invisible barriers that need further effort in their identification and, once identified, need further effort to have the existing legal regime modified. This means that liberalization in services will have to proceed gradually and must include mutual benefits to all relevant parties: the process takes time and persuasion, which is the reason why the instant liberalization of the whole of a specific sector is usually met with opposition. Accordingly, the negotiators arrived at a model that, while based on the GATT, was in certain ways quite different, reflecting the intangible and non-storable nature of services.

The GATS consists of three pillars: the *Agreement* itself, the *Sectoral Annexes*, and the *Schedules* outlining each member's negotiated commitments to liberalize trade in services.[40] It formally comprises twenty-nine articles and is intended to cover all tradable services supplied at the international level by any of four modes of delivery.[41]

Two essential provisions form the basis of the GATS: the most-favoured nation (MFN) principle (Article II) and the transparency rule (Article III). The MFN principle prohibits discrimination between suppliers of foreign services and guarantees that any favourable treatment granted to any one country shall also automatically be granted to all other member states. However, although MFN is a general obligation, the GATS contains an Annex

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[39] For a more detailed description of the GATS, see further Y.ZHAO, "The commercial use of telecommunications under the framework of GATS", 24 *Air & Space Law* (1999) 311-316.

[40] See further the presentation by G.SAMSON, Director of the Group of Negotiations on Services Division, General Agreement on Tariffs and Trade, at the World-Wide Air Transport Colloquium, Montreal, 6-10 April 1992, at 3.

[41] Under its Art.I the GATS categorizes the supply of services into four different modes of delivery: the supply of a service across the border can take place by movement of the service itself to the customer (mode 1: cross-border supply), or by movement of the customer to the supplier (mode 2: commercial presence), or by the establishment of a commercial presence in a foreign country (mode 3: consumption abroad), or through the movement of natural persons (staff) on a temporary basis (mode 4). See www.wto.org/wto/new/guide1.htm. According to the WTO Secretariat the most important mode of supply is mode 3. See op.cit.n.37. See also Air transport services (Background note by the Secretariat, Council for Trade in Services, WTO, S/C/W/59 (98-4346) of 5 Nov.1998.

allowing for exemptions. Thus, the coverage of the MFN principle is determined by a so-called negative list.[42] The transparency rule requires Member States to make their rules on, and measures affecting, trade in services publicly known or easily available, thus reducing in international transactions any uncertainty that could defeat the purpose of the regulation.[43]

There are three other liberalization provisions, namely, the *Market Access* principle (Article XVI), the *National Treatment* principle (Article XVII) and the *Domestic Regulation* rule (Article VI). The first principle obliges Member States to open their domestic markets to all services suppliers; the second principle obliges Member States to grant all foreign services suppliers the same treatment as accorded to domestic suppliers, while the third principle prohibits future introduction of discriminatory measures against competition in the markets to the freedom of which the State concerned has committed itself. It is to be noted that the market access and national treatment obligations apply only to the services listed in the schedule of each Member State. The Member States are free to decide upon their respective scales of commitments in the schedule, but once this is done, the Member in question may not later take a contrary action. This freezing mechanism in fact acts as a guarantee of gradual liberalization.

Besides the above provisions, there are twelve other provisions setting out "general obligations and disciplines". Certain obligations are of particular relevance to air transport services. First of all, the *Economic Integration* provision (Article V) allows Members to enter regional agreements on the liberalization of trade without extending the created right to preferential treatment to other Member States. However, one precondition for this entitlement is that the agreement has as its purpose the furthering of meaningful economic integration and progressive trade liberalization. Thus, in the case of the EU, liberalization measures taken in respect of relations among its Members *inter se* would not be extended to other Members of GATS.

Secondly, the *Mutual Recognition* provision (Article VII) allows groups of Members to conclude agreements (or act unilaterally) towards the recognition of another State's domestic standards or criteria for the authorization, licensing and certification of service suppliers as being equivalent to its own. This provision is most closely relevant to regulations in the field of air transport relating to safety issues such as leasing, maintenance and repair, and crew and pilot training services, for example. It allows Member States to keep improving safety standards without imposing on them the obligation of extending recognition to other Members whose standards do not as yet

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[42] A member state may maintain a measure that existed at the entry into force of the GATS although inconsistent with the MFN treatment, provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions. See B.HOEKMAN and M.KOSTECKI, *The political economy of the world trade system* (1995) 131.

[43] P.NICOLAIDES, "Economic aspects of services: implications for a GATT Agreement", 23 *Journal of World Trade Law* (1989) 131.

meet the same requirements regarding levels of protection. Besides, the provision has the merit of spreading such higher safety standards by prescribing the possibility of accession by other interested Member States.

Thirdly, the *Monopolies and Exclusive Services Providers* provision (Article VIII) requires reasonable and non-discriminatory access to service suppliers. Closely connected with this provision, the *(Restrictive) Business Practices* provision (Article IX) recognises that certain business practices may restrain competition and thereby restrict trade in services. This is especially relevant to the field of computer reservation systems. Such practices, which may include subsidies and government procurement, should not be adopted or should be eliminated, as the case may be.

The above provisions set out in general terms an approach on how to liberalize services while leaving specific areas for further negotiations. This is in accordance with the general idea of gradual liberalisation. In order to achieve a prompt adoption of the GATS, some *exemptions* were accepted, like the MFN exemption, environment considerations, etc. Furthermore, the GATS contains several provisions relating to possible *exceptions*: Emergency safeguard measures (Article X); Restrictions to safeguard the balance of payments (Article XII); Security exceptions (Article XIV *bis*). All these exemptions and exceptions, however, may be claimed only on very limited grounds.[44]

### *3.2.2. An analysis of the Annex on Air Transport Services*

During the Uruguay Round of negotiations, it was felt that special features characterized air transport and that these would prevent its inclusion within the general and unconditional application of the GATS discipline.[45] Thus, a separate Annex on Air Transport Services was drawn up to accommodate the needs of the members.[46] It forms an integral part of the GATS and clearly sets out the scope of the Agreement in the field of air transport. Since the GATS is the first successful multilateral liberalization effort in this sector,

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[44] For example, the Annex on Article II Exemptions allows the exemptions only at the entry into force of the Agreement and these exemptions shall be reviewed within no more than five years, should not exceed ten years and shall be subject to negotiation in subsequent trade-liberalizing rounds.

[45] *GATS 2000 and air transport services* (UK Dept. of Environment, Transport and the Regions, <http://www.aviation.detr.gov.uk/consult/gats2000/index.htm>.

[46] For detailed description of national commitments, see ICAO Working Paper A32-WP/52, EC/5, Addendum No.1, of 4 September 1998.

one paragraph of the Annex is dedicated to a system of periodic review.[47] The Annex also provides for the settlement of disputes in the sector.

The Annex consists of six paragraphs. The first three paragraphs define the scope of the Annex and of the GATS with regard to trade in air transport services. Paragraph 1 establishes the primacy of existing bilateral or multilateral agreements that were in effect on the date of entry into force of the WTO agreement, over the GATS. This is based on the consideration that the present supply of air transport services is governed by some 3000 bilateral agreements worldwide, covered by ICAO.

Paragraphs 2 and 3 are closely related. Paragraph 2 explicitly excludes the application of GATS to measures affecting traffic rights and services directly related to the exercise of traffic rights, except as provided in Paragraph 3. This latter paragraph on its part lists three measures covered by the GATS: aircraft repair and maintenance services, the selling and marketing of air transport services, and computer reservation system (CRS) services. This means that the general obligations and principles of the GATS are to apply to these three activities unless a Member claims exemption particularly under the *Annex on Article II Exemptions*.

Paragraph 6 of the Annex on Air Transport Services provides definitions of the three categories of services in the field of air transport to which the GATS is to apply. "*Aircraft repair and maintenance services*" are defined in sub-paragraph (a) as meaning "such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance". This corresponds to what is meant in the industry by the "MRO" concept: maintenance, repair and overhaul. Sub-paragraph (b) defines the "*selling and marketing of air transport services*" as "opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions". It follows from this definition that activities carried out by computer reservation system (CRS) are not covered. Finally, "*Computer Reservation System*" (CRS) services are defined in sub-paragraph (c) as "services provided by computerized systems that contain information about carriers' schedules, availability, fares and fare rules, for which reservation can be made or tickets may be issued". The CRS enables

[47] According to the provision, a periodic review of the air transport services (as listed in the Annex) and the operation of the Annex shall take place at least every five years. The Uruguay Round of negotiations reached its final stage in 1994, thus, it was expected that a new round of negotiations would be launched before the end of 1999 or, at the latest, early in 2000. However, the Seattle Meeting in November 1999 failed to do so.

travel agents to have access to up-to-date information about participating airlines' schedules and fares, and also to make instantaneous bookings.[48]

The GATS members are free to decide upon their commitments with respect to the three services above. Most members made their commitments based on considerations of reciprocity. The EU as a whole has committed itself to opening their markets with respect to all three services listed in the Annex, while the US scheduled a commitment with respect to only one of these services, i.e. aircraft repair and maintenance services. It claimed exemption from the other two services pending further bargaining.[49] There is thus still much progress to be made before full liberalization is achieved.

### *3.2.3. Other commitments of the Member States*

Besides the services discussed above, we should note that some Members have made commitments with respect to other services in the air transport sector. For example, the EU has made commitments on the rental and leasing of aircraft in the "Business Services" section of their schedules under the heading "Rental/leasing services without operators". It is important to note that the GATS principles fully apply to this service since it falls outside the Annex on Air Transport Services. Furthermore, another GATS Annex, on "Movement of Natural Persons Supplying Services Under the Agreement", may similarly be relevant for the personnel involved in the international air transport industry including pilots and flight attendants.[50]

Even under the traditional areas covered by the GATT, given the close connection between transport and goods, there are several subjects with a degree of relevance for the air transport services. For example, the right of transit should be assumed to include the right of air transit, since it does not refer to a specific mode of transportation. Thus, those Countries that have made commitments on transit rights in their national schedules with respect to the trade in goods are obliged to provide the right of air transit, outside the framework of the GATS, but still within that of the WTO.

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[48] B.V.HOUTTE, "Community competition law in the air transport sector", 18 *Air & Space Law* (1993) 284. In order to avoid conflicts the ICAO revised its "Code of Conduct on the regulation and operation of CRS" which then became the "Code of Conduct for computerized reservation systems". The European Civil Aviation Conference (ECAC) gave its approval to the revision at its meeting of June 1994 in Strasbourg. For the text of the Code, see www.icao.org/icao/en/atb/ecp/code-conduct.htm. However, since 1994 new ways of CRSs have appeared, entailing new need for clarification.

[49] See further the Progress Report (22 Feb.1999) of the PPC Working Group on GATS 2000.

[50] The Annex applies to measures affecting natural persons who are employed by a service supplier of a member state, with respect to the supply of a service. However, it does not apply to measures affecting natural persons seeking access to the employment market of a Member State, nor does it apply to measures regarding citizenship, residence or employment on permanent basis.

### *3.2.4. Dispute settlement*

One distinct improvement brought about by the foundation of the WTO is its new dispute settlement mechanism, designated as the most important single contribution of the WTO to the stability of the global economy. The *Understanding on Rules and Procedures Governing the Settlement of Disputes,* incorporating a streamlined dispute settlement mechanism, emerged out of the Uruguay Round of negotiations and is a key text[51] for our subject.

The mechanism starts with bilateral consultations. The Members in dispute are offered the chance to meet and try to find ways to reconcile their conflicting interests. If the consultations yield no results, it is open for both parties to ask for a panel with clear terms of reference and an agreed composition to be appointed by the Dispute Settlement Body (DSB). Even after a panel report has been adopted by the DSB, either party is entitled to appeal on points of law. The defeated Member must within a reasonable period either comply with the report of the panel or the appellate body as adopted by the DSB, or must enter into new negotiations with the prevailing Member to reach agreement on a mutually acceptable form of compensation pending actual implementation. As a last resort, the DSB can authorize retaliatory measures against the losing party.[52]

From this summary description it can be seen that the new mechanism tries to resolve a dispute while maintaining friendly relations between the disputing parties and is more flexible and timely than, and constitutes a great improvement on, the former [GATT] mechanism.[53]

Where air transport services are concerned, the situation is more complex. Thousands of bilateral agreements exist between GATS Members, all providing dispute settlement mechanisms in one way or another. Prior to GATS, all these mechanisms under bilateral agreements and under the Chicago Convention operated smoothly. It is not easy to adopt another mechanism within a short period: furthermore, many Members still have reservations on the function of the WTO in the air transport sector. Paragraph 5 of the Annex on Air Transport Services on periodical review reflects this need for a longer

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[51] The Understanding is contained in Annex 2 to the Marrakech Agreement establishing the World Trade Organization. Text in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (World Trade Organization, 1994) 404-433, and at http://www.wto.org/wto/services/14_disp.htm.

[52] See *Settling disputes: the WTO's most individual contribution*, at <http://www.wto.org/about/dispute1.htm>.

[53] See, for various opinions on the WTO mechanism of dispute settlement, *inter alia*, L.WANG, "Some observations on the dispute settlement system in the World Trade Organization", 29 JWT (1995); E.VERMULST and B.DRIESSEN, "An overview of the WTO dispute settlement system and its relationship with the Uruguay Round agreements: nice on paper but too much stress for the system?", 29 JWT (1995); P.T.B.KOHONA, "Dispute resolution under the World Trade Organization: an overview", 28 JWT (1994); N.KOMURO, " The WTO dispute settlement mechanism: coverage and procedures of the WTO Understanding", 29 JWT (1995).

time to accomplish the drastic change of mechanism and to allow the members to adjust.

Accordingly, if a dispute arises with respect to activities excluded from coverage by GATS under Paragraph 2 of the Annex on Air Transport Services, it is suggested that the dispute settlement procedure provided in bilateral air services agreements or under the Chicago Convention should apply.

With respect to the services to which the Annex is applicable (listed in Paragraph 3), the dispute settlement mechanism of the WTO may of course be invoked, but only so far as the parties concerned have assumed obligations or commitments and, in the light of the above, when the dispute settlement procedures provided for in bilateral air services agreements or under the Chicago Convention have been exhausted. Thus, the new dispute settlement mechanism is in fact supplementary in its nature, with a fair possibility of never being used by the Members. This results in awkward situations that might be detrimental to further liberalization in a multilateral context and that might encourage forum shopping.

### 3.3. Comments on the Annex

Internationalization of the legal framework of civil aviation, at least conceptually, reached an unprecedented level through the inclusion of air transport services in the GATS.[54] However, it is clear from the foregoing analysis that only a marginal part of these services was included in the WTO framework and even in these areas many problems remained. First of all, further clarification of the services covered is needed. Among other things, the lack of a definition of "services directly related to the exercise of traffic rights" is a striking problem. Although a definition of "traffic rights" is provided in Paragraph 6 item (d) of the Annex,[55] there is confusion about the phrase "directly related". This can cause uncertainty in the status of the following services: services auxiliary to all forms of transport such as handling and storage, services that are rendered to passenger flights, and ancillary services of air transport.

A further factor is that developments in technology are matched by rapid achievements in the air transport sector. In the face of innovations, the old structure needs to be reviewed and necessary modifications made to meet each new situation. Several years have passed since the Annex was concluded

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[54] See *GATT Uruguay Round of Multilateral Trade Negotiations* (H.R.Doc.No.195, 103d Cong., 1994).

[55] Para 6 item (d) reads:"'*traffic rights*' mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control."

and during this period significant changes have taken place in the air transport industry. As a result various provisions of the Annex have already become outdated or inadequate. For example, in the field of CRS services the classical pattern has been evolving with the prevalent use of the Internet, thus invoking the necessary accommodation of this new trend.

Given the situation at the time of the negotiations, when air transport services were still governed by the ICAO and the bilateral system, the introduction of multilateral liberalization in this sector really was a revolution; yet even if viewed from a perspective of optimism, the Annex has constituted more a symbol of than an agreement on liberalization. Many delegates stubbornly opposed the inclusion of the sector into the WTO framework. The Annex was adopted only after long deliberations and inter-sectoral exchanges. However, it has proved the possibility of including the sector into a general services framework. Most notably, a periodic review system was set up for further negotiations. The importance of the Annex lies not in the document itself, but rather in what it represents. Thus, it could be extolled for its "pioneer" function in the air transport sector, paving the way for further liberalization. In this sense, it is more important than any other existing agreement relating to the sector.

## 4. A FRAMEWORK FOR FUTURE NEGOTIATIONS ON AIR TRANSPORT SERVICES

### 4.1. General observations

It has been frequently claimed that the present structure of air transport services is rather limited and that much still needs to be done in order to realize genuine liberalization in the sector. The Annex on Air Transport Services may serve as a starting point for these efforts.

Different interest groups have already been preparing new areas for further rounds of negotiation. Although doubts still exist about the inclusion of the sector into the WTO forum, the positive forces have gained the upper hand. Especially, the US and the EU act as the forerunners of liberalization. They have actively advocated the benefits of liberalization and have taken practical steps in determining which areas to open next.[56]

It is widely believed that it is neither possible nor practical to open the whole sector completely in the next round. A more pragmatic way might be to go step by step, using the policy of "nibbling" – as displayed by the Annex on Air Transport Services, gradually realizing the overall liberalization of the sector. Considering the present level of opposition, this may be the only

[56] On 20 October 1998, the European Commission distributed *"GATS 2000 – Questionnaire on EU industry priorities for market opening worldwide"*, by way of preparing for negotiations in the next round.

effective way to encourage more Members to sit down around the negotiation table. Thus, in dealing with the liberalization of air transport services, there should be both short term and long-term goals. We should first determine the services that are urgently needed and which are feasible for negotiations in the next round, and only afterwards pursue the ultimate liberalization in air transport services. In the following part, we shall tentatively explore possible areas for negotiation in the next round and onwards.

Generally speaking, a further application of the GATS to air transport services could be achieved in the following two ways: (1) removing the possibility of exemptions from the MFN principle and making new commitments to market access for the three services covered in the Annex on Air Transport Services; (2) making new commitments on other services not yet covered. The next round of negotiations could serve as a vehicle for either or both types of expansion in the application of the GATS.[57]

### 4.2. Possible areas for liberalization in the next round

Air transport services include a wide variety of services, each of which needs to be addressed individually in the context of GATS.

At present, three of these services are already covered by the GATS. Air traffic rights, on the one hand, are not covered, although they are in fact the tools used for selling and marketing air transport services, on the other, and the two are thus inextricably linked. Excluding air traffic rights from the GATS is in fact a contradiction.[58] Further, we can see from the Uruguay Round of negotiations that the greatest problem lies in the basic principles of the GATS. If this can be resolved, ultimate liberalization could be realized within a foreseeable future. However, it will not be easy for future negotiators to reach common ground in modifying the application of these principles, since these constitute the basis of the GATS framework. In the event of failure there should still be another, more practical, way: negotiating one service at a time, starting from the most feasible. In fact it seems unlikely that worldwide consensus on any wide-ranging liberalization of trade in air transport services through the GATS can be obtained as soon as in the next round of WTO negotiations. On the other hand, it seems equally unlikely that there will be general consensus on maintaining the *status quo* of the present, very limited, GATS liberalization measures in the field of air transport.[59] It may

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[57] *Regulation of International Air Transport Services* (report by the Council of Trade in Services, ICAO Working Paper, A32-WP/52, EC/5, 15 July 1998).

[58] See further R.I.R.ABEYRATNE, "Would competition in commercial aviation ever fit into the World Trade Organization?", 61 *Journal of Air and Space Law* (1996) 835.

[59] See further *Subject: GATS 2000 – preparations for next round of trade negotiations* (by AEA, PPC No.99.03, issued 22 February 1999).

be expected that this dissatisfaction with the *status quo* will prevail in the next round of negotiations.

### *4.2.1. Clarification of certain terms*

The Annex on Air Transport Services was intended to serve as a determination of the scope of application of the GATS in this sector. It sets out to do so by using positive and negative lists of services and, furthermore, extra definitions of four important terms. However, this has not prevented ambiguity. The wording in the Annex has given rise to several reasonable interpretations. Besides, as a result of technical developments, new services have arisen under the three services covered and are causing new applicability problems.[60] Thus, further clarification regarding the applicability of the Annex is called for. A question that could arise is, *inter alia*, whether the remittance of earnings services belongs to the marketing and selling of air transport services. Another question deals with the right to use expatriate staff; many other questions may be anticipated.

### *4.2.2. Applicable general principles and traffic rights*

As discussed above, the fundamental principle governing the GATS is the MFN principle intended to apply to all parties immediately and in all services covered by the GATS, regardless of the sectors in which specific commitments have been made.[61] It is possible to limit or exempt MFN, but only at the moment of signing up to the GATS, and these exemptions and limitations are due for a regular review. The principle has been working fairly well in other sectors. For example, it is generally admitted that in the case of GATT side agreements, non-parties to such agreements who are, however, parties to GATT may benefit indirectly from the provisions of those agreements, since treatment accorded to countries under the side agreement may have to be given to all GATT members pursuant to the MFN principle.[62] Moreover, the cross-sectoral reciprocity inherent in the GATS system gives other States the possibility of benefiting from the comparative advantage which one State may enjoy with respect to the production and marketing of

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[60] For instance, a common, standardized database for all CRSs to enter freely may be required for interlining purposes. Besides, new concerns are being raised over display bias and abusive booking fees in connection with multi-carrier Internet booking sites that use CRSs for the booking engine. See J.W.YOUNG, "Airline alliance – is competition at the crossroads?", 24 ASL (1999) 287.

[61] The European Commission's informative non-paper on general issues relevant to the discussion on air transport and GATS 2000.

[62] See further W.J.DAVEY, "An overview of the General Agreement on Tariffs and Trade", in E.PETERSMANN and M.HILF (eds.), The new GATT Round of Multilateral Trade Negotiations (1988) 19.

a certain good or service.[63] However, when it comes to the sector of air transport, this has aroused strong objection, particularly from the ICAO.

The problem in the field of air transport is that the unconditional application of the MFN clause to air traffic rights is incompatible with the current treatment of international air transport based on reciprocity. The MFN rule requires a State to grant to all members the same degree of access to its market, regardless of whether that State's airlines have access to the other markets: such granting of access would cause disparity of air transport markets.[64] Thus, it is difficult to grant MFN treatment in respect of Third, Fourth and Fifth Freedom traffic rights,[65] and in respect of freedom of capacity and frequency on all routes to/from a specific country. It has been suggested that the ultimate and thus final solution that could satisfy opposition to the inclusion of air transport services into the GATS framework would consist of changing the method of applying the MFN principle to air traffic rights. A number of experts have proposed that the MFN principle should oblige every Member to offer to all other Members the same conditions that it already offers in its most favourable bilateral agreement; this should occur on the basis of reciprocity and, therefore, in exchange for the same condition's being imposed on the other party to the agreement.[66] Through this mode of application of the MFN principle one could prevent countries from taking advantage of the MFN principle without offering reciprocal conditions.[67] Proponents of this approach have argued that it would set in motion a mechanism for progressive multilateral liberalization.

It cannot be denied that air transport services are different from other services in some significant respects. Progressive liberalization in different sectors involves different market structures and results in different consequences of the application of the MFN principle. The potentially absurd

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[63] H.A.WASSENBERGH, "The future of international air transportation law: a philosophy of law and the need for reform of the economic regulation of international air transport in the 21st century", 20 *Annals of Air and Space Law* (1995) 406.

[64] See further STOCKFISH, loc.cit.n.3, at 641.

[65] The Third Freedom refers to the right to discharge traffic from the home country in a foreign country; the Fourth Freedom is the right to pick up traffic in a foreign country bound for the home country; and the Fifth is the right to pick up traffic in a foreign country and convey them to yet another country, provided that the flight originates or terminates in the home country.

[66] Actually, it is not precisely true that the GATS offers no place for the operation of reciprocity. It has even been claimed that during the Uruguay Round the position of reciprocity took gained prevalence. See T.TAKIGAWA, "The impact of the WTO Telecommunications Agreement on US and Japanese telecommunications regulations", 32 *Journal of World Trade Law* (1998) 43. The case of recognition of qualifications under Art.VII GATS and of recognition of foreign prudential regulation of financial services is instructive. See further JANDA, loc.cit.n.33, at 420-421. Furthermore, the MFN Principle also applies to concessions that are granted to non-GATS Members, *e.g.* on a bilateral basis.

[67] VIRGINIA RODRIGUEZ SERRANO, "GATS Annex on Air Transport Services, its shortcomings and possible revision", and R.JANDA, "Government Regulation of Air Transport", 19 February 1999, at http://www.law.mcgill.ca/academics/coursenotes/janda/grat/virginia.html.

results of an inappropriate application of the MFN principle in the field of air transport services should not have the effect of ruling out the possibility of a modified application of this principle in this specific sector. Thus, as suggested above, it is realistic to consider incorporating the notion of reciprocal exchange of equal access into the definition of hard rights, thus combining existing bilateralism with the MFN principle. The MFN principle would in this way be coupled with commitments on market access, establishing a threshold of liberalization beneath which a member is not allowed to go. Over time, this would evolve into a plurilateral, and ultimately a truly multilateral, arrangement.[68]

There is also controversy on the application of National Treatment principle. It is said that, as is the case with the MFN principle, the National Treatment principle too is inappropriate for application to air transport, which should rather be based on balance of economic benefits. This view is championed by the US in particular. It has, however, been refuted as inappropriate from the perspective of global trade liberalization. All air transport suppliers should compete on the same conditions, excluding considerations of protectionism. In the field of other services similar claims of non-applicability of the National Treatment principle have also been rejected. Thus, in view of preceding experience the principle is not to be regarded as an obstacle to liberalization in the air transport services.

### *4.2.3. Services eligible for negotiation in the next Round*

There has been some discussion about other services to be included in the future negotiations. The ICAO has invited experts to pursue research into further liberalization in the sector and is actively pursuing more active participation in the negotiations. The International Chamber of Commerce (ICC) firmly supports further liberalization in the field of air transport[69] and its Committee on Air Cargo Transport has formulated a *Policy Statement on Air Cargo and the WTO* to define its position.[70] The US concern about the new negotiations has manifested itself in proposals on further liberalization in the sector. The EU has the highest number of stakes and is, consequently, even more active in this field. European organizations have, at various levels, been responding positively to negotiations on the subject. The European Commission launched a comprehensive process of gathering information from the member states and from representatives of the European industry, including the air transport industry, while organizing a special seminar on "Air

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[68] See further JANDA, loc.cit.n.3, at 424-425.

[69] See further *Convergence of competition law and policy in the field of air transport with special reference to the EU-US context* (Commission on Air Transport of the ICC, 16 July 1997), http://www.iccwbo.org/Cust/html/310468e.htm.

[70] International Chamber of Commerce, Doc.No.322-3/5 Rev.3 (25 September 1998).

Transport in GATS 2000".[71] A professional organization – the European Services Network (ESN) – was set up and a work programme in relation to the GATS 2000 seminar was developed. The Association of European Airlines (AEA) was also involved in the GATS 2000 preparations[72] and the European Express Organization issued a "Position Statement" regarding the inclusion of postal and express delivery services in the GATS.[73] Still other European organizations are and will also be most interested in the liberalization of the sector. Whatever services the efforts may concern, there is a common understanding that overall liberalization is remote. For the time being, the workable way is to identify several services for consideration. These services will be addressed in the following sections.

*4.2.3.1. Freedom of transit*

The right of transit has been defined as the First and Second Freedoms: the right to fly over another country without landing and the right to make a technical stop without picking up or letting off revenue traffic.[74] These two freedoms enable market access in other countries, facilitate the provision of air transport services, and form the basis of international trade in the field of air transport. On the other hand, the exercise of the freedoms does not affect the commercial interests of the state concerned. Accordingly, these two freedoms cannot be considered to constitute economic assets to be exploited by national governments.[75] Moreover, the freedoms have in fact been indirectly included in the GATT under the commitment of the right of transit. What we need to do in a new round of negotiations is merely specify the matter and emphasize it to the member states. It will, therefore, be an easy item and should be given priority in future negotiations. Actually, there is already an agreement on the subject, *viz.* the International Air Services Transit Agreement of 1944,[76] but this agreement is not widely ratified and is in force among only ten States,[77] hence its limited validity and social impact. It

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[71] This Seminar was held on 20 April 1999 in Brussels to stimulate discussion of the subject.

[72] The AEA, on the one hand, participates with other industries from the services sector in the ESN while, on the other hand, a PPC w/g is developing proposals on a possible extension of the scope of the GATS in the air transport sector.

[73] *Position Statement of the European Express Organization Regarding the Inclusion of Postal & Express Delivery Services in GATS 2000* (1 April 1999), at Http://www.euroexprss.org.

[74] The concept of "freedom of the air" was formulated by the Canadian delegation at the Chicago Conference. See A.F.LOWENFELD, *Aviation law: cases and materials* (1981) 2-6.

[75] *Market Access/Traffic Rights in GATS 2000* (European Commission non-paper, RJF, 29 March 1999).

[76] This Agreement was signed at Chicago on 7 December 1944. See: http://www.lawbusiness.ch/chicago/transit.html.

[77] P.M.DE LEON, "Air transport as a service under the Chicago Convention: the origins of cabotage", 19 *Annals of Air and Space Law* (1994) 534-535.

should be possible to take several provisions of this Agreement and use them as a basis in future negotiations.[78]

*4.2.3.2. Non-scheduled (charter) flights*

The development over the years of increasingly flexible charter rules has progressively led to an erosion of the regulatory distinction between scheduled services and non-scheduled flights. Although Article 5 of the Chicago Convention states that airlines shall be granted the "privilege" of operating non-scheduled services, it also allows states to attach whatever conditions or restrictions they see fit. In practice, some countries have sought to apply such restrictions, for example, by including charter flights within their bilateral air services agreements. The ICAO has pointed out that a discussion about including commitments with respect to non-scheduled services in the Annex could be conducted on the basis of some provisions on market access that appear in bilateral agreements. Considering the close relationship between scheduled and non-scheduled services, it is believed that liberalizing the non-scheduled services would be the first step towards the liberalization of scheduled services.

*4.2.3.3. Air cargo services*

Air cargo is becoming an increasingly important part of the international logistic chain serving trade and industry all over the world. Although, in terms of weight, only two percent of all cargo moves by air, its value accounts for well over a third of all the world trade in merchandise.[79] It represents an essential service for the latter's infrastructure, and the more efficient are the means of transport of a country, the better its system of exports (and imports) works. Air cargo is an industry distinct from passenger services, which are much more subjected to political considerations and the idea of balance of economic benefits.

Air cargo services are closely connected with other modes of transportation, and the fact is that all other means of transportation have been undergoing proper liberalization. As a result inter-modal transportation will never be successful as long as air cargo still remains under its old regime: this has an unwieldy structure that obstructs the forming of further links among different means of transportation. Failing to improve the structure would thwart the liberalization of trade in goods and other services and, in the end, harm the consumers' interests.

It is to be noted that the real possibility that liberalization may occur lies in the fact that there is not much sense in restricting a certain means of

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[78] For example, Arts.I (secs. 1 and 4) and II (sec.1) of the International Air Transit Agreement could provide the basis for an appropriate definition of these two operational freedoms.

[79] Op.cit.n.70.

transport when barriers for the entry of goods are progressively lifted in many countries. This provides the fundamental premise for possible liberalization. However, as we have witnessed, the air transport component of air cargo services is still strongly linked with passenger transport services, while it is still difficult to persuade states to make certain commitments in respect of passenger services at this stage. Since traffic rights are generally less important an issue as far as cargo services are concerned, it has been suggested that the latter be included in the GATS either by focusing on services specifically provided by all-cargo transport aircraft or by adopting an even broader approach that covers all types of cargo operation by air.[80] This might stimulate further liberalization in cargo transportation and serve as breakthrough point for the liberalization of traffic rights.

#### *4.2.3.4. Ownership and control*

Airlines are traditionally a symbol of a State's sovereignty. The relevance of aircraft to the State in times of war has always justified the special status of airlines and aircraft.[81] It has been said that civil aviation has become a part of the face of the state.[82] Indeed, the situation of airlines to a certain extent mirrors the situation of a state. States are thus most interested in protecting national airlines through special measures. The most outright measure is to impose limitations on ownership and control. Actually, suggestions have been made regarding the modification of the traditional criteria of ownership and control, in order to facilitate market access. This would broaden the investment possibilities for carriers and thus increase competition in realizing maximum resources allocation.[83]

Formerly, most bilateral air transport agreements contained clauses allowing states to refuse recognition of a designation of air carriers that are not substantially owned and effectively controlled by nationals of the designating party to the agreement. This was justified by the concept of sovereignty and also by the fear of such possibilities as the dissemination of military and technological secrets, having foreign aircraft in the civil reserve air fleet (CRAF), and terrorism.[84] All this has served to imbue airlines with an artifi-

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[80] *Air Cargo – Issues that could be raised in GATS 2000* (European Commission non-paper, RJF, 29 March 1999).

[81] B.J.H.CRANS, "Liberalization of airports", 21 *Air & Space Law* (1996) 10.

[82] See further H.A.WASSENBERGH, "Regulatory reform – a challenge to intergovernmental civil aviation conferences", 11 *Air Law* (1986) 31.

[83] See further R.DOGANIS, "Relaxing airline ownership and investment rules", 21 *Air & Space Law* (1996) 267.

[84] See further B.M.J.SWINNEN, "An opportunity for trans-Atlantic civil aviation: from open skies to open markets?", 63 *Journal of Air Law and Commerce* (1997) 282.

cial sense of "nationality".[85] The restriction has been abolished among EU member states. The so-called "de-nationalization" has become the modern trend, which means the elimination of the "nationality" criterion for the authorization of designated air carriers, as governments do not wish to interfere with economic aspects of the airline industry.[86] A European Civil Aviation Conference (ECAC)[87] task force recently developed a draft recommendation to replace the traditional ownership/control clause in bilateral air services agreements with a clause stipulating the requirement of a strong link between an airline and its designating State.[88] Under this recommendation, an airline would be required to be established and have its principal place of business in the country of designation, and to hold an Air Operator's Certificate (AOC) from that State. The former criterion -- the nationality of the owners and managers of the airline – is thus no longer relevant.[89] Conceivably, the new concept could be multilateralized through the GATS, provided appropriate negotiating safeguards apply in the prevention of a one-sided outcome. On this point, use could be made of Article XVI of the GATS that, *inter alia*, establishes rules against the avoidance of commitments of market access. Among these rules is the prohibition of limiting participation of foreign capital in terms of maximum percentage of foreign shareholding.

The abolition of the nationality criterion might involve a risk of "flags of convenience" unless certain harmonization efforts are included in the general policy approach.[90] Nevertheless, the main effect of liberalizing the ownership conditions would be to open the possibilities of international mergers, thereby creating the possibility of truly global networks.[91]

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[85] See further Z.J.GERTLER, "Nationality of airlines: a hidden force in the international air regulation equation", 48 *Journal of Air Law and Commerce* (1982) 51.

[86] H.A.WASSENBERGH, "International air transport: regulatory approaches in the nineties", 17 *Air & Space Law* (1992) 68.

[87] The ECAC is an inter-governmental organization founded in 1955. It aims at promoting the continued development of a safe, efficient and sustainable European air transport system. See further http://www.ecac-ceac.org/uk.

[88] See further PPC paper 99.01.

[89] The register of Australia is basically a nationality register not intended to have any role as a register of title and charges. This division also serves a good example. See further W.KOECK, "Introduction to importation, acquisition and financing of aircraft in Australia", 11 *Air Law* (1986) 19.

[90] See *Regulation of International Air Transport Services, Broadening Airline Ownership and Control Criteria* (ITF Civil Aviation Section, Working Paper 87), http://www.itf.org.uk/SECTIONS/Ca/87.htm.

[91] The European Commission non-paper on Ownership/Control, FS, 9 April 1999.

### *4.2.3.5. Ground handling*

During the Uruguay Round of negotiations, ground services were initially included in the draft Annex on Air Transport Services, but were later deleted since many members either filed exemptions from the MFN principle or maintained reservations and limitations.[92] Ground services are the starting point and the finishing point of air transport services. They constitute the basis for the exercise of other air transport services, particularly the exercise of traffic rights. Liberalization of the ground services is conducive to further negotiations on traffic rights. To a certain extent, ground handling services are similar in their character to the three services covered by the Annex as auxiliary services and as such constitute the area most susceptible to liberalization without arousing much opposition.

The problems relating to ground services reside in prevailing restrictions on their handling by the carriers themselves and the absence of competition between independent handling companies. In order to guarantee quality services at an acceptable price level, discriminatory practices and distortions of competition must be abolished and their reappearance prevented in the future by removing current *de jure* and *de facto* restrictions on free access to the market.[93] Against this backdrop the ICAO introduced an element of liberalization by offering the possibility of letting carriers operate their own activities, individually or with other airlines, or to select a provider for themselves.[94] This has now been introduced as a regular item in bilateral instruments.

Ground handling is a very broad sector including different types of services that need to be distinguished.[95] Liberalization in this area opens up safety-sensitive activities and puts new competitive pressures on the relevant companies, influencing the safety culture required in the air transport industry and, consequently, requiring the adoption of safeguard measures with minimum safety standards for ground handling operators.[96]

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[92] *Doing Business/Ancillary Issues in GATS 2000* (European Commission non-paper, RJF, 3 April 1999).

[93] C.DUSSART-LEFRET and C.FEDERLIN, *"Ground handling services and EC competition rules: a Commission initiative to open up ground handling markets"*, 19 *Air & Space Law* (1994) 59; see also R.PADOVA, "Deregulation and competition of ground handling services in EU airports – an Italian perspective", 22 *Air & Space Law* (1997) 203; W.DESELAERS, "Liberalization of ground handling services at Community airports", 21 *Air & Space Law* (1996) 260.

[94] ICAO doc.AT Conf/4-WP/14 (17 May 1994).

[95] For example, servicing and attending aircraft is different from airport management and air traffic control services. See further *supra* n.50.

[96] http://www.itf.org.uk/SECTIONS/Ca/55.htm.

### *4.2.3.6. Aircraft leasing*

Both wet and dry leasing are increasingly important in today's air transport industry. Lease arrangements have become very common and have enhanced the utilization of costly aircraft.[97] As indicated earlier, some GATS members have made commitments on rental/leasing services without operators, a so-called "dry" leasing service. No commitments have, however, been made yet concerning "wet" leasing services, which might significantly contribute to improving an airline's operating efficiency.

The overall status of aircraft leasing in the GATS is not yet clear. Some Countries still adopt a very restrictive approach to leasing. This may be caused by a lack of clarity about which State retains operational control of the leased aircraft, as well as differences in safety oversight requirements, which are necessary to ensure aviation security. Clarity could be improved within the framework of GATS. The principle of transparency may imply an obligation to disclose relevant information and to avoid possible unclear areas.

It may be concluded that the sector can be covered by the GATS, with due account being taken of aviation safety and national security. This could be achieved through clear-cut but sufficiently flexible conditions for the title registration,[98] the maximum duration of wet leases and/or the maximum percentage of wet-leased aircraft in an airline's fleet.[99]

### *4.2.3.7. Other services and the way forward*

Besides the aforementioned services various interest groups have raised other services as subjects for further negotiation, such as airport charges, code sharing,[100] slot allocation, express delivery services, etc. The feasibility of their coverage is still being considered.

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[97] G.F.FITZGERALD, "Convention on international civil aviation: lease, charter and interchange of aircraft in international operations", 1 *Air Law* (1975/1976) 20.

[98] For discussion on title registration, see R.J.GOLDSTEIN, "Aircraft title registration and perfection of lien rights in aircraft", 4 *Air Law* (1979) 2-4; M.J.LESTER, "Aircraft interchange", 4 *Air Law* (1979) 9.

[99] See further *Economic and Regulatory*, athttp://www.ecac-ceac.org/uk/activities/activities-economic.htm.

[100] Code sharing is important for the effective participation of all states. One of the obvious ways for strong air carriers to enable weaker air carriers of foreign states to operate their own international air services is to negotiate a code-sharing arrangement with the foreign air carrier.

## 5. CONCLUSION

### 5.1. Tentative evaluation

Civil aviation is unique in that it has up to now largely remained regulated at the international level by bilateral agreements.[101] The effects of the Uruguay Round on the liberalization of international trade in air transport services so far have been rather limited. The GATS and the Annex on Air Transport Services cover only a limited range of affiliated aviation services, while many other aviation services, including the exercise of various "hard" and "soft" rights, are not yet included. In essence, the GATS and the Annex codify the *status quo* and have established a mechanism for future rounds of negotiations for this sector of services. The actual degree of liberalization has remained dependent on the commitments that states are willing to accept for inclusion into their Schedules. As most countries still have misgivings about the WTO framework for air transport services, it is unlikely that many new markets will soon be opened to competition on the global level.

This paper has revealed the complexity of the integration of the Annex with the Articles of the GATS agreement and the way in which the compromise reached during the negotiations of the Group of Negotiations on Services (GNS) is reflected in the Annex.[102] The reluctance of the members to include hard rights in the GATS can be largely explained by the fear that unbalanced market gains may result from undertaking different commitments governed by the MFN principle. There is a tendency to demand reciprocal treatment, at least for initial market access. It is difficult at the moment to predict the likely outcome of the next round of negotiations. For the EU, the negotiations are closely linked with its internal timetable on the liberalization of air transport services; for the US, the negotiations are closely related to its own economic expansion. In spite of the existing resistance to further liberalization, the advantages of an agreement under the GATS regime, if compared with other, bilateral or regional options, are obvious. For the time being, there is in fact no choice but that of liberalizing within the framework of the GATS.

### 5.2. Implications for developing countries

In the negotiations on the different sectors the possible impact of liberalization on developing countries received special attention. Account was taken of their special needs, particularly the possibility of achieving maximal

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[101] C.LYLE, "Plan for guiding civil aviation in the 21st century represents a renewed commitment by ICAO", *ICAO Journal*, March 1997, http://www.icao.org/icao/en/jr/5202_ar.htm.

[102] A.MENCIK VON ZEBINSKY, "The General Agreement on Trade in Services: its implications for air transport", 18 *Annals of Air and Space Law* (1993) 398.

benefits from their participation. It is necessary for developing countries effectively to participate in the air transport industry while retaining economic independence.[103] It has been widely recognized that freedom of trade should be moulded into freedom to co-operate and that during the time needed for weaker national air carriers to become internationally competitive, the rules should be interpreted and applied in a pragmatic and modern way.[104]

A classic objection to the application of the GATS concerns its possible destructive effects on the economic development and independence of developing countries. Air transport is one of the three objectives that new nations seek to achieve on gaining independence: a central bank, a seat at the UN and a national airline,[105] hence its sensitivity. As developing countries lag behind in the sector, the consequence of competition may be the eclipse of the national airlines from the market and the total dependence of national aviation on foreign suppliers. This would be detrimental to national economic independence and national security. Therefore, the developing countries should be cautious so as to avoid losing control over national development.

In view of all these factors the GATS and the WTO Final Act contain special rules relating to developing countries. First of all, the developing countries may take advantage of exemptions from the MFN principle in order to maintain restrictive market access. The *Understanding on Rules and Procedures Governing the Settlement of Disputes* also provides several preferential measures for developing countries.[106] Furthermore, Article IV of the GATS contains incentives for increased participation of developing countries. The *Decision on Measures in Favor of Least Developed Countries*,[107] forming part of the Final Act of the GATS, establishes preferential treatment for these countries. Thus, it is possible for developing countries to make exceptions to market access or to establish preferential measures. If they choose, they can maintain restricted access to their markets and use these preferential treatments to help adjust to a more competitive environment.

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[103] This concern has been frequently asserted by developing countries. See further: *The Arab States' position on the regulatory frameworks for international air transport* (ICAO, AT Conf/4-WP/89, 30 Nov. 1994); see also the position of the 42 African states, in ICAO doc.AT Conf/4-WP/66 (20 Oct.1994) and of the 16 Latin American and Caribbean States, ICAO, doc.AT Conf/4-WP/90 (30 Nov.1994).

[104] H.A.WASSENBERGH, "De-regulation of competition in international air transport", 21 *Air & Space Law* (1996) 88.

[105] R.S.SOWTER, "Lease finance for airlines", 4 *Air Law* (1979) 12.

[106] The Understanding constitutes Annex 2 of the Marrakech Agreement Establishing the World Trade Organization. For example, Art.4 (10) specifies "During consultations Members should give special attention to the particular problems and interests of developing country Members". In particular, Art.12 (11) provides that the panel report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing Members.

[107] This is a Ministerial Decision adopted by the Trade Negotiations Committee on 15 December 1993.

Developing countries are standing at the gateway into a new era. With their commitments to open their markets and to compete with international suppliers, they face a great challenge. First of all, they have to accept the fact that liberalization is well underway and that no one can obstruct its progress; secondly, they urgently need to develop an operable domestic regulatory policy and an independent regulatory body to overlook the performance of commercial actors; thirdly, they are in great need of experts in the field of aviation and international trade to help adjust national policy and achieve a healthy economic development. The transitional period will be hard in the beginning but could serve as a good opportunity. Developing countries should maximize the benefits of the internationalization of services and move on towards the fast-changing information age.

### 5.3. Closer cooperation between the ICAO and the WTO

A final important item to be dealt with here is the need to clarify the relationship between the regime on air transport services under the auspices of the WTO and the closely connected work of the ICAO as the first multilateral organization in the field. The ICAO is endowed with a broad and precise legislative mandate in the technical field of aviation[108] and a more vague mandate on its economic, regulatory and trade related aspects. In the economic field the ICAO has proved to be unable to provide the institutional framework for the elimination of discrimination and the reduction of barriers in the international trade of air transport services. The WTO, on the other hand, is a specific organization in this field, one that has gained a vast amount of experience and expertise in the international management of trade liberalization and is thus clearly the right forum for the economic side of air transport services. Thus, it has been suggested that the ICAO be in charge of the technical field of the sector and the WTO take the responsibility of the economic field.[109] However, being a technique-intensive industry, it is impossible completely to separate the economic side of air transport from its technical side. Consequently, in the above structure close cooperation between the two aspects is desirable. ICAO involvement in trade in services started at the first Air Transport Conference in 1977, where this issue was first

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[108] Traditionally, aero-politics have focused more on air transportation, but, actually, the ICAO has also dealt with air navigation, which actually gave the ICAO its face. See S.A.KAISER, "Infrastructure, airspace and automation: air navigation issues for the 21st Century", 20 *Annals of Air and Space Law* (1995) 447.

[109] Some authors have suggested three divisions of the air transport industry – the economic side (to be covered by the GATS); the technical side (to be covered by ICAO); and the legal side (to be covered by the Legal Committee of the ICAO).

raised.[110] Since then, the ICAO has maintained an active interest in the Uruguay Round of negotiations. At the fourth worldwide Air Transport Conference under ICAO auspices in 1994 a multilateral framework was proposed.[111] Liberalization in air transport services was publicly recognized as the final goal.[112] This setting of an aim served to provide the impetus towards multilateralism and is in line with the aim of the WTO.

It is clear that the Chicago-based system and the GATS can co-exist.[113] In fact, they are complementary in their functions.[114] First of all, air transport services are to be dealt with from various perspectives: technical, economic and legal. Consequently the two organizations with different assignments in the sector should be taken in close combination with one another. Secondly, the ICAO is specialized in the field of air transport services and constitutes a pool of air transport experts; the WTO, on the other hand, needs the expertise, support and advice of the ICAO for its negotiations towards further liberalization. Thirdly, since it is not yet possible to include all services, particularly the "hard" rights, in the WTO framework, the services not yet so covered should temporarily remain under the ICAO regime. In the longer term, however, the WTO will review the Annex on Air Transport Services and, depending on the progress achieved in ICAO, may indeed extend its scope to air transport traffic rights.[115]

Actually, the ICAO has been rather enthusiastic in preparing for the next WTO round of negotiations. It acknowledges that this new Round will be of great importance to the aviation community since it will include a review of air transport services with an eye on expanding application of the

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[110] See ICAO Council Recommendation 11 (1985) and ICAO General Assembly Resolution A26-14 on trade in services.

[111] *Regulation of international air transport services*, report by the Council on Follow-up Work Requested by the World-wide Air Transport Conference, See further ICAO doc.A32-WP/9, EC/3 (15 May 1998).

[112] See keynote address by A.KOTAITE, president of the ICAO Council, at the session on "Aviation regulation: new millennium – new direction", 56th IATA Annual General Meeting, Sydney, 5 June 2000, www.icao.int/icao/en/pres/pres_sydney.htm.

[113] Some authors have even made a comparison between the constitutional issues of the two organizations. See, for example, MENCIK VON ZEBINSKY, loc.cit. n.108 at 388-390. Such a comparison shows that the economic provisions as contained in the GATS do not appear, or exist to a lesser extent, in the Chicago Convention, confirming that the two organizations regulate different aspects of the matter. Their existence side by side would, consequently, hardly cause conflicts from a constitutional point of view.

[114] Signatories to both would have to comply with both. States parties to the GATS would, as part of their transparency obligations, have to record their existing commitments under the Chicago system with the GATS and file them appropriately. Similarly, any GATS commitments not already recorded with ICAO will have to be filed in accordance with ICAO requirements under the terms of the Chicago Convention.

[115] See further GIL, loc.cit.n.28, at 80.

GATS.[116] A special panel has been set up to deal with this issue and to take a stand on the question of the future framework. The WTO for its part has facilitated these developments. It has afforded observer status to the ICAO and has joined in bringing about a close relationship conducive to a further healthy liberalization of air transport services.[117] Dr. A.KOTAITE, President of the Council of the ICAO, stated, "[T]he objective of ICAO is to contribute constructively to the WTO process and to ensure that the objectives of the international aviation community continue to be met as the international trade system continues to evolve".[118] The ICAO should adopt a new and special role in the future negotiations in order to ensure that the particular characteristics of air transport, and its regulatory structures, agreements and arrangements, are fully understood and taken into account.[119]

## 5.4. Epilogue

Compared to the situation in other industries, the level of international cooperation and joint decision-making in the field of air transport services is unprecedented. This cooperative spirit, together with technical innovation and rising consumer demands, has carried the sector to the threshold of a truly global open market.[120] Confronting the challenge of the twenty-first century, liberalization is unavoidable. We should bravely face this challenge in the quest for a new millennium strategy. In the words of the IATA Director-General PIERRE JEANNIOT, "[t]here is no question that the air transport industry will continue to liberalize. Our main concern is that liberalization proceeds in a manner which produces the best balance of benefits to consumers, airlines and the public interest".[121] After all, it is the global public interest that will decide on what will have to be done in this new millennium.[122]

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[116] "ICAO adopts position on negotiations in World Trade Organization", *ICAO Update*, Nov.-Dec.1999, http://www.icao.org/icao/en/jr/5409_up.htm.

[117] In July 1998 the Council for Trade in Services decided to confer observer status on an *ad hoc* basis for attending the meetings of the WTO. The ICAO would be able to make recommendations during the negotiations and the WTO would take them into account.

[118] http://www.icao.org/icao/en/nr/pio9915.htm.

[119] See further M.A.MAGDONA and L.B.MALAGAR, "The implications of the General Agreement on Trade in Services (GATS) on international civil aviation: should we do away with ICAO", 14 *The World Bulletin* (Special Issue on International Civil Aviation and the Law, Jan.-Apr.1998) 128.

[120] J.W.YOUNG, "Globalism versus extraterritoriality, consensus versus unilateralism: is there a common ground? A US perspective", 24 *Air & Space Law* (1999) 216.

[121] P.JEANNIOT (Director-General of IATA), "Balance the benefits of liberalization", at http://www.iata.org/py/pr99novb.htm.

[122] H.A.WASSENBERGH, "The regulation of state-aid in international air transport", 22 *Air & Space Law* (1997) 165.

# THE ASEAN FREE TRADE AREA (AFTA) AND ITS COMPATIBILITY WITH THE GATT/WTO

Alberta Fabbricotti*

## INTRODUCTION

The Asian economic crisis has caused growing concern, especially considering the spectacular economic development of South and East Asian countries of the last two decades, and has threatened the process of integration under construction in that region.[1] In this paper attention is primarily focused on the Association of South East Asian Nations (ASEAN)[2] and, more specifically, on the ASEAN Free Trade Area (AFTA), which symbolises the recent response of the Southeast Asian countries to other, more advanced, instances of regional economic integration, and to the globalization process.

AFTA represents a challenge also for ASEAN after the unsuccessful programmes for the expansion of trade amongst ASEAN economies and prior to the formation of the free-trade area.[3]

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[1] For a survey of the Asian financial and economic crisis, see, among others, S.CLAESSENS and T.GLAESSNER, *Are financial sector weaknesses undermining the East Asian miracle?* (Washington: World Bank, 1997); P.DIBB, D.D.HALE and P.PRINCE, 'The strategic implications of Asia's economic crisis', 40 *Survival* 2 (1998) 5-26; SHALENDRA D. SHARMA, 'Asia's economic crisis and the IMF', 40 *Survival* 2 (1998) 27-52; 'Trade Implications of the East Asian Crisis', and 'International Financial Instability and the East Asian Crisis', in: (UNCTAD) *Trade and Development Report 1998*, chapters II and III, respectively; 'Asia and the Pacific', in: (UNCTAD) *World Investment Report 1998: Trends and Determinants*, chapter VII; D.K.BROOKS and M.QUEISSER (eds.), *Financial liberalisation in Asia: analysis and prospects* (Paris: OECD, 1999); A.MCINTYRE, 'Institutions and investors: the politics of the economic crisis in Southeast Asia', 55 *International Organization* (2001) 81-122.

[2] ASEAN comprises Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

[3] Before presenting AFTA, it is appropriate to introduce the concept of the *ASEAN Preferential Trading Arrangements* (PTA) which was the predecessor of AFTA. The 1976 *Declaration of ASEAN Concord* (in M. HAAS (ed.), *Basic Documents of Asian Regional Organizations*, Dobbs Ferry, N.Y.: Oceana Publ. (1979), Vol.6 at 321); *ASEAN Documents Series 1967-1988* p.36), the 1976 *Treaty of Amity and Cooperation in Southeast Asia* (Basic Documents etc. Vol.6 at 316; ASEAN Documents

*Asian Yearbook of International Law,* Volume 8 (B.S. Chimni *et al.,* eds.)

It therefore seems important, after a basic description of what AFTA actually is and an explanation of what it entails, to determine its place within the multilateral trading system and, in particular, its compliance with the rules of GATT/WTO.

The notification of the establishment of AFTA and its provisions under the Enabling Clause, which contains a significant relaxation of the conditions for the creation of free-trade areas or customs unions among developing countries, has not given rise to objections.[4] Thus, the mechanism of Article XXIV of GATT, which concerns the assessment of the conformity of regional integration arrangements with the multilateral trading system, may be presumed not to apply in the case of AFTA. A similar reasoning could arguably be followed with regard to a future decision on AFTA compatibility with the rules of the General Agreement on Trade in Services (GATS). In the latter case, however, recourse to the Enabling Clause seems redundant: a special set of rules in favour of developing countries is here provided by Article V in the GATS dealing with economic regional integration in the field of trade

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etc. at 39) and the 1976 *Agreement on the Establishment of the ASEAN Secretariat* (Basic Documents etc. Vol.6 at 345; ASEAN Documents etc. at 165), are among the fundamental documents relating to the launch of economic integration among ASEAN member states, a policy promoted at the Summit of Den Pasar (Bali) in February 1976. Of particular importance is the second of these documents that became, notwithstanding its programmatic nature, the point of departure for increased economic co-operation among the member states since then. The ideas contained in the Treaty of Amity and Cooperation aiming at breathing new life into co-ordination in the economic field were observed and followed by the adoption in 1977 of the *Agreement on the PTA* (Basic Documents etc. Vol.6 at 354; ASEAN Documents etc. at 293) and the approval of several projects of industrial development). The 1977 Agreement granted the ASEAN member states the opportunity to grant preferences to one another on a selective basis. During the Summit of Manila (1987), the ASEAN Heads of Government signed four new agreements to (1) put half of intra-ASEAN trade under the existing ASEAN PTA after five years (*Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangement* (*ASEAN Documents Series 1967-1988* at 302); (2) expand industrial joint ventures (*Revised Basic Agreement on ASEAN Industrial Joint Ventures*, ibid. at 281); (3) freeze and gradually reduce non-tariff barriers to intra-ASEAN trade (*Memorandum of Understanding on Standstill and Rollback on Non-Tariff Barriers among ASEAN countries*, ibid. at 310) and (4) encourage investments by offering an investment guarantee agreement (*Agreement for the Promotion and Protection of Investments*, ibid. at 288). The reduction of tariffs became the most important and widely used instrument of the PTA and it evolved from a product-by- product means to a wider range of products. The PTA, however, failed to significantly increase intra-ASEAN trade. According to most analyses, the reason for this failure was to be found in the relatively small tariff cuts offered and in the extremely small number of products exchanged among the ASEAN countries, in comparison to total number of products traded by the ASEAN countries. See on this issue, *infra*, section 1.

[4] The Enabling Clause (*Decision of CONTRACTING PARTIES of 28 November 1979 on differential and more favourable treatment, reciprocity and fuller participation of developing countries*) provides an important exception to the general principle of most favoured nation (MFN) in favour of developing countries, *inter alia* facilitating agreements amongst those states for the mutual reduction or elimination of tariffs and non-tariff measures on a preferential basis. Text in L/4903, BISD 26S/203; www.wto.org.

in services. Indeed, under its paragraph 3 developing countries are granted flexibility in observing the general requirements for an economic integration agreement as set out in paragraph 1. ASEAN Member States would be entitled, when notifying the ASEAN Framework Agreement on Services (AFAS), to resort to paragraph 3 in order to avoid in-depth scrutiny by the WTO.

The above reasoning is, however, debatable. First, doubt may be raised as to whether ASEAN Member States still fall within the category of developing countries.[5] Indeed, there seems to be no ground for exempting ASEAN Members from compliance with Article XXIV of the GATT if at least certain of these Countries are considered as economically developed or in transition.[6] Secondly, it is questionable whether the duty of notification under the Enabling Clause represents an alternative to the notification requirement of Article XXIV, paragraph 7 of the GATT. This question has never been seriously examined before; it is necessary to collect the relevant data, if not from the flexible monitoring system of WTO, then at least from the ASEAN Members' behaviour.

## 1. THE ESTABLISHMENT OF THE AFTA

The sudden revival of economic regionalism, especially the developments in the European Union and the conclusion of the North-American Free Trade Agreement (NAFTA), pushed the Heads of State and Government of ASEAN at their meeting at Singapore in 1992 officially to announce the creation of the ASEAN Free Trade Area (AFTA).[7]

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[5] See also P.J.DAVIDSON, 'ASEAN: The legal framework for its trade relations', 49 *International Journal* (1994) at 598 and 607. But the contrary has been equally asserted in respect of the period between 1970 and 1979. See P.BURNS, 'The Association of South East Asian Countries (ASEAN)', in J.JAMAR (ed.), *Intégrations régionales entre pays en voie de développement* (Cahiers de Bruges No.41, Bruges: Tempelhof, 1982), at 20, who states that "[t]he ASEAN States can be correctly considered as developing countries".

[6] P.J.DAVIDSON, loc.cit. n.5 at 607-608 rightly remarks that: "[t]he Enabling Clause provides for 'regional or global arrangements entered into amongst less-developed contracting parties'. Although the clause allows a developed country to give preferences to trade coming from developing countries, it does not permit the reverse, that is, preferences given by a developing country to trade coming from a developed country. Moreover, any preferences given have to be non-discriminatory 'in accordance with the Generalized System of Preferences'. Thus, it would appear that a developed country cannot participate in a free trade area on the basis of the Enabling Clause". One could argue that, as far as trade in services is concerned, this preclusion would only partly concern the conformity of a regional agreement with the multilateral rules on trade, because paragraph 3 of Article V of the GATS makes a distinction within the category of regional agreements liberalising trade in services: those *including* developing countries among the participants (letter *a*) from those involving *only* developing countries (letter *b*). As a result, it is admitted that a certain flexibility in regarding the conditions set out in paragraph 1 be granted to "mixed" agreements.

[7] On East-Asian reactions to the challenge of the European Union's 1992 programme, the Canada-US Free Trade Agreement and the efforts to include Mexico into the latter, see H.DICHTER, 'Legal

The new framework of regional economic co-operation, as conceived at the Singapore Summit, is based on three instruments:[8] The *Singapore Declaration*, which represents the first of these instruments, summarises, in a number of programmatic chapters, the understandings gained in the different fields of the activity of the Association. In the field of economic co-operation, the Declaration not only announces the establishment of AFTA, but also determines in detail its aims and its essential working rules; it further outlines instruments to accompany and complement the free-trade area and to deal, for instance, with the search for new models of industrial development, the liberalization of the movement of capital, the improvement of transport, communications, postal services and telecommunications, the strengthening of co-operation with other countries and international organizations, and the promotion of inter-ASEAN investments.[9]

AFTA is only an aspect, although undoubtedly the most relevant, of the programme of economic co-operation planned in the second document, the *Framework Agreement on Enhancing ASEAN Economic Co-operation.*[10] Article 2(A) of this Agreement envisages the realization of the free-trade area within 15 years and, to this end, provides for a Council consisting of the ASEAN Economic Ministers to be charged with its effective implementation. The purpose of the AFTA, as defined in the Singapore Declaration, is the reduction of tariffs between Member States to a level below five per cent through the application of a Common Effective Preferential Tariff (CEPT) scheme.

The CEPT is determined on the basis of a scheme contained in the third document adopted in Singapore, the so-called *CEPT-AFTA Agreement.*[11] According to the definition supplied in Article 1 of this Agreement, the CEPT applies to products originating from ASEAN Member States. Paragraphs 4 and 5 of Article 2 specify that a product is to be considered of ASEAN origin if at least 40% of its content originates from any of the ASEAN Member States and that the schedule fixed for tariff reduction is automatically applicable to all manufactured goods, including capital and processed agricultural products. From the wording of these provisions, in connection with the

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implications of an Asia-Pacific Economic Grouping', 16 *University of Pennsylvania Journal of International Business Law* (1995) 99-154; R.POMFRET, 'Regionalism in Europe and the Asia Pacific economy', in P.DRYSDALE and D.VINES (eds.), *Europe, East Asia and APEC* (Cambridge UP 1998) at 54-55.

[8] On the Singapore Summit and the agreements adopted there, see P.KENEVAN and A.WINDEN, 'Flexible free trade: the ASEAN Free Trade Area', 34 *Harvard International Law Journal* (1993) 224-240.

[9] Singapore Declaration of 28 January 1992, 31 ILM (1992) 498; *ASEAN Documents Series 1991-1992* p.16.

[10] Agreement of 28 January 1992, 31 ILM (1992) 506; *ASEAN Documents Series 1991-1992* p.7.

[11] *Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA)* of 28 January 1992, 31 ILM (1992) 514; *ASEAN Documents Series 1991-1992* p.11.

definition of "agricultural products" in Article 1 paragraph 7,[12] it follows that both primary agricultural products and those that have undergone simple processing yet have retained their original form are excluded from tariff reduction.

As regards the list of products covered by tariff reduction, the system shows a large margin of flexibility. This becomes evident through some important exceptions. One of these is to be found in Article 2, paragraph 3 of the CEPT-AFTA Agreement, according to which a Member State may be exempted for a limited time from including a certain product in the list if that State is not yet ready to include it. Another exception is provided by the escape clause contained in Article 6, under which tariff reduction can be suspended when the import of a product covered by the CEPT scheme increases to such proportions as to cause (or threaten to cause) serious prejudice to the national production of the same item of goods.

What has been said so far refers to the primary free-trade agreement, that is to say, the Singapore Agreement of 1992. Some amendments have subsequently been introduced. These changes have been approved by the ASEAN Economic Ministers at Chiengmai (Thailand) in September 1994 and were couched in a legal form during the Summit Meeting at Bangkok in December 1995.[13] It was decided to move up the implementation of AFTA from 1 January 2008 to 1 January 2003.[14] Moreover, according to the new rules, primary agricultural products would automatically be subjected to the schedule of tariff reduction while those products temporarily excluded from the CEPT scheme in conformity with Article 2 paragraph 3 of the original CEPT-AFTA Agreement were to be gradually included in the scheme before 1 January 2000.[15]

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[12] Art.1 para.7 CEPT-AFTA Agreement reads: "'Agricultural products' means: (a) agricultural raw materials/unprocessed products covered under Chapters 1-24 of the Harmonised System (HS), and similar agricultural raw materials/unprocessed products in other related HS Headings; and (b) products which have undergone simple processing with minimal change in form from the original products".

[13] *Bangkok Summit Declaration on the Progress of ASEAN, Vietnam's Membership, Greater Economic Cooperation and Closer Political Cooperation in International Fora*, Bangkok 15 December 1995, 35 *ILM* (1996) 1063; ASEAN Document Series of 1994-1995, at www.aseansec.org. On content and relevance of these amendments see, *inter alia*, M.ARIFF, 'La liberalizzazione degli scambi e l'AFTA', in FONDAZIONE GIOVANNI AGNELLI (ed.), *Rapporto ASEAN. Il futuro del Sud-Est Asiatico fra integrazione regionale e globalizzazione* (Torino, 1996) at 51.

[14] Art.1, *Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation*, Bangkok, 15 December 1995, at www.aseansec.org.; 6 *AsYIL* (1996) 501.

[15] Art.1, *Protocol to Amend the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area*, Bangkok, 15 December 1995, at www.aseansec.org.; 6 *AsYIL* (1996) 502. Finally, by virtue of a third Protocol (*Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangement*, Bangkok, 15 December 1995, at www.aseansec.org.), the rules of origin which were at the basis of the tariff reductions of PTA (1977 Preferential Trading Arrangements) were replaced by those provided by the CEPT.

Apparently, these amendments were considered essential to conforming AFTA to the requirements concerning the compatibility of treaties establishing economic regional organizations with the multilateral trading system. This topic will be discussed later.

To complete the description of AFTA, it appears important to observe the relationship of ASEAN and its Members with third states. Starting from 1976, a growing and closer partnership had developed with the World's great economic powers,[16] such as Japan,[17] the European Union[18] and the USA.[19] These commercial links have in the long run become vital for the economies of the ASEAN Member States. This is evidenced by the uninterrupted growth of trade to and from third countries during the period from the late 1970s to the mid-1990s.[20] Hence, it is not surprising that the AFTA is unabashedly outward looking in its orientation.

Furthermore, efforts to increase trade within the ASEAN area before the establishment of the AFTA, such as the PTA (Preferential Trade Arrangements) and the projects of industrial development,[21] were relatively unsuccessful in practice.[22] Suffice it to consider that intra-ASEAN trade continued to cover only 30% or even less of all the trade of East Asia.[23] Hence, an inward-looking ASEAN bloc would be disruptive and antithetical to the original purposes, as long as trade diversion were high and trade creation

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[16] In fact, the starting point of this trend is to be found in the Declaration of ASEAN Concord (*Supra* n.3), Art. 6 of which exhorts the member states to "explore all avenues for close and beneficial cooperation with other states as well as international and regional organizations outside the region".

[17] See F.JOYAUX, *L'Association des Nations du Sud-Est asiatique (ANSEA)*, (Paris: PUF, 1997) at 79.

[18] For a survey of the ASEAN-European Union partnership, see U.HIEMENZ and R.J.LANGHAMMER (eds.), *ASEAN and the EC – institutions and structural change in the European Community*, (Singapore: ISEAS, 1988); R.FRID, *The relations between the EC and international organizations. Legal theory and practice* (The Hague-London-Boston: Kluwer, 1995) at 128; DJISMAN S.SIMANDJUNTAK, 'Le relazioni tra Unione Europea e ASEAN: passato, presente e futuro', in AGNELLI (ed.), op.cit. n.13 pp.67-82; M.CARBONIERO, 'Le relazioni UE-ASEAN: sviluppi recenti', 51 *La Comunità Internazionale* (1996) 590-600; CHIA SIOW YUE and JOSEPH TAN (eds.), *ASEAN & EU – forging new linkages and strategic alliances*, (Singapore: ISEAS, 1997); R.J.LANGHAMMER, 'Europe's trade, investment and strategic policy interests in Asia and APEC', in P.DRYSDALE and D.VINES (eds.), op.cit. n.7 at 223.

[19] See M.Y.PIERSON, 'East Asia: regional economic integration and implications for the United States', 25 *Law and Policy in International Business* (1994) 1161-1185.

[20] Ibid. at 1173; P.GUERRIERI, 'Trade patterns and regimes in Asia and the Pacific', in V.K.AGGARWAL and C.E.MORRISON (eds.), *Asia-Pacific crossroads: regime creation and the future of APEC* (London: Macmillan, 1998) at 65.

[21] *Supra* n.3.

[22] On this issue, see ARVIND PANAGARIYA, 'East Asia and the New Regionalism in world trade', 17 *The World Economy* (1994) at 825.

[23] The share of intra-ASEAN trade in world trade is controversial. G.R.SAXONHOUSE, 'Trading blocs and East Asia', in JAIME DE MELO and ARVIND PANAGARIYA (eds.), *New dimensions in*

fairly minimal, and since a major goal of the AFTA is to attract direct foreign investments (DFI).[24]

According to most economic analyses, past attempts to promote intra-ASEAN trade have failed (failure marked by the stagnation of import-export within the area as compared to the impressive expansion of trade with countries outside ASEAN) because of a lack of a complementary nature in productive sectors within ASEAN (that is to say, the over-abundance of identical products) and, as a consequence, the small number of goods exchangeable among its Member States[25] and the limited effect of tariff reductions on intra-ASEAN trade.[26]

The non-complementary nature of productive sectors, in addition to the great diversity among ASEAN Member States in terms of size, economic development, degree of industrialisation, political system and even in religion and culture, fully explains why the Association has never tried to follow a pattern of economic integration similar to the single market that brings together the Member States of the European Union.[27] Yet, as will be demonstrated in the next section, the nature of the AFTA is ambitious: the different

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*regional integration* (Cambridge: UP 1993) at 393, asserts that the amount of trade among member states is around 40% of ASEAN trade in total. This percentage seems modest anyhow compared with intra-area trade in Western Europe (European Union), which exceeds 70% of total trade. The same percentage, however, is high if compared to the intra-regional trade in North America. According to M.G.PLUMMER, 'ASEAN and institutional nesting in the Asia-Pacific: leading from behind in APEC', in V.K.AGGARWAL and C.E.MORRISON, op.cit. n.20 at 286: "In 1994, approximately one fourth of ASEAN trade was intraregional, and even this figure is deceptive, as much of this trade is entrepôt in nature and flows through Singapore; if Singapore is excluded the figure falls to about 5 percent." According to ASEAN (www.aseansec.org), in 1997-1998 total extra-ASEAN exports amounted to approx. US$ 250 billion, while total intra-ASEAN export was approx. US$ 37 billion.

[24] See M.G.PLUMMER, loc.cit. n.23 at 286 and 289.

[25] According to SOMPONG SUCHARITKUL, 'ASEAN Society, a dynamic experiment for South-East Asian regional co-operation, 1 *AsYIL* (1991) at 117: "[O]utstanding statistics concern the over-abundance of identical products rather than complementarity of products to boost intra-ASEAN trade. Three or four members of ASEAN produce as much as 70 to 80 per cent of world production of such as tin (Malaysia, Thailand, Indonesia and Singapore), while coconut oil and palm oil (mainly Malaysia and Philippines) and tapioca or manioc (mainly Thailand and Indonesia) are common export items from ASEAN countries. Energy resources such as gas and petroleum products are exported from Indonesia, Malaysia and the Philippines and to some extent refined and exported from Singapore [...]. In the industrial sectors of late, automobiles, electronics, television sets, VCRs, computers, etc., have begun to constitute significant export items from Singapore, Thailand and Malaysia".

[26] See S.CHATTERJEE, 'ASEAN economic co-operation: past, present and future', in A.BROINOWSKI (ed.), *ASEAN into the 1990s* (London:Macmillan,1990) at 66; J.-R.CHAPONNIERE, 'L'ASEAN: réussite politique ou échec économique?, 57 *Economie Internationale* (1994) at 50.

[27] On differences and similarities between ASEAN and the EC, see H.C.RIEGER, 'The Treaty of Rome and its relevance for ASEAN', 8 *ASEAN Economic Bulletin* (1991) 160-172; P.J.DAVIDSON, loc.cit n.5 at 599-601; COLIN Y.C.ONG, *Cross-border litigation within ASEAN. The prospects for harmonization of civil and commercial litigation* (The Hague-London-Boston: Kluwer, 1997) 33-113.

commitments undertaken by ASEAN leaders in order to complement the creation of the free-trade area with other forms of economic integration in "non-border areas", such as those pertaining to an investment code, the protection of intellectual property and a services agreement, warrant this conclusion.

As regards the features of the economic co-operation among ASEAN countries, as is equally the case in other regional organizations in Asia, such as APEC, the keyword is "open regionalism": in short, regional co-operation to promote regional trade without discrimination against outsiders.[28] The majority of academic economists assert that "open regionalism" has been embraced by the AFTA in its purest form.[29] If this is correct, the AFTA would enhance regional economic liberalization in a manner consistent with the GATT/WTO rules on global liberalization. This is what the last part of the present article will try to demonstrate.

Meanwhile, it is remarkable that ASEAN members often adopt a common position within other international organizations.[30] The Association thus presents itself as a single unit at the international level, showing a consider-

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[28] See R.GARNAUT, 'ASEAN and the regionalization and globalization of world trade', 14 *ASEAN Economic Bulletin* (1998) at 216. Several definitions of "open regionalism" are available nowadays. A study of the *Trade Policy Forum of the Pacific Economic Cooperation Council*, quoted by B.BORA and C.FINDLAY, 'Introduction and overview', in B.BORA and C.FINDLAY (eds.), *Regional integration and the Asia-Pacific* (Melbourne: Oxford UP 1996) at 6, points out that "open regionalism" takes place in trade of goods and services when: "there is a movement towards free trade, that is, a reduction in barriers to trade compared to what might otherwise have been the case (binding existing tariffs would qualify); a reduction in barriers to trade is stimulated by and supported by a consensus between a group of countries located in the same region (e.g. East Asia, or the Pacific); the reduction in barriers to trade is applied country by country in a non discriminatory fashion but possibly not equally by every country in the group. Reductions in trade barriers occur in a number of sectors at the same time". In the opinion of IPPEI YAMAZAWA, 'On Pacific economic integration', 105 *Economic Journal* (1992) at 415, "open regionalism" is by definition an "outward-oriented regional arrangement" that shows the following peculiarities: "it is open, in the sense of not discriminating against the rest of the World; its primary policy focus is economic; it has coordinated decision-making based on consensus, rather than seeking to impose any supra-national authority on participants".

[29] See L LOW, 'The ASEAN Free-Trade Area', in B. BORA and C. FINDLAY (eds.), op.cit.n.28 at 197-206; J.PELKMANS, 'ASEAN and APEC: A triumph of the "Asian Way"?', in P.DEMARET, J.-F.BELLIS and G.GARCIA JIMENEZ (eds.), *Regionalism and multilateralism after the Uruguay Round* (Bruxelles: EIP, 1997), 199-230; M.G.PLUMMER, loc.cit.n.23 at 287; R.GARNAUT, loc.cit.n.28; D.K.DAS, 'Regional trading agreements – the contemporary scenario', 2 *Journal of World Investment* (2001) at 383.

[30] This is what happens *de facto* within the WTO, though ASEAN as such does not enjoy the status of member or of observer in the Organisation. On this issue, see P.J.DAVIDSON, loc.cit.n.5 at 597.

able cohesion that is peculiar to economic and customs unions, but is quite unusual in the case of free-trade areas.[31]

## 2. LEGAL INSTRUMENTS COMPLEMENTARY OR ADDITIONAL TO THE AFTA: THE ASEAN FRAMEWORK AGREEMENT ON SERVICES (AFAS) IN PARTICULAR

During the Bangkok Summit of December 1995, the view was expressed that some bold measures were needed in order to accelerate further economic and political integration among ASEAN countries in the context of the establishment of the AFTA. These measures should serve to broaden the areas of economic co-operation by including services,[32] intellectual property[33] and a new industrial co-operation scheme. Consequently, the Bangkok Summit, in addition to the Amendment Protocols on the acceleration of the implementation of AFTA to 2003 and the expansion of the number of products subjected to tariff reduction[34] produced a *Framework Agreement on Intellectual Property Cooperation*[35] and a *Framework Agreement on Services* (AFAS).[36]

The former of these agreements envisages co-operation in the domain of intellectual property through the establishment of a system of ASEAN

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An exception has, meanwhile, been introduced within the FAO as a particular concession to ASEAN: the right to take the floor has been given to the Association, although not all its members are members of the Organisation (the two non-member nations of FAO are Singapore and Brunei Darussalam). On this issue see R.FRID, op.cit.n.18 at 245-246. The position of ASEAN appears to have different features within the UN General Assembly. M.MARIN-BOSCH, *Votes in the UN General Assembly*, (The Hague: Kluwer, 1998) at 159, notices that: "It would be impossible to measure precisely the effects that trade and economic groupings have had on the voting patterns of their members. The ASEAN nations have had, at least since the seventies, a very high level of coincidence in General Assembly votes. And yet, except for some specific economic issues, they do not appear to seek, as do the members of the European Union, common voting positions beyond the co-ordination offered to them as members of the Group of 77 or the Non-Aligned Movement. Moreover, since 1991, differences among them have appeared, especially regarding social issues in general and human rights in particular. This trend has also become evident within the Non-Aligned Movement and between its members and the Western countries".

[31] But see the opposite opinion of M.MARIN-BOSCH, op.cit. n.30.

[32] On this issue, see ROBERT R.TEH, 'Preferential liberalization of services in ASEAN', in CHIA SIOW YUE and JOSEPH TAN (eds.), *ASEAN in the WTO: challenges and responses* (Singapore: ISEAS, 1996) 164-184.

[33] On the protection of intellectual property rights in ASEAN countries, see GEOFFREY YU, 'Issues in the protection of intellectual property rights in ASEAN: an international perspective', and S. TIWARI, 'Intellectual property rights: an ASEAN perspective', in CHIA SIOW YUE and JOSEPH TAN (eds.), op.cit.n.32 at 71-95 and 98-107, respectively.

[34] *Supra*, ns. 13, 14 and 15.

[35] 35 I.L.M.(1996) 1074; 6 *AsYIL* (1996) 504.

[36] 35 I.L.M.(1996) 1077; 6 *AsYIL* (1996) 507.

patent and trademarks offices.[37] The agreement merely reiterates the obligation of member states to implement intra-ASEAN intellectual property arrangements in a manner in line with their international intellectual property obligations: in particular, those arising from the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs).[38]

The Agreement on Services, on the other hand, aims at purposes beyond the GATS.[39] Among its objectives is, according to Article 1(c) of the AFAS, the liberalization of trade in services "by expanding the depth and scope of liberalization beyond those undertaken by Member States under the GATS with the aim to realising a free trade area in services". Therefore, AFAS deserves special attention: a survey of its relevant provisions including an examination of its compatibility with GATS will be presented in section 5 of this paper. Such an investigation is further stimulated by the inclusion in the GATS (Article V),similarly to the GATT (Article XXIV) but not to the TRIPs, of specific rules applicable to regional integration. Apparently, provisions on regional arrangements were omitted from the TRIPs Agreement because the very broad obligation of national treatment contained in this treaty left little room for customs unions and free trade areas to provide preferential treatment to regional trade partners.[40]

ASEAN economies were severely affected by the financial and economic crisis of the years 1997-1998.[41] In order to regain business confidence and enhance economic recovery in the region, the Member States decided to give priority to the promotion of ASEAN's industrial competitive edge and the encouragement of greater investment flows into the area.[42]

For this purpose, on 8 October 1998 the ASEAN governments concluded a *Framework Agreement on the ASEAN Investment Area* (AIA). Its main objectives are the increase of investments into ASEAN from both ASEAN and non-ASEAN sources, the improvement of competitiveness of ASEAN's economic sectors, and the reduction or elimination of regulations and con-

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[37] For a detailed description of this agreement, see M.BLAKENEY, 'The role of intellectual property law in regional commercial unions', 1 *The Journal of World Intellectual Property* (1998) at 700; M.BLAKENEY and M.WILLIS, 'Intellectual property and regional trade arrangements in Europe, Asia and the Western Hemisphere', 4 *International Trade Law & Regulation* (1998) at 75.

[38] See Art. 2 of the ASEAN Framework Agreement on Intellectual Property Cooperation.

[39] See COLIN Y.C.ONG, op.cit.n.27 at 65.

[40] See *Regionalism and the world trading system* (WTO, Geneva 1995) at 60-61; T.EINHORN, 'The impact of the WTO Agreement on TRIPs on EC Law: a challenge to regionalism', in P MENGOZZI (ed.), *International trade law on the 50th anniversary of the multilateral trade system*, (Milano: Giuffrè, 1999) at 541.

[41] See *supra*, n.1.

[42] On the implications of AFTA for the investment flows and trade patterns in the region, see PREMA-CHANDRA ATHUKORALA and J.MENON, 'AFTA and the investment-trade nexus in ASEAN', 20 *The World Economy* 2 (1997) 159-174.

ditions that may impede the implementation of investment projects in ASEAN.[43]

It is to be noted that promotion of ASEAN industrial competitiveness had also been sought in 1996 through the enactment of a new form of industrial cooperation scheme (*ASEAN Industrial Cooperation (AICO) Scheme*)[44] replacing the *ASEAN Industrial Joint Ventures Scheme*.[45] In short, the AICO Scheme encourages joint manufacturing industrial activities between ASEAN-based companies, granting to AICO products a preferential tariff rate in the range of zero to five per cent.

The AFTA is also complemented by an apposite dispute settlement mechanism. A special *Protocol on Dispute Settlement Mechanism* implementing Article 9 of the Framework Agreement on Enhancing ASEAN Economic Cooperation, providing for the future designation of an appropriate body for the settlement of disputes, was signed on 20 November 1996.[46] The mechanism may pass through five stages, that is to say, consultations, diplomatic means, recourse to the Senior Economic Officials Meeting (SEOM), establishment of Panels, and appeal to the ASEAN Economic Ministers (AEM) .[47]

## 3. THE NOTIFICATION OF THE AFTA UNDER THE ENABLING CLAUSE

The notification of the 1992 agreements establishing the AFTA was addressed to the GATT Contracting Parties requesting that these agreements be examined in the light of the Enabling Clause.[48] The request was based on the argument that the arrangements in question constituted an integral part of the 1977 *Agreement on ASEAN Preferential Trading Arrangements* already

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[43] The 1998 Framework Agreement on the AIA, *The ASEAN Document Series of 1998-1999* (www.aseansec.org.) reiterates (in its preamble) the commitments of the member states to the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol.

[44] *Basic Agreement on the ASEAN Industrial Cooperation Scheme*, Singapore 27 April 1996, *The ASEAN Document Series of 1996-1997* (www.aseansec.org.)

[45] *Supra*, n.3.

[46] *The ASEAN Document Series of 1996-1997* (www.aseansec.org.). Note that the Dispute Settlement Mechanism is to cover disputes arising from the interpretation or application of the 47 agreements listed in Appendix 1 to the Protocol, and future ASEAN economic agreements (Art.1.1 of the Protocol).

[47] For an analysis of the institutional framework and the procedural aspects of the ASEAN Protocol on Dispute Settlement Mechanism, see R.MOHAMAD, 'ASEAN's Protocol on Dispute Settlement Mechanism: a rule-based or political approach', *International Trade Law & Regulation* 2 (1998) 47-54. On the brevity of the Protocol on Dispute Settlement Mechanism, with the intention of promoting, instead, the establishment of a regional arbitration centre, see PEARLIE M.C.KOH, 'Enhancing economic co-operation: a regional arbitration centre for ASEAN?', 49 *ICLC* (2000) 390-412.

[48] L/7111 (30 October 1992).

notified in 1979.[49] By virtue of this precedent, it was assumed that the usual examination carried out by the Committee on Trade and Development (CTD) in compliance with paragraph 4 of the Enabling Clause would take place. The GATT Contracting Parties expressed formally no objection to the above request, although some countries (the US, the EC and the Nordic countries) showed some concern and advanced the proposal that a notification be sent to the Council in order that the agreements be examined fully on their implications for all GATT Contracting Parties.[50] Informal consultations took place on this point, resulting in the conclusion that, at that time, a free-trade area was only an aspiration. Since then, the ASEAN countries have continued to submit to the CTD at least annual information on their agreement.[51]

None of the reporting on the part of ASEAN has so far provoked any close investigation by the CTD. This is the conclusion to be drawn from the records of the meetings of this body.[52] This attitude of the CTD is not surprising, considering that the substantive requirements of the Enabling Clause for regional arrangements entered into among less-developed contracting parties within the GATT/WTO framework are extremely flexible and even vague. The Enabling Clause in fact prescribes that any differential and more favourable treatment provided by those regional arrangements "shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other (GATT) contracting parties" and that it "shall not constitute an impediment to the reduction or elimination of tariffs and other restriction to trade on a most-favoured-nation basis".

As will be pointed out in section 4 of this paper the requirements of the Enabling Clause are less strict than those provided for in both Article XXIV of the GATT and in the *Understanding* on its interpretation. For instance, regarding the liberalization of trade among the Contracting Parties of a regional agreement, the requirements allow the exchange of preferences on a sub-set of products, and the partial reduction, rather than elimination, of

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[49] L/4581 (1 November 1977); *Report of the Working Party adopted on 29 January 1979*, L/4735; *Decision of the CONTRACTING PARTIES of 29 January 1979*, L/4768, BISD 26S/321 and 224, respectively; L/6569 (12 October 1989).

[50] See the communication received from the United States, L/7175 (28 January 1993).

[51] See, for instance, L/7111/Add.1 (16 July 1993); L/7307 (29 Oct.1993); L/7307/Rev.1 (18 November 1993); L/7491 (27 June 1994); L/7546 (2 November 1994); L/7546/Add.1 (3 November 1994).

[52] See, for instance, *Report of the Committee on Trade and Development to the CONTRACTING PARTIES*, L/7567 (9 December 1994), BISD 41S/97, which merely relates that "[t]he Committee also had before it notifications received from the ASEAN Member States (L/7491, and L/7546 and Add.1)" (par.2), and that "[t]he Committee took note of the notifications concerning the GSP schemes and of those received from the ASEAN Member States" (par.3). However, the control on the part of CTD had been a little more thorough when examining the first report on AFTA (L/7111). See *Report of the Committee on Trade and Development to the CONTRACTING PARTIES*, L/7124, of 3 December 1992, in *BISD* 39S/13, paras. 29-32.

trade barriers. This immediately raises questions as to the adequacy of the required notification of arrangements made under the clause and, in particular, as regards which of the WTO Members are entitled to benefit from it.

Thus, it can be argued that, while the approval by the GATT Contracting Parties of the 1977 ASEAN preferential arrangements under the clause was legally and politically grounded, "the economic position of the ASEAN Member States has changed since that time: the status of Singapore as a developing country is certainly questionable, and other ASEAN member-states are also rapidly reaching the point where their claim to this status will be untenable".[53]

## 4. APPLICATION *EX HYPOTHESIS* OF ARTICLE XXIV OF THE GATT TO THE AFTA

While, from a legal point of view, questions of compatibility of the AFTA with the GATT/WTO system are perhaps answered through the Enabling Clause (and, potentially, Article V paragraph 3 of the GATS), this should not preclude a further examination. Above all, it is interesting to verify whether the creation of a free-trade area amongst ASEAN Member States does or does not satisfy the requirements laid down in Article XXIV of the GATT and thus, by analogy, those listed in Article V paragraph 1 of the GATS. Since a developed country cannot, on the basis of the Enabling Clause[54] participate in a free-trade area, a free trade area comprising both developing and developed countries should comply with the provisions of Article XXIV of the GATT in order to be in line with the GATT/WTO. The letter and spirit of the reference in paragraph 2 item (c) of the Enabling Clause to mutual "regional or global arrangements entered amongst less-developed contracting parties" would hardly be compatible with its application to regional arrangements including both developed and less-developed economies. Even though the Clause allows a developed country to accord preferences to trade originating from developing countries (paragraph 2, item (a)), it certainly does not allow the reverse, i.e., preferential treatment accorded by a developing country to trade coming from a developed country. However interpreted, the Enabling Clause may thus allow an arrangement to "raise barriers or to create undue difficulties for" world trade, in spite of its explicit preclusion in paragraph 3 item (a). Thus, as ASEAN Member States reach developed country status, the legal framework of AFTA will have to be changed to bring it into conformity with the general rules of the multilateral trading system.[55]

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[53] See P.J.DAVIDSON, loc.cit.n.5 at 607.

[54] Arguments leading to this conclusion, see *supra* n.6.

[55] See P.J.DAVIDSON, loc.cit. n.5 at 608.

Such a new approach to regional arrangements notified under the Enabling Clause was already adopted with regard to the MERCOSUR Agreement. In this case it was indeed decided that the customs union forming the *Mercado Comun del Sur* be examined not only in the light of the Enabling Clause but also from the perspective of Article XXIV.[56] Under the resulting compromise solution, not in itself considered as setting a precedent, the agreement was monitored both by a Working Party established within the CTD and by the *Committee on Regional Trade Agreements* (CRTA).

Created in 1996 by a decision of the WTO General Council,[57] the CRTA is charged with monitoring all preferential trade arrangements among WTO members.[58] The functions of the CRTA overlap with, but do not replace, the special tasks of the Council on Trade in Goods (CTG), the Council on Trade in Services (CTS), and those of the CTD. Given its general competence *ratione materiae*, that is to say, its jurisdiction over agreements notified under Article XXIV of the GATT, Article V of the GATS or the Enabling Clause, priority will here be given to the practice of the CRTA in this examination into the compliance of the AFTA with the GATT/WTO rules.

The present section discusses the conformity of AFTA rules on trade in goods with the GATT/WTO; the following section compares the provisions of AFAS with those of Article V paragraph 1 of the GATS. Thus, other possible conflicts that may come to light between the rules of AFTA and GATT/WTO, such as in the field of intellectual property or dispute settlement, will not be addressed.[59]

Article XXIV of the GATT deals with free-trade areas in a less severe way than customs unions. The main reason for this distinction lays on the application within a customs union of a single tariff towards goods imported

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[56] Decision of the GATT CONTRACTING PARTIES L/7124 of 3 December 1992, BISD 39S/13.

[57] WT/L/127 of 7 February 1996.

[58] On the CRTA, see A.FABBRICOTTI, 'Gli accordi di integrazione economica regionale ed il GATT/OMC. I parametri normativi e l'opera del CRTA', 14 *Diritto del Commercio Internazionale* 2 (2000), 281-327; 'Gli accordi di integrazione economica regionale ed il GATT/OMC. L'attivazione del regolamento delle controversie', 15 *Diritto del Commercio Internazionale* 4 (2001), 793-810.

[59] States participating in a regional arrangement on trade in goods are invited by the CRTA to supply information on procedures for dispute settlement and on the relationship between the notified agreement in question and other arrangements. See *Standard Format for Information on Regional Trade Agreements*, WT/REG/W/6 (15 August 1996) para.III items 3 ("Dispute settlement procedures – Description of the mechanisms provided for resolving disputes among parties to the Agreement, and its relationship with intergovernmental dispute settlement instruments entered into by the parties under other bilateral, plurilateral and/or multilateral agreements") and 4 ("Relation with other trade agreements – Information relating to whether or not the Agreement establishes any specific relation with other bilateral, plurilateral and/or multilateral trade agreements"). During the CRTA meeting of 29-31 July 1996, the Chairman, speaking on his personal behalf, explained that "the submission of information which was not required specifically under Article XXIV: 5 was useful not only for reasons of transparency but also for understanding the dynamics of the agreement and delegations should feel encouraged to do so". See WT/REG/M/3 (29 August 1996) item C para.7.

from outside the union. Since AFTA is a free-trade area, only paragraphs 4, 8(b) and 5(b) and (c) of Article XXIV will be taken into consideration.[60]

### 4.1. The legal significance of Article XXIV paragraph 4

According to Article XXIV paragraph 4, the creation of a free-trade area is "desirable" as long as its purpose is "to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties (GATT parties/WTO Members) with such territories". Given the vagueness of this language, there has been a continuing debate among jurists as to whether paragraph 4 is legal or political in its nature. The view has been expressed that, from a legal point of view, paragraph 4 has the value of a preamble: hence, it has a merely declaratory character and does not produce any direct and compulsory effect.[61]This leads to the major conclusion that Article XXIV does not entail tests other than those provided for in paragraphs 5-8.

Since the analysis will hereinafter focus on the last-mentioned paragraphs, it should be stressed that ASEAN Member States have always underlined both in public statements and in agreements concerning AFTA the pre-eminence of the GATT rules. Furthermore, they have in particular confirmed their will to maintain unchanged the trading relations with third states.[62]

As described above, AFTA embraces and promotes "open regionalism" on account, among other reasons, of the non-complementary nature of the goods produced by its member states. In this context it is most relevant to recall the 1966 GATT *Working Party* report on "EEC Association Agreements with African and Malagasy States and Overseas Countries and Territories". It was noted in this report that "even if a free-trade area arrangement [...] met all the more specific requirements of Article XXIV, it was unlikely, given that the parties to the Arrangement tended to produce entirely different products, to satisfy the general requirement of paragraph 4 of the Article that free-trade arrangements should be designed to create new trade between the parties and not to divert existing trade".[63] As a logical consequence, the diversity in productive sectors singled out by the *Working Party* as an example

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[60] The order of listing and treatment of these paragraphs follows from the fact that para.8(b) contains a definition of free-trade area; its provisions should therefore be discussed before those of para.5. The same, R.S.IMHOOF, *Le GATT et les zones de libre-échange* (Genève: Georg, 1979) at 57.

[61] See A.FABBRICOTTI, loc.cit. n.58 (2000) at 299.

[62] This corresponds to the results of an investigation into the intentions of ASEAN leaders in AFTA, carried out between 1 January and 7 October 1996 for *The Straits Times* (with its reputation of having the most extensive coverage of ASEAN affairs) and the *Far Eastern Economic Review*. See also M.G.PLUMMER, 'Regional economic integrations and dynamic policy reform: the "special" case of developing Asia', 4 *Asia-Pacific Development Journal* (1997) at 18.

[63] Report of 4 April 1966 (L/2441), in Analytical Index: *Guide to GATT Law and Practice*, 6th edn. (Geneva:1994) at 74.

of non-conformity to paragraph 4, and thus to Article XXIV in general, would presumably not be contended in respect of AFTA Member States.

### 4.2. The "substantially all the trade" requirement

The main condition required in Article XXIV paragraph 8(b) is that "substantially all the trade" between Member States of the free trade area concerned be affected by liberalization. Much has been said about the meaning of the expression "substantially all" and, in particular, on whether a quantitative (in number of products) or a qualitative (in number of productive sectors) criterion should be applied for this requirement to be satisfied.[64] The practice of the CRTA shows that the issue is still controversial.[65] The agricultural sector seems to constitute a substantial obstacle to a settlement of the disagreements: industrialized countries tend to refuse to extend reduction or abolition of tariffs to agricultural products while developing countries urge for a liberalization of the sector.

Turning attention to the AFTA, it would appear that the (Bangkok) arrangements of 1995 should be seen in connection with the "substantially all the trade" requirement. The arrangements had subjected unprocessed agricultural products to tariff reduction. Besides, products that, according to the 1992 CEPT-AFTA Agreement, were temporarily excluded from the scheme of tariff reduction were to be progressively liberalized before 1 January 2000. It now seems clear that these amendments were needed in order to adhere to Article XXIV paragraph 8(b) of the GATT. To this end, ASEAN Member States applied both the qualitative criterion, that of liberalizing the agricultural sector, and the quantitative criterion, of liberalizing almost all the products.

### 4.3. The prohibition to increase tariffs or to restrict other regulations of commerce with third parties

According to Article XXIV paragraph 5(b) of the GATT, the duties and other regulations of commerce maintained in each Member State of a given free-trade area and applicable to the trade with third countries shall not be higher or more severe than those existing prior to the creation of this free-

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[64] See, *inter alia*, J.H.JACKSON, *World Trade and the Law of GATT* (Indianapolis-Kansas City-New York: Bobbs-Merrill, 1969) at 607 *et seq.*; IMHOOF, op.cit. n.60 at 65 *et seq.*; J.HUBER, 'The practice of GATT in examining regional arrangements under Article XXIV', 19 *Journal of Common Market Studies* (1981) 282; D.CARREAU, T.FLORY and P.JUILLARD, *Droit international economique*, 3rd edn. (Paris: LGDJ, 1990) at 124; *Regionalism and the world trading system*, *supra* n.40 at 13 *et seq.*

[65] See, e.g., WT/REG/W/16 (26 May 1997) paras.40-44, and WT/REG/W/21/Add.1 (2 December 1997).

trade area. Apparently, this condition does not raise particular questions; it seems simply to repeat the obligations, concerning tariffs concessions, already binding on all WTO members from the entry into force of Articles XXVIII and XXVIII *bis* GATT.[66] The real meaning and purpose of paragraph 5(b) becomes clear, however, when it is compared to the preceding paragraph 5(a), which applies to customs unions. The focus here is on the effects on trade with third states that would result from the introduction of a single customs tariff, which "shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce" applicable in the member states prior to the formation of the customs union.

Free-trade areas are more limited in scope than customs unions, since they are created for the mere purpose of trade liberalization among member states. The risk of these countries' attempts to compensate for the abolition or reduction of tariffs on goods produced within the area by raising tariffs towards products from outside does indeed exist and should not be underestimated. Hence, not only is the prohibition against acting in this discriminatory way affirmed by paragraph 5(b), but the escape clause of Article XXIV paragraph 6, consisting of new tariff negotiations with third states, covers customs unions only and does not apply to free-trade areas.[67]

It seems that the discussion on the compliance of the AFTA with paragraph 5(b) should start with the obvious point that, with respect to relations with the outside world, this free-trade arrangement implies not the adoption of a single customs tariff, but the reduction of customs tariffs on the products of other member states to less than five per cent.

Nevertheless, it should be asked whether this internal provision can, even though only in an indirect manner, affect the commerce of each of the ASEAN countries with third states. Statistics show that trade of ASEAN member states with countries outside the free-trade area continued to increase after the decision on the formation of AFTA had been taken.[68] Presumably, this result was achieved thanks to the "outward-orientated" policy of ASEAN

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[66] T.FLORY, *Le GATT, droit international et commerce mondial* (Paris: LGDJ, 1968) at 63; R.S.IMHOOF, op.cit. n.60 at 87.

[67] See, for example, the Japanese critical remarks during the examination of the Interim Agreement between the European Communities and Poland within the CRTA: "As everyone was aware, Poland had raised import tariffs from 15 per cent to 35 per cent after signing the Agreement and later given a duty-free quota to the EC. This had caused damage to the industries of many countries, including Japan. In 1992-1993 Japanese car sales to Poland dropped by 40 per cent [...]. Article XXIV:5(b) should be interpreted strictly. Thus, the Parties should not have raised duties. Raising the tariff right after the Agreement had been signed was not consistent with Article XXIV, or, more generally, the principles of the WTO." WT/REG18/M/2 (3 October 1997) para.12.

[68] See, for instance, the tables (9.2 and 9.3, originating from the EC in 1995) supplied by D.J.LANGHAMMER, loc.cit. (Europe's trade, etc.) n.18, concerning the increasing percentage of imports in ASEAN member states of goods originating in the European Union, the USA and Japan, during the years 1991-1994.

and the concern of its members for restrictions on trade with third parties being introduced as a reaction to the reduction of tariffs within the region.[69]

As examined above, such a policy, inspired by the idea of "open regionalism",[70] is closely connected with several features of the Association, such as the gap in economic and political development between member states, and the non-complementary nature of their productive sectors. Hence, the volume of trade (the exports, in particular) between each of the ASEAN Members and third states is bigger than the volume of trade between the ASEAN Member State in question and all other participants to the free-trade arrangement.[71] It is thus obvious that ASEAN Member States would never jeopardise their relations with trading partners outside the free-trade area by creating new and stricter barriers.

Closely related to the above is the question whether rules of origin[72] fall within the "other regulations of commerce", the restriction of which is prohibited by paragraph 5(b). According to the practice of the CRTA, this question should be answered in the affirmative, although a minority of states still consider rules of origin as mere criteria for the administration of intra-regional trade flows and, consequently, of no relevance for commerce with the outside world.[73]

The AFTA rules of origin need to be addressed. The aim of ASEAN (Member States) to keep the AFTA market open to the world outside the area seems confirmed by the rules of origin that are at the basis of CEPT. A provision such as that in Article 2 paragraph 4 of CEPT, stating that AFTA origin is already ascribed to products even if no more than 40% of their content originates from a Member State, indeed shows a tendency to allow third states relatively easy access to the preferential treatment.[74] On the other

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[69] This attitude was apparent in Art.1 of the Framework Agreement of 1992: "Member States shall endeavour to strengthen their economic cooperation through an outward-looking attitude so that their cooperation contributes to the promotion of global trade liberalisation". See also *supra* n.62.

[70] On "open regionalism" in general see *supra*, section 1 (especially n.28). On application of "open regionalism" to ASEAN, see P.DRYSDALE, A.ELEK and H.SOESASTRO, 'Open regionalism: the nature of Asia Pacific integration', in P.DRYSDALE and D.VINES (eds.), op.cit. n.7 p.103 et seq.

[71] On this issue, see D.A.DEROSA, *Regional trading arrangements among developing countries: the ASEAN example* (International Food Policy Research Institute Report No.103, at 25.

[72] Through the use of very complex percentage coefficients, these rules determine the products that should be considered as originating in a particular region and that are, by virtue of the certificate of origin, eligible for liberalisation: especially in free-trade areas, these rules have an immediate and considerable impact on the direction of production and on trade flows.

[73] See A.FABBRICOTTI, loc.cit. n.58 (2000) at 312. The issue has been discussed several times in the GATT Working Parties, now replaced by the CRTA. See *Guide*, op.cit. n.63 at 746 et seq.

[74] By way of comparison, the percentage of 62,5 applied by NAFTA to automobiles indicates a higher degree of protectionism. On this topic, see F.M.ABBOTT, *Law and policy of regional integration: The NAFTA and Western Hemispheric integration in the World Trade Organization system* (Dordrecht-Boston-London: Nijhoff, 1995) at 65. For a comparison of different rules of origin in customs unions and free-trade areas, see D.PALMETER, 'Rules of origin in customs unions and free

hand, the need to promote the localization of the manufacturing process seems already to have been met through the statement that "products worked on and processed as a result of which the total value of the materials, parts or produce originating from non-ASEAN countries or of undetermined origin used does not exceed 60% of the value of the product produced or obtained" are also eligible for preferential concessions, provided that "the final process of the manufacture is performed within the territory of the exporting Member State".

### 4.4. The schedule for establishing the AFTA

According to Article XXIV paragraph 5(c) of the GATT, any interim agreement leading to the formation of a free-trade area shall include a plan and schedule for the establishment of such an integrated area "within a reasonable length of time". Paragraph 3 of the 1994 *Understanding on the Interpretation of Article XXIV* later clarified that the "reasonable length of time" should only in exceptional cases exceed ten years. It is thus arguable that the decision taken at the Bangkok Summit to advance the effective formation of the AFTA to 2003 was in fact an act of enforcement of this time-limit requirement.[75]

## 5. THE COMPATIBILITY OF THE AFTA WITH THE GATS

It remains to be considered whether the *ASEAN Framework Agreement on Services* (AFAS) is consistent with the rules concerning regional integration set out in the General Agreement on Trade in Services (GATS).[76]

The present paper has already demonstrated a certain tendency of the AFTA to comply with the prevailing multilateral trade rules applicable to developed countries. This is reinforced by reading the AFAS in the light of Article V paragraph 1 of the GATS, dealing with the liberalization of trade in services among some of the Parties to the General Agreement.[77] This reading clearly shows that Article III of the AFAS, which contains the essence of the whole Framework Agreement, was conceived in order to comply with the requirements listed in the GATS provision.[78]

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trade areas', in K.ANDERSON and R.BLACKHURST (eds.), *Regional integration and the global trading system* (New York: Harvester, 1993) 326 *et seq.*

[75] See L.LOW, loc.cit. n.29 at 199.

[76] On AFAS, see *supra*, section 2.

[77] For a detailed analysis, see NAGAVALLI ANNAMALAI, 'ASEAN Framework Agreement on Services and GATS – a textual analysis', *International Trade Law & Regulation* 2 (1998) 61-67.

[78] On this topic, see NAGAVALLI ANNAMALAI, 'Liberalisation of trade in services in ASEAN – developments and comments', *International Trade Law & Regulation* 2 (1998) at 58.

Let us compare the two statements. According to paragraph 1 of Article V of the GATS, a preferential agreement on trade in services shall have "substantial sectoral coverage" and shall provide for the absence or elimination of "substantially all discrimination" between the parties in the sectors covered through the "elimination of existing discriminatory measures and/or prohibition of new or more discriminatory measures". In line with these requirements, ASEAN member states undertook in Article III of the AFAS to "liberalise trade in services in a substantial number of sectors within a reasonable time-frame by: (a) eliminating substantially all existing discriminatory measures and market access limitations amongst Member States; and (b) prohibiting new or more discriminatory measures and market access limitations".

There is yet another coincidence. Article V paragraph 6 of the GATS prescribes that: "A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement [...] shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement". Although using a negative formulation, Article VI of the AFAS provides the same when asserting that "[t]he benefits of this Framework Agreement shall be denied to a service supplier who is a natural person of a non-member State or a juridical person owned or controlled by persons of a non-member State constituted under the laws of a Member State, but not engaged in substantive business operations in the territory of Member State(s)". It is to be noted that those instrumental in drafting the AFAS could in fact have ignored the requirement of "substantive business operations" and by way of justification invoke paragraph 3(b) of Article V of the GATS; this provides that, in the event of an agreement exclusively involving developing countries, "more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement".

The AFAS had at the time of writing not yet been notified to the WTO. In view of the foregoing, it appears that there is no reason to suspect that ASEAN Member States would try to evade the control of the CRTA under paragraph 1 of Article V of the GATS. Such a suspicion does not seem to be justified given, among other factors, that the text of the AFAS was elaborated in collaboration with WTO legal advisers.[79]

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[79] Rather, one should wonder if the ASEAN member states would, in notifying the AFAS to the WTO, invoke the cover of Art.V para.3 GATS, which provides a special treatment for economic arrangements among developing countries. The provision corresponds, with special reference to trade in services, to what the Enabling Clause is for trade in goods. It reads: "(a) Where developing countries are parties to an agreement of the type referred to in paragraph 1 [i.e. economic integration agreement], flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and sub-sectors; (b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1, involving only

## 6. FINAL REMARKS

At the very beginning, the AFTA was probably not conceived to be consistent with Article XXIV of the GATT. Rather, it was projected by relying on the exception granted in favour of developing countries, allowing them under the Enabling Clause to conclude preferential trading agreements. Thanks to this exemption from Article XXIV, developing countries have enjoyed virtual "*carte blanche*" in their practice in the formation of free-trade areas or customs unions. Yet it is doubtful whether such a differential and preferential treatment has in fact helped the developing countries to integrate with the world economy or whether it has, on the contrary, retarded this integration.[80] Whatever the case may be, the present study has shown that the ASEAN countries have departed from the practice under the Enabling Clause and have tried to bring the AFTA in conformity with the requirements of Article XXIV of the GATT. The 1995 amendments to the initial AFTA arrangements may have been made for this purpose and AFAS has been drafted to be in conformity with Article V paragraph 1 of the GATS. Consequently, both AFTA and AFAS appear in principle to be consistent with GATT/WTO rules concerning the creation of a customs union or a free-trade agreement among developed countries.

The concern of ASEAN over Article XXIV of the GATT and Article V paragraph 1 of the GATS may in fact have been for different reasons. One explanation may be found in the awkward position of some ASEAN Member States, as they became aware that they no longer fitted within the definition of "developing countries". This is supposedly the case with Singapore, an industrialised or newly industrialising country (NIC),[81] whose growth of *per capita* gross national product is among the higher ones in the world.[82] On the other hand, ASEAN Member States may have been persuaded that transparency would be the most effective means of conferring credibility and respectability upon the AFTA. Indeed, even if Article XXIV of the GATT and Article V paragraph 1 of the GATS are unable to prevent harmful prac-

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developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement." On the special position of developing countries in the GATS, see A.A.KIPPEL, 'Special and differential treatment for developing countries', in T.P.STEWART (ed.), *The World Trade Organization* (Washington D.C.: American Bar Association, 1996) at 656 *et seq.*

[80] The latter conclusion is drawn, *inter alia*, by the Carnegie Endowment Study Group on International Trade, in its report entitled *Reflections on Regionalism* (Washington, 1997) at 30, and by T.N.SRINIVASAN, 'Regionalism and the WTO: is non-discrimination passé?', in A.O.KRUEGER (ed.), *The WTO as an International Organization* (Chicago-London: University of Chicago Press, 1998) at 330.

[81] See D.A.DEROSA, op.cit n.71 at 15.

[82] Wherever these terms are defined, a country's status as "developed", "developing", or "least-developed" is determined primarily with reference to its *per capita* gross national product (GNP). See A.A.KIPPEL, loc.cit. n.79 at 622.

tices, they can at least provide legal cover and can confer a hallmark of transparency to a much higher degree than do the Enabling Clause and Article V paragraph 3 GATS, both of which are suspected of providing the means of avoiding the most-favourite-nation obligation.[83] Besides, ASEAN Member States may have become increasingly self-confident and, consequently, optimistic about the outcome of WTO control under Article XXIV of the GATT and Article V paragraph 1 of the GATS.

The attitude and behaviour of ASEAN described above should be encouraged and commended among the participants in other regional arrangements notified to the WTO under the Enabling Clause. Success in this respect might be achieved by stressing that Article XXIV of the GATT and the Enabling Clause, on the one hand, and paragraphs 1 and 3 of Article V of the GATS on the other, are not mutually exclusive.[84] This view has so far been held only in the case of MERCOSUR, though rather by way of exception than to be considered to have set a precedent.[85]

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[83] See the Report, *supra* n.80.

[84] How the WTO should treat legally regional arrangements on trade in goods including both developed and less-developed economies as members is an issue currently under debate. Three options may be available: (1) the participating states may be requested to conform the RTA in question with the requirements of paragraphs 5 to 8 of Article XXIV GATT; (2) the member states of the arrangement concerned may be requested to notify these RTAs under both the Enabling Clause and Article XXIV GATT; (3) the RTAs in question may be treated in a special and flexible way, which could consist of either allowing different levels of liberalization amongst Contracting Parties; or applying internal rules differently; or introducing transition periods for some of the members; or compensating exemptions with special measures. The third option would appear to be the most appropriate in view of the diversity among the economies within such regional arrangements, as is AFTA. Flexibility is already topical in a number of regional arrangements characterised by diversity of the economies involved, like the Lomé Convention and the special measures applied to Mexico by NAFTA. The legal justification for this kind of arrangements is to be found in the differential treatment accorded to less-developed WTO member states, mainly under the cover of Part IV GATT or by resorting to Art.XXV, par.5 GATT (Waiver). However, since excessive differential measures may divert into protectionism, which is deemed to be detrimental to the cause of regionalism – that is to say to both regional liberalisation efforts and regional integration and co-operation – it seems desirable that new, balanced, solutions be studied and promoted. On this topic, see YOSHI KODAMA, *Asia Pacific economic integration and the GATT-WTO regime* (The Hague, London and Boston: Kluwer, 2000) at 172.

[85] See *supra*, section 4, esp. n.57.

# THE FISHERIES POLICY OF JAPAN UNDER THE NEW LAW OF THE SEA

Mizukami Chiyuki*

## 1. INTRODUCTION

With the coming of the so-called 200-mile age, Japan's fisheries policy has changed greatly. Japan, which once espoused the idea of narrow territorial seas and vast high seas and was opposed to the concept of a 200-mile resource zone or an exclusive economic zone, has gradually accepted the idea and now has its own exclusive zone.

Today, Japanese fishing vessels are being phased out from the 200-mile zones of foreign countries. For example, the *Japan-US Fisheries Agreement*, which provided for conditions of access and operation for Japanese vessels in the 200-mile zone of the US, lost its validity at the end of 1991. Also, the catch quota for Japanese vessels in the Russian 200-mile zone, determined by the Japan-Russian fishery talks, has been decreasing.

Partly because the areas in which Japanese fishing vessels operate are becoming smaller and partly because Japan's 200-mile exclusive economic zone, established in 1996, is the world's seventh-largest, the Japanese Government is now paying greater attention to the preservation and management of living resources within its zone. For example, Japan in 1997 introduced the total allowable catch (TAC) system for its fishing vessels. Under this system Japan decides each year the total allowable quota for each main species.

Moreover, in the field of high seas fisheries, Japanese vessels have been increasingly regulated by international conventions. With the decrease of high seas fish stocks and straddling stocks, and as a result of international pressure on high seas fishing, Japan has changed its fisheries policy to attaching more and more importance to the preservation and management of fisheries resources based on scientific evidence.

This paper will discuss the fisheries policy of Japan under the New Law of the Sea.

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## 2. THE TERRITORIAL SEA

Through applying the *Law on the Territorial Sea* of 1977, Japan extended its territorial sea from three miles to twelve miles, except in the five international strait areas where the territorial sea remains three miles. The reasons why Japan extended its territorial sea were to keep up with the world-wide trend of enlarging the territorial sea to twelve miles and, more directly, to keep foreign fishing vessels, mostly Russian ships, out of the nearby sea. At the time when Japan enacted the 1977 law, Russian fishing vessels operated in the Pacific Ocean off Hokkaido and Honshu, and southward as far as the Izu Islands, damaging the fishing nets of Japanese fishing vessels and affecting the amounts of fish caught by Japanese vessels.

When Japan ratified the *United Nations Convention on the Law of the Sea* (UNCLOS) in 1996, it revised the Law on the Territorial Sea and the Contiguous Zone to adopt the system of straight base lines and contiguous zone; (through the revision the name of the law was changed into the Law on the Territorial Sea and the Contiguous Zone). Among the merits of adopting straight base lines, as expressed by a Government official in the Diet, was that the areas where fishing by foreigners was banned would become larger and that it would become easier to enforce fishing laws in intricately configured coastal areas.

In 1997, several cases occurred in which South Korean vessels were seized by Japanese patrol boats in Japan's thus enlarged territorial sea. In some of them, Korean fishermen were fined on summary verdicts.

In the Daedong No.909 case, a Korean fishing vessel was seized off Hamada, Shimane Prefecture, at a point beyond twelve miles from the coast but within Japan's new territorial sea. Under the 1965 *Japan-Korea Fisheries Agreement,*[1] which was still in force at the time of the seizure, the flag state had exclusive enforcing jurisdiction beyond twelve miles from the coast. The Hamada Branch of the Matue District Court rendered a decision on 15 August 1997.[2] It threw out the indictment against the captain of the vessel, saying that under the Japanese constitution the Japan-Korea Fisheries Agreement had priority over Japanese domestic law, that is, the Law on the Territorial Sea and the Contiguous Zone. According to the decision, the point where the Daedong No.909 was seized was beyond the twelve-mile fishing zone as established by the Agreement, and thus at a place where only the flag state had enforcement jurisdiction.

The Matue Branch of Hiroshima High Court, on 11 September 1998, annulled the decision of the Hamada Branch of the Matue District Court and referred the case back to the District Court, saying that the point where the Daedong No.909 was seized had been within the Japanese territorial sea from

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[1] Text of the Agreement in SHIGERU ODA (Ed.), *The International Law of the Ocean Development* (1975) at 554.

[2] Matue District Court, judgment 15 August 1997, Case No.(wa) 35 (1997).

1 January 1997. According to the decision of the Matue Branch, the Law on the Territorial Sea and the Contiguous Zone was enacted in accordance with the United Nations Convention to which Korea was also a party, so that Japanese authorities had jurisdiction of enforcement within the territorial sea as determined by it.[3]

On further appeal by the defendant the case was dealt with by the Supreme Court. The No.3 Petty Bench of the Supreme Court upheld the decision of the Matue Branch of Hiroshima High Court on 30 November 1999.[4]

In another case in which a Korean fishing vessel was seized by a Japanese patrol boat while the fishing vessel was operating within the newly determined territorial sea off Nagasaki, the Nagasaki District Court sentenced the captain to 30 months in prison, suspended for three years, and fined him 1.5 million yen. The court also sentenced two members of the crew to 18 months in prison, suspended for three years. The court held that in the waters declared Japanese territorial sea under the Law on Territorial Sea and the Contiguous Zone, Japan had enforcement jurisdiction and that the bilateral agreement did not restrict Japan's control over the area.[5] The Fukuoka High Court on 28 April 1999, and The No.3 Petty Bench of the Supreme Court on 30 November 1999, upheld the decision of the Nagasaki District Court.[6]

## 3. THE EXCLUSIVE ECONOMIC ZONE

When the problem of the exclusive economic zone was considered at the earlier sessions of the Third United Nations Conference on the Law of the Sea, Japan was not willing to accept the idea of a 200-mile resources zone. The delegate of Japan at the second session of the Conference, which was held in Caracas in 1974 said:

> "For Japan, the sea areas beyond the territorial sea should retain basically the character of high seas. It had been argued that the freedom of fishing in the high seas could be abused, but it was surely not appropriate to abolish a freedom because of the risk of abuse.
>
> Although it was true that in certain limited cases, freedom of access to fishery resources might have led to over-exploitation and depletion, it was an exaggeration to contend that the danger of depletion of world fishery resources was imminent or omnipresent. The truth of the matter ... was that despite the popular belief to the contrary, the number of stocks that were actually depleted, in the sense that their

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[3] Hiroshima High Court, judgment 11 September 1998, Case No.(u) 32 (1997).
[4] Supreme Court, judgment 30 November 1999, Case No.(a) 1137 (1998).
[5] Nagasaki District Court, judgment 24 June 1998, Case No.(wa) 15 (1998).
[6] Fukuoka High Court, judgment 28 April 1999, Case No.(u) 221 (1998); Supreme Court, judgment 30 November 1999, Cases Nos.(a) 764 and 855.

> productivity had been significantly reduced, was still small. The world catch could thus be increased substantially before the level of full utilization was reached."[7]

He then emphasized that the new convention should contain a general obligation for all States to adopt conservation measures and should lay down certain basic principles relating to such measures. These should include the need to base decisions on the best scientific evidence available, the requirement of consultation with appropriate international or regional organizations, the principle of non-discrimination among fishermen, and recognition of the special status of the coastal state with regard to conservation. He added:

> "If the proposed 200-mile economic zone was adopted, the major fertile fishing grounds of the world come under the exclusive jurisdiction of several coastal states, including some highly developed countries. That fact showed ... that acceptance of the exclusive economic zone as currently conceived would accentuate rather than reduce existing inequities."[8]

It was in 1976 that the fishery interests in Japan began reconsideration of Japan's negative attitude.[9] However, when the Japanese Government decided in that year to extend its territorial sea from three miles to twelve miles, it had no intention of establishing a 200-mile zone. However, actions by the Soviet Union and the United States in that same year caused Japan to change direction. In the course of drafting a territorial sea law, the Soviet Union in February 1976 extended fishery jurisdiction to 200 miles off its coast. Similarly, the United States set up a 200-mile fishery zone through the Magnuson Fishery Conservation and Management Act. Japan then decided to establish a 200-mile fishing zone in order to stand on an equal footing in fishery talks between Japan and the Soviet Union.[10]

In conformity with this change of policy, Japan established a 200-mile fishing zone through the *Law on Provisional Measures relating to the Fishing Zone* of 1977. Under the Law, Japan claimed "jurisdiction" over fisheries within the fishing zone,[11] unlike other countries that claimed "sovereign rights" or "exclusive jurisdiction" for the purpose of fishery or resource control within their respective 200-mile zones. The Enforcement Order on the Law on Provisional Measures refrained from setting up a fishing zone in the area of the Sea of Japan west of the line 135°E and the East China Sea, a part of the Pacific Ocean adjoined thereto, the Yellow Sea, because the Republic of Korea and China did not have a 200-mile zone. Moreover,

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[7] Third United Nations Conference on the Law of the Sea, Official Records, Vol.2 (1975) 217.
[8] Ibid.
[9] MOTOO OGISO, "Japan and the UN Convention on the Law of the Sea", 25 *Archiv des Völkerrechts* (1987) 73.
[10] CHIYUKI MIZUKAMI, *Nihon to Kaiyoho* [Japan and the Law of the Sea] (1995) 63-69.
[11] Art.2

the fishery control within the fishing zone was directed towards Soviet fishing vessels, whereas Korean and Chinese fishing vessels were exempted from the application of the Law although small parts were applicable to them.

Japan ratified the United Nations Convention on the Law of the Sea on 20 June 1996. To implement Part V of the Convention, it enacted the *Law relating to the Exclusive Economic Zone and Continental Shelf*, the *Law on the Exercise of Sovereign Rights concerning Fisheries in the Exclusive Economic Zone, the Law relating to the Preservation and Management of Marine Living Resources* and, in addition, amended some of its existing laws.[12]

The *Law relating to the Exclusive Economic Zone and Continental Shelf* established a 200-mile exclusive economic zone. The Law stipulates the establishment of the exclusive economic zone as being a zone in which Japan exercises its sovereign rights and other rights as a coastal State as prescribed in Part V of the UN Law of the Sea Convention. Unlike the case of the fishing zone, the exclusive economic zone was set up around all the coasts of Japan, taking into account Japan's basic stand on Takeshima and the Senkaku Islands. Of course it could be expected that the Republic of Korea and China would react strongly.[13] In the case of Takeshima, it is agreed by Japan and the Republic of Korea that the territorial problem over the island and the issues of the delimitation of the exclusive zone and fisheries that had accompanied the establishment of the exclusive economic zone should be handled separately.[14]

The purpose of the *Law on the Exercise of Sovereign Rights concerning Fisheries in the Exclusive Economic Zone* is to provide necessary measures for the exercise of sovereign rights over fisheries in the exclusive economic zone.[15] This includes measures to preserve and manage marine living resources appropriately by properly implementing the provisions of the UN Law of the Sea Convention. The Law repealed the 1977 *Law on Provisional Measures* and replaced it with another that contained changes in several respects. One of the more important changes was the deletion of the exception of highly migratory species from the requirement of permission for foreigners to catch these species. Japan now claims, as do other countries, including

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[12] MORITAKA HAYASHI, "Japan, New Law of the Sea Legislation", 12 *The International Journal of Marine and Coastal Law* (1997) 570-580. For the text of the Law on the Exclusive Zone and the Continental Shelf, see (United Nations) *Law of the Sea Bulletin* No.35 (1997) 94.

[13] TOSHIHISA TAKATA, "The conclusion by Japan of the United Nations Convention on the Law of the Sea (UNCLOS) and the adjustment of maritime legal regime", 39 *JAIL* (1996) 137.

[14] Ibid at 140. See also *The Daily Yomiuri* of 22 February 1996; *Nihonkeizai Shimbun* of 8 August 1996.

[15] Art.1.

the United States, jurisdiction over highly migratory species within its 200-mile zone.[16]

Under the above Law foreigners shall not engage in fishing or catching, nor in taking marine animals and plants within the exclusive economic zone (with the exception of the area referred to in the subparagraphs of Article 4) without permission from the Minister of Agriculture, Forestry and Fisheries, except if, *inter alia*, the catching and taking concerned is of an insignificant nature.[17] The Minister shall not grant such permission unless he is confident (a) that the fishing or catching and the taking of marine animals and plants as meant by the application will be conducted properly in accordance with the applicable international agreements or other arrangements, (b) that such activities will not exceed the limits of the catch as laid down by the ordinance of the Minister of Agriculture, Forestry and Fisheries Ordinance for the purpose and (c) that such activities will be in accordance with any other criteria prescribed by Cabinet Order.[18][19] The purpose of the *Law relating to the Preservation and Management of Marine Living Resources* is (a) to preserve and manage marine living resources in the exclusive economic zone through a program of preservation and management of the said resources, (b) to take measures to control the allowable catch, along with the measures taken under the *Fisheries Law* and the *Fisheries Resources Conservation Law* and (c) to ensure, at the same time, a proper implementation of the UN Law of the Sea Convention. The ultimate goal of the Law is to help develop the fishing industry and stabilize the supply of marine products.[20]

In Japan, fishery management had been conducted under the Fisheries Law and its regulations through the Minister of Agriculture, Forestry and Fisheries and by prefectural governors controlling the size of fishing vessels, fishing areas, fishing periods of the year, etc. However, these measures have proved to be "not only ineffective but consequently invite over-fishing because many boats tried to outdo each other in their horse-power abilities to beat

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[16] In the United States, effective 1 January 1992, an amendment to the Magnuson Fishery Conservation and Management Act includes highly migratory species within US jurisdiction. WILLIAM T.BURKE, *The New International Law of Fisheries, UNCLOS 1982 and Beyond* (1994) at 238.

[17] Art.5.

[18] Art.6 para.1.

[19] The decisions on the limits of the catch are to be made in accordance with prescriptions under Cabinet Order, based on (1) fishery resources trends as supported by scientific evidence; (2) the actual situation with respect to fishing by Japanese fishermen within the fishing zone, and (3) overall consideration of factors such as the actual situation with respect to fishing by foreigners within the fishing zone and the situation with respect to Japanese fisheries in the waters adjacent to a foreign country (Art.6 para.2). Decisions on the limits of catch in respect of the marine living resources referred to in Art.2 para.3 of the *Law relating to the Preservation and Management of Marine Living Resources* are to be based on the total allowable catch as determined under Art.2 para.2 of the Law, in addition to the conditions mentioned above (Art.6 para.3).

[20] Art.1.

out their rivals."[21] The UN Law of the Sea Convention obliges the coastal state to ensure, through proper conservation and management measures, that the maintenance of living resources in the exclusive economic zone is not endangered by over-exploitation.[22] It also obliges the coastal state to determine the allowable catch of living resources in its exclusive economic zone, to promote the objective of optimal utilization of living resources, to determine its capacity to harvest the living resources of the exclusive economic zone, and to give other states access to the surplus of the allowable catch.[23] When Japan became a party to the UN Law of the Sea Convention, it reconsidered its policy on the preservation and management of marine living resources. This involved consideration of the recent situation of fisheries in the sea off Japan, stock levels, and the fact that many of the Western countries, particularly Canada and the United States, had adopted the Total Allowable Catch system (TAC), although each country's concrete measures of TAC system vary.

There are three types of fishery management under the TAC system. One is the system of Individual Transferable Quotas (ITQs) in which quotas, a form of property right, are set for fisheries or EEZs and individual quotas (IQs) are allocated to vessels or groups of vessels within TACs. This system was first introduced in New Zealand and has since been adopted in various ways by fisheries in Australia, South Africa, Holland, Canada, and the United States.[24] The second is the so-called IQ system in which individual quotas are not transferable. Norway and several EU countries have adopted this system in some of their fisheries.[25] The third is the so-called "olympic" system in which, without allocating catch quotas, fishing vessels stop operating when the total allowable catch for the species is reached. The United States, Sweden and Argentina have adopted this system in some of their fisheries. Japan has also adopted this system.

Japan introduced the TAC system in the above *Law on the Preservation and Management of Marine Living Resources* (the so-called TAC Law), in addition to the traditional system. According to the TAC Law, the Minister of Agriculture, Forestry and Fisheries shall establish a basic program for the preservation and management of marine living resources in the area under Japanese jurisdiction. The program shall contain, *inter alia*, a basic policy concerning preservation and management of marine living resources, a deter-

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[21] *Asahi Evening News* of 3 March 1996.

[22] Art.61 para.2.

[23] Art.61 paral, Art.62 paras 1 and 2.

[24] G.R.MORGAN, "Optimal fisheries quota allocation under a Transferable Quota (TQ) management system", 19 *Marine Policy* (1995) 379-390; COLIN HUNT, "Management of the South Pacific Tuna Fishery", 21 *Marine Policy* (1997) 167-170.

[25] RAGNAR ARNASON, "Ocean Fisheries Management: Recent International Developments", 17 *Marine Policy* (1993) 339.

mination of the stock situation of each designated marine living resource, and the total allowable catch of each designated marine resource.[26]

As for designated resources, this was to be understood as those about which enough scientific data and knowledge are available and meet the following criteria: (a) species which are caught and consumed in large quantities and are important for people's livelihood and the fishing industry, (b) species in need of preservation and management measures such as urgent establishment of TAC due to the bad situation of the resources, and (c) species for which foreign vessels undertake activities in the waters near Japan.

Under Japan's TAC system, the Minister or the Prefectural Governor may publicize the catches made if they consider that these are drawing near the total catches according to their management authority, and give advice or guidance to fishermen to prevent them from surpassing the total allowable catch. They may also order to halt operations or take other measures when they consider that the catches made have surpassed, or are likely to surpass, the total allowable catch.[27] The Fisheries Agency on 2 October 1966 decided on the following allowable catch for 1997 for six species, as follows:

| | | |
|---|---|---|
| Pacific saury | 300,000 tons | |
| Alaska pollack | 267,000 tons | |
| Yellowfin horse mackerel | 370,000 tons | |
| Spotlined sardine | 720,000 tons | |
| Snow club | 4,815 tons | |
| Chub mackerel and spotted mackerel | 630,000 tons | (later changed to 700,000 tons) |

The Fisheries Agency decided in October 1997 to add Pacific flying squid as a designated resource to which the TAC system was to apply. This addition became possible as a result of the developments in the ways of detecting the volume of the population of Pacific flying squid.[28] The final annual allowable catch for 1998 for seven species were as follows:

| | |
|---|---|
| Pacific saury | 300,000 tons |
| Alaska pollack | 311,000 tons |
| Yellowfin forse mackerel | 430,000 tons |
| Spotlined sardine | 520,000 tons |
| Snow club | 4,945 tons |
| Chub mackerel and spotted mackerel | 700,000 tons |
| Pacific flying squid | 450,000 tons |

[26] Art.3.

[27] Arts. 8-10.

[28] Norintokeikyokai, *Gyogyohakusyo* [White Paper on Fisheries] *1997* (1998) 115.

In May 1996 Japan began negotiations with the Republic of Korea on new fishery relations under the UN Law of the Sea Convention. On 23 January 1998, Japan decided to give notice to Korea of its decision to terminate the 1965 Japanese-Korean *Fisheries Agreement* in order to protect Japanese fishermen from the operations of Korean vessels off the Japanese territorial sea. Under the 1965 Agreement, the operation of Korean vessels off the Japanese territorial sea was regulated by the Korean authorities. After tough negotiations, the two countries concluded on 28 November 1998 a Fisheries Agreement that replaced the 1965 Agreement. It came into force on 22 January 1999 and applies to the exclusive economic zones of the Parties.

Under the agreement, each Party decides every year on the catch quotas and other conditions of fishing operations in its exclusive economic zone for fishing vessels of the other Party, taking account of the conditions of the marine living resources in the zone. Accordingly permissions are issued to the vessels.

The agreement establishes a Provisional Zone around Takeshima, the title to which is being claimed by both Parties. A similar Provisional Zone was established in the East China Sea off the Korean Cheju Island. In these Provisional Zones the flag state has jurisdiction to prescribe and enforce fishing regulations.

The agreement set up a Joint Fishery Committee whose functions are to take into consideration and advise the parties on fishing operations in the exclusive economic zone of each party, the maintenance of order of fishing operations, the cooperation between the two countries in the field of fisheries, the preservation and management of living resources in the provisional zones, etc.

In November 1997 Japan and the People's Republic of China also signed a *Fisheries Agreement*. However, as of the time of this writing, it has not yet come into effect. The agreement would apply to the exclusive economic zones of the Parties. Each Party would decide on the species, the quotas and other conditions for fishing operations in the exclusive economic zone of either Party for nationals of the other Party. The agreement would establish a Provisional Measures Zone (Joint Management Zone) in the area between 30°40'N and 27°N and beyond 52 miles from the coast of each Party. In the zone, joint management measures taken by the Parties would apply. In the area south of 27°N, in which the Senkaku Islands are located, the flag state principle would apply. Both Japan and China, and also Taiwan, claim territorial rights to the islands.[29]

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[29] For comment on the Agreement, see MASAYOSHI MIYOSHI, "New Japan-China Agreement; an evaluation from the point of view of dispute settlement", 41 *JAIL* (1998) 30-43.

## 4. THE CONTINENTAL SHELF

Japan was not a party to the 1958 Convention on the Continental Shelf. It refrained from participation because the Convention included sedentary species in the continental shelf resources, whereas Japan had argued that some crabs such as king crabs are not continental shelf resources but high seas resources. Even when Japan established the 200-mile fishing zone in 1977, a government official stated as the government's view in the Diet that under the Law on Provisional Measures crustaceans at the seabed or subsoil of the 200-mile zone are not continental shelf resources, but marine living resources.[30]

On the other hand, with the development of the continental shelf regime in international law, Japan has been engaged in the exploration and exploitation of mineral resources of the continental shelf such as oil or natural gas, on the understanding that under customary international law the coastal state has exclusive rights to explore and exploit these resources.

The Law on the Exclusive Economic Zone and the Continental Shelf of 1996 provides that Japan exercises sovereign and other rights as a coastal State in accordance with the UN Law of the Sea Convention.[31] So, Japan in fact adhered to Part VI of the Convention that contains a provision concerning sedentary species, although in practice it does not make any difference within the 200-mile zone whether marine living resources are exclusive economic zone resources or continental shelf resources.

The Law on the Exercise of the Sovereign Rights concerning Fisheries in the Exclusive Zone provides that its Articles 3-14 which deal with fishing by foreigners in the exclusive economic zone, apply *mutatis mutandis* to fishing of *sedentary species* (within the meaning of the UN Law of the Sea Convention) and to the taking and exploitation of marine living resources on the continental shelf *beyond* the outer limits of the exclusive economic zone.[32] On the other hand, the TAC Law applies to *marine living resources* of the exclusive economic zone and the continental shelf.[33]

Under the laws mentioned above, read together, fish and other marine living resources on the continental shelf beyond the outer limits of the exclusive economic zone would be subject to the TAC system. Under the UN Law of the Sea Convention, sedentary species of the continental shelf are not subject to the provisions of Part V on the preservation and management of living resources, including the determination by the coastal state of allowable catch.[34] Nevertheless, some countries, including the United States, apply

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[30] Minutes of the Joint Committee of the Committee for Agriculture, Forestry and Fisheries, the Committee for the Cabinet, and the Committee for Foreign Affairs No. 1 (1977) at 1-2.

[31] Art.2.

[32] Art.14.

[33] Art.2.

[34] Art.77.

the preservation and management system under their national law to the sedentary species of the continental shelf.[35]

## 6. INTERNATIONAL CONTROL OF HIGH SEA FISHERIES

Japan is one of the countries which has made the most of freedom of fishing on the high seas. But that does not necessarily mean that Japan has paid little attention to preservation and management of marine living resources. For example, the delegate of Japan at the Sea-Bed Committee of the United Nations in 1972 said:

> "Developments of modern techniques have increased man's capabilities to fish so much that, if unregulated, over-fishing is now not only possible, but a reality in some cases. Thus, the necessity for regulating fishing activities, whenever there is a danger of over-exploitation, has now come to be widely recognized by the international community, and indeed international cooperation for the purpose of conservation – both bilateral and multilateral – has been developed in response to such circumstances.
>
> Accordingly, it would seem reasonable to say that the freedom to fish has already been modified to the extent that there is now [an] obligation imposed on States to take an cooperate [*sic*] in the adoption of necessary conservation measures whenever it is necessary to do so."[36]

It is significant to note the contrast to Japan's earlier policy of freedom of access. Japan is now a party to the *Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea*, the *Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean*, the *Agreement for the Establishment of the Indian Tuna Commission*, the *Convention on Conservation of Antarctic Marine Living Resources*, the *Convention between the United States of America and the Republic of Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission*, the *Convention for the Conservation of Atlantic Tuna*, the *Convention on Future Multilateral Cooperation in the North Atlantic Fisheries*, and several more.

### 5.1 Ban on salmon fishing in the high seas

In regard to anadromous stocks, the UN Law of the Sea Convention provides that fishing such stocks shall be conducted only in waters landward of the outer limits of exclusive economic zones, except in cases where this

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[35] USC 1802, 1812.

[36] The Law of the Sea Office, the Ministry of Foreign Affairs, Third United Nations Conference on the Law of the Sea, Statements Delivered by the Delegation of Japan (n.d.) 133-134.

rule would result in economic dislocation for a state other than the state of origin.[37]

In the Northern Pacific area, the following actions by the Soviet Union and Japan in relation to this subject are significant. First, in 1976, the Soviet Union established a 200-mile zone. Next, on 29 April 1978, the *Japan-USSR High Seas Fisheries Treaty*, which had governed the fishing of salmon, herring and clubs since 1952, became ineffective. In the same year salmon fishing by Japanese fishing vessels came under the regime of the 1978 *Japan-USSR Agreement concerning Cooperation in the Field of Fisheries* and the *Protocol on the Procedures and Conditions for Japanese Salmon Fisheries*. Since 1985, salmon fishing is regulated by the *Japan-USSR Agreement concerning Cooperation in the Field of Fisheries*. Under the agreements of 1978 and 1985, a Japan-USSR Commission every year sets the quota each year of salmon for Japanese fishing vessels in the sea outside the 200-mile zone of the Soviet Union. However, in the latter half of the 1980s there was a movement to ban salmon fishing in the area beyond the 200-mile limit of the coastal state. For instance, in the 1986 talks between Japan and the Soviet Union under the 1985 Agreement the Soviet delegation made a statement according to which the Soviet Union might ban fishing for salmon of Soviet origin in the area beyond the 200-mile limit. Japan requested withdrawal of the statement on the ground that according to the established rule the annual catch quota was to be decided by agreement between the two countries. Nevertheless, the Soviet Union persisted in its position that it is up to the Soviet Union to evaluate the population of salmon of Soviet origin and to decide the catch quota for Japanese fishing vessels. In the 1988 talks, in line with its position, the Soviet Union announced a ban on fishing for salmon of Soviet origin in the area beyond the 200-mile limit by 1992.

At the US-Soviet Summit on 31 May 1988 the two states signed a comprehensive fisheries agreement. In February 1989, at the first meeting of the US-Soviet Intergovernmental Consultative Committee on Fisheries, which was set up under the agreement, a provisional accord was reached on the banning of salmon fishing in the North Pacific high seas. The two governments then started to draft a new convention on the conservation and management of anadromous stocks in the Pacific aimed at (a) ending high seas salmon fishing (that is, banning any high seas taking except as specifically agreed by the signatories) and (b) providing for broader multilateral cooperation than was provided for under the regime in effect at that time, including the (tripartite) *North Pacific Fisheries Convention*. The draft was then sent to Japan and Canada for consideration.[38]

Japan decided to accept a proposed four-party convention. This decision was facilitated by two factors: (1) At the Soviet-Japanese Ministerial Meeting

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[37] Art.66 para.3.

[38] MORITAKA HAYASHI, "Fisheries in the North Pacific: Japan at a 'turning point'", 22 *Ocean Development and International Law* (1991) 351.

between Japan and the Soviet Union held in Moscow in June 1991, the Soviet Union agreed to allow Japanese fishing vessels to fish for salmon within the Soviet 200 mile zone and (2) high seas fishing had done great damage to salmon stocks. In 1992, Japan announced that it would henceforth refrain from salmon fishing in the high seas.

Japan, the Russian Federation, the United States, and Canada finally signed the *Convention for the Conservation of Anadromous Stock in the North Pacific Ocean* on 11 February 1992, thus terminating the North Pacific Fisheries Convention. The new Convention prohibits fishing of anadromous stocks in the North Pacific Ocean and its adjacent sea north of 33°N beyond 200 miles from the baselines, while incidental taking shall be minimized to the largest possible extent. Thus, Japan accepted the idea of "no salmon fishing" in the high seas.

## 5.2 Control of fisheries on the high seas area of the Bering Sea

With the strengthening of control within the 200-mile zones by the United States, the Soviet Union, and other countries, fishing vessels of Japan, the Republic of Korea, China and Poland rushed into the high seas area of the Bering Sea (the Donut Hole).[39] In 1980, Japanese and Korean vessels caught approximately 15,000 tons of pollack in the Donut Hole. In 1985 Chinese and Polish vessels, followed in 1986 by Russian vessels, joined operations in the area. These vessels engaged in operations on a large scale. As a consequence, catches in the Donut Hole decreased from the peak of more than 1.4 million tons in 1989 to approximately 290,000 tons in 1991. In response, delegations of China, Japan, the Republic of Korea, Poland, the Soviet Union, and the United States met in February, 1991 in Washington D.C. to discuss the establishment of an international conservation regime for pollack resources of the area. The meeting, which was the First Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea, laid the foundation for talks by concluding, by consensus, that pollack stocks were fully utilized and by affirming the need to take urgent conservation measures for the marine living resources of the area.[40]

At first, Japan took the position of giving priority to the maintenance of freedom of fishing on the high seas. However, even before the second

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[39] Arts.1 and 3. For an account of this Convention, see YVONNE L.DE REYNIER, "Evolving principles of international fisheries law and the North Pacific Anadromous Fish Commission", 29 *Ocean Development and International Law* (1998) 147-178.

[40] WILLIAM T.BURKE, "Fishing in the Bering Sea Donut: straddling stocks and the new international law of fisheries", 16 *Ecology Law Quarterly* (1989) 285-289; LOURENE 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 areas", 26 *San Diego Law Review* (1989) 525-531.

meeting, which was held in Tokyo from 31 July to 2 August 1991, Japan proposed voluntary fishery controls, thus changing its high seas fisheries policy from one of priority for freedom of fishing to one of priority for preservation and management of high seas fishery resources based on scientific research.

Japan played an important role in the drafting of the *Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea*, which was adopted at the tenth conference held in Washington, D.C. in February 1994. The signatories were China, Japan, South Korea, Poland, the Russian Federation and the United States. The objectives of the Convention are: the establishment of an international regime for conservation, the management and optimum utilization of pollack resources in the Central Bering Sea and the restoration and maintenance of pollack resources in the Bering Sea at levels which will permit maximum yield.

## 5.3 Large-scale driftnet fishing problems

It is said that the origin of the contemporary driftnet issue dates from 1979 when the fishing fleets of Japan, Korea and Taiwan developed driftnet fisheries targeting neon flying squid in the North Pacific region.[41] In 1987 Canada and the United States exerted pressure on the three countries to control these activities. Canada banned the use of large-scale driftnets within its waters. The United Stated enacted the 1987 Driftnet Impact Monitoring, Assessment, and Control Act, which directed the Departments of Commerce and State to negotiate with countries using driftnets in areas where U.S. marine resources were affected. Japan, Taiwan and Korea entered into agreements on the matter with the United States in 1989.[42]

On the other hand, driftnet fishing by Japanese and Taiwanese fishing vessels in the South Pacific region targeting albacore had raised the concern of South Pacific Forum member countries since late 1988. In July 1989, at the meeting of the Forum at Tarawa, Kiribati, the member states adopted a declaration calling on Japan and Taiwan to end driftnet fishing. In response to the Tarawa Declaration, Japan decided in September 1989 to reduce the

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[41] WILLIAM T.BURKE, MARK FREEBERG, EDWARD L.MILES, "United Nations resolutions on driftnet fishing: an unsustainable precedent for high seas and coastal fisheries management", 25 Ocean Development and International Law (1994) 133. According to JOHNSTON, emerging in 1979, neon squid or flying squid fishery was originally confined to Japanese vessels on the high seas area of the North Pacific designated by the INPFC. DOUGLAS M.JOHNSTON, "The driftnetting problem in the Pacific Ocean: legal considerations and diplomatic opinions", 21 *Ocean Development and International Law* (1990) 12.

[42] TED L.MCDORMAN, "Canada and the North Pacific Ocean: recent issues", 22 *Ocean Development and International Law* (1991) 371-372; VIRGINIA M.WALSH, "Eliminating driftnets from the North Pacific Ocean: U.S.-Japanese cooperation in the International North Pacific Fisheries Commission, 1953-1993", 29 *Ocean Development and International Law* (1998) 315.

number of vessels engaging in driftnet fishing in the region. The South Pacific Commission (SPC) at its meeting at Guam in October 1989 also adopted a resolution calling for an immediate ban on driftnet net fishing in the South Pacific while pointing out its adverse effects on fishing in the SPC region. In November 1989, member states of the Forum Fisheries Agency adopted the *Convention for the Prohibition of Fishing with Long Drift Nets in the South Pacific* (Wellington Convention) and protocols related to it.[43]

In December 1989 the General Assembly of the United Nations, upon the proposal of the United States, New Zealand and some other countries, adopted resolution 44/225 entitled "*Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world's ocean and the sea.*" The operative paragraphs of the resolution included the following:

(a) Moratoria on large-scale pelagic driftnet fishing on the high seas by 30 June 1992, with the understanding that such a measure will not be imposed in a region or, if implemented, can be lifted, should effective conservation and management measures be taken based upon statistically sound analysis to be jointly made by concerned parties of the international community with an interest in the fishery resources of the region, to prevent the unacceptable impact of such fishing practices on that region and to ensure the conservation of the living marine resources of that region;

(b) Immediate action to reduce progressively large-scale pelagic driftnet fishing activities in the South Pacific region leading to the cessation of such activities by July 1991, as an interim measure, until appropriate conservation and management arrangements for South Pacific albacore tuna resources are entered into by the parties concerned.

The Japanese government thereupon decided on 17 July 1990 to suspend driftnet fishing in the South Pacific region for the 1990-1991 season, beginning in November. The suspension was to continue until regulatory measures for driftnet fishing referred to in the UN resolution would be established. The Japanese decision was made with due account taken of the fact that the economies of the South Pacific island countries rely on fisheries resources, that these countries wish to develop their economies based on albacore fishing, and that, therefore, their grave concern about driftnet fishing in the region was justified.[44]

In December 1990, resolution 44/225 was re-affirmed by General Assembly resolution 45/197. The following year the General Assembly in its resolution 46/215 of December 1991 called, *inter alia*, for a complete end of driftnet fishing on the world oceans and seas by 31 December 1992. Japan thereupon submitted a plan to the UN Secretariat detailing its intended phase-out and

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[43] CHIYUKI MIZUKAMI, "Fisheries problem in the South Pacific region", 15 *Marine Policy* (1991) 118-120.

[44] *Asahi Evening News* of 18 July 1990.

stopped all large-scale driftnet fishing on the high seas by the end of December 1992.

## 5.4 Conservation and management of tuna

Japan took part in the tripartite (Japan, Australia, New Zealand) meetings for the preservation and management of southern bluefin tuna, which started in 1982. In 1993, the three countries adopted the *Convention for the Conservation of Southern Bluefin Tuna.*[45] The objective of the Convention is to ensure, through appropriate management, the conservation and optimum utilization of southern bluefin tuna. Under the Convention a Commission for the Conservation of Southern Bluefin Tuna decides on the total allowable catch and its allocation among the parties, unless the Commission prefers other appropriate measures on the basis of the report and recommendations of a Scientific Committee.[46] The Convention reflects a recent positive change in Japan's approach to coastal state jurisdiction over highly migratory species and the regulation of high seas fisheries.[47] Accordingly Japan enacted the *Law on the Special Measures concerning the Preservation and Management of Tuna Resources* in June 1996.

In October 1996 the Minister of Agriculture, Forestry and Fisheries published a basic policy aimed at strengthening the preservation and management of tuna resources. The policy purported to ensure the strengthening of conservation and management of tuna resources and their optimum utilization through the appropriate international organizations and, where no such organization exists, the cooperation among states concerned to establish a new international organization for that purpose. The Fisheries Agency decided, that same month, to begin consultation with the states concerned on the establishment of an organization to preserve and manage tuna resources in the Pacific Ocean. It was said that the United States, Canada, the Republic of Korea, and Indonesia agreed to establish such an organization.[48]

In further developments, Japan conducted an experimental fishing program in 1998-1999 after it failed to persuade Australia and New Zealand in the Commission for the Conservation of Southern Bluefin Tuna, established by the 1993 Convention, to increase the catch quotas of southern bluefin tuna. This gave rise to a dispute between Australia and New Zealand on the one hand and Japan on the other hand. In Japan's view, experimental fishing can be carried out within the framework of the 1993 Convention and in light of

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[45] For the background and an account of this Convention, see ANTHONY BERGIN and MARCUS HAWARD, "Southern bluefin tuna fishery, recent developments in international management", 18 *Marine Policy* (1994) 263-273.

[46] Preamble, Arts.3 and 8.

[47] BERGIN and HAWARD, loc.cit.n.45 at 271.

[48] *Cyugoku Shimbun* of 29 October 1996.

scientific evidence, without endangering tuna stocks. Australia and New Zealand referred the case to arbitration under Annex VII of the UN Convention on the Law of the Sea, and in July 1999 requested the International Tribunal for the Law of the Sea (ITLOS) to prescribe provisional measures ordering Japan to discontinue its experimental fishing pending the setting up of the arbitral tribunal. Japan contested the existence of jurisdiction of an arbitral tribunal set up under Annex VII of the UN Law of the Sea Convention and argued that the International Law of the Sea Tribunal lacks jurisdiction to order the provisional measures asked for. Japan also contended that the dispute arose from the 1993 Convention and, accordingly, should be settled by reference to the procedure provided for in that Convention. Japan also argued that even if the International Law of the Sea Tribunal has jurisdiction over the request, the prescription of provisional measures would be inappropriate because of the absence of risk of irreparable damage to the southern bluefin tuna stock.

On 27 August 1999, the Tribunal prescribed provisional measures nonetheless, ordering the parties, *inter alia*, to ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocation at the levels last agreed by the parties and that, in calculating the annual catches for 1999 and 2000, account shall be taken of the catch in 1999 as part of an experimental program. The Tribunal also ordered to refrain from conducting experimental fishing programs, except with the agreement of the other parties or unless the experimental catch is counted against the annual national allocation concerned. It also decided that the parties should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna.[49]

Following the ruling of the Tribunal, the Fishery Agency of Japan decided to deduct the catch made under the experimental fishing program (2,000 tons) from its commercial fishing quota, partly from that for 1999 but mostly from that for the year 2000.[50]

## 6. CONCLUSION

As mentioned earlier, Japanese fisheries policy has changed greatly since the latter half of the 1970s with regard to fisheries both within and beyond the 200-mile zone. It evolved from a policy strongly supporting freedom of the high seas to one of acceptance of numerous regulatory regimes. In order to be effective, it is necessary that fisheries policies for the preservation and management of fish stocks be coordinated. Fisheries policies must also be based on the best scientific data and knowledge available. Fishery organiza-

[49] Order on the Requests for provisional measures in the Southern Bluefin Tuna cases, 27 August 1999.

[50] Nihonkeizai Shimbun of 30 August 1999.

tions, both worldwide and regional, have significant roles to play in this important endeavour.

# ESTABLISHMENT OF A *DE JURE* PEACE ON THE KOREAN PENINSULA: INTER-KOREAN PEACE TREATY-MAKING UNDER INTERNATIONAL LAW*

Eric Yong-Joong Lee**

## 1. INTRODUCTION

Written in 1795, IMMANUEL KANT's essay "Toward Perpetual Peace: A Philosophical Sketch" begins with the pessimistic remark that humanity can find perpetual peace only in a vast grave where all the horrors of violence or those responsible for them would be buried.[1] The great philosopher who introduced a modern definition of peace envisaged real peace as emerging from a state of nature among nations under a new form of cosmopolitan law based on a peaceful federation of all the peoples of the earth.[2] Despite these and other ceaseless quests by thinkers and politicians since ancient times,[3] achieving real peace in human society, especially in the international sphere, has not become tangible and has remained a vain ideal. Would it then really be impossible to obtain real peace even in our twenty-first century world society?[4]

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* This article is a fully revised version of Chapter VII of the author's dissertation, "Legal issues of inter-Korean economic cooperation under the armistice system" (Kluwer, 2002), for which the author was awarded the doctoral degree by the Faculty of Law, Erasmus University, Rotterdam, The Netherlands, on 7 June 2001. The author accepts full responsibility for the presentation of facts and views expressed in this article. Readers' comments will be cordially welcomed: <grotian@yahoo.com>

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[1] See I.KANT, "Toward perpetual peace: a philosophical sketch", in H.REISS (ed.), *Kant's Political Writings* (Cambridge, 1970) 105.

[2] See J.BOHMAN & M. L.BACHMANN (eds.), *Perpetual Peace: Essays on Kant's cosmopolitan ideal* (The MIT Press, Cambridge, 1997) 1.

[3] On the ancient idea of peace, see G.ZAMPAGLIONE, *The Idea of Peace in Antiquity* (Translated into English by R. Dunn, University of Notre Dame Press, 1973) 16 *et seq.*

[4] GALTUNG defines peace from two different perspectives: peace, in a negative sense, may be an absence of organized violence between major human groups like nations, while, in a positive sense, peace implies a pattern of cooperation and integration between major human groups. See J.GALTUNG,

*Asian Yearbook of International Law,* Volume 8 (B.S. Chimni *et al.*, eds.)

As the idea of peace became more popular in the twentieth century, people began to make serious efforts to establish a stable peace system that could be universally applied.[5] This idealistic vision has finally been substantiated in the postwar international legal system by creating the new concept of collective security. A striking aspect of the collective security system is that the international society may set up an institution for the management of peace and security. This was realized by introducing a comprehensive ban on the use of force as a binding rule of law in Article 2(4) of the United Nations Charter.[6] Although the system has not always worked in international crises,[7] it has functioned as a norm and a means for the international society to limit conflicts and uphold an, albeit unstable, peace regime. Efforts to maintain peace and security have been made in many areas of the world, especially under the auspices of the UN; some have been successful, others less so. One of the regions where ultimate peace has not yet been achieved is on the Korean peninsula.

Arising from their division at the end of the Second World War and a resulting terrible civil war (1950-3), the conflict between North and South Korea became a chronic issue in the contemporary world. The Korean question did not remain a domestic problem between Koreans, but expanded as one of the several critical international issues in postwar international relations. The two Koreas, whose mutually hostile relations deteriorated even further during the Cold War, were unable to repair their relations in the first two decades after the end of the civil war. It was 1972 that a sudden change occurred in their extremely confrontational relationship. On 4 July in that year, the two Koreas issued a Joint Communiqué, a watershed in the search for peace on the Korean peninsula. The Joint Communiqué was followed by a resumption of discussions on the Korean question in the UN, then several meaningful exchanges and some instances of cooperation in the early 1970s. Despite its idealistic principles,[8] however, the Joint Communiqué failed to produce any further fruitful results. Inter-Korean relations had entered a second dark period by the end of the 1980s. At that time, there were few peaceful but, on the contrary, severe political activities and military confrontations along the Demilitarized Zone (DMZ).

With the end of the Cold War in the early 1990s, the two Koreas shifted their stance to a more friendly relationship and finally reached an historic

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Peace: Research, Education, Action: Essays in Peace Research *1* (Christian Ejlers, Copenhagen, 1975) 29.

[5] For details on peace studies, see G.A.LOPEZ, *Peace Studies: past and future* (Sage Publications, Newbury Park, 1989).

[6] Art.51 of the Charter, however, provides the right to collective and individual self-defence against an armed attack. See P. MALANCZUK, *Akehurst's Modern Introduction to International Law,* 7th edn. (Routledge, London, 1997) 27.

[7] E.g. the 1956 Suez crisis, the 1961 Cuban missile crisis, the Vietnam War, etc.

[8] See infra, text at n.21.

Agreement on Reconciliation, Non-aggression and Exchanges and Cooperation (the Basic Agreement) in 1991. However, although it comprises a wide range of accords in the fields of political and military as well as of mutual economic cooperation, the Basic Agreement has failed both to bring about a peace regime and to lead to the conclusion of the desired peace treaty. The establishment of a stable peace regime has thus been left for the Korean people to achieve in the twenty-first century.

The primary purpose of this paper is to explore the possibility of establishing a peace system on the Korean peninsula and its conditions from an international legal perspective. History shows that peace, especially among nations, is more stable when it is set within a legal and institutional framework. Such de jure peace[9] requires the successful installation of legal measures for the establishment and protection of the desired *status quo.* Accordingly, an important issue is that of finding a way to set up the legal framework. The most frequently adopted way is the conclusion of a peace treaty. This is also applicable to Korea. The current armistice agreement could be replaced by a peace treaty that may function as the legal foundation for a reliable peace regime on the Korean peninsula. An examination of the legal problems involved is, however, indispensable before the making of a peace treaty between North and South Korea can begin.

Our inquiry consists of four parts. In section 2 the origin and evolution of the Korean conflict will be reviewed and the quest for peace under the armistice system examined. For a better understanding of our topic Section 3 will approach the matter of peace treaty-making from an historical perspective. In an initial sub-section, some comparison will be made of peace treaties in Western Europe and in East Asia. As an example of recent state practice, a brief review will be offered of the process of German reunification. Section 4 will be devoted to the critical legal problems involved in the making of an inter-Korean peace treaty. Among the points of contention that stand in the way of concluding an inter-Korean peace treaty are the qualification of the parties in the process, the status of the United Nations Command (UNC) on the Korean peninsula, and the question of the United States armed forces stationed in South Korea. The relation of each factor to the making of a peace treaty will be analyzed from the international law perspective. In section 5 the legal methods and procedures of the making of a peace treaty will be examined. In a sub-section, the inter-Korean issue will be discussed in light of the procedures laid down in the Vienna Convention on the Law of Treaties of 1969. Finally, legal questions concerning the replacement of the armistice agreement with a peace treaty will be explored.

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[9] On the "de jure peace," see H.KELSEN, *Peace Through Law* (Chapel Hill, North Carolina, 1944) 3-9. See also E.LUARD, *Conflict and Peace in the Modern International System* (Little Brown and Co., Boston, 1968) 1-28.

## 2. THE QUEST FOR PEACE OF THE KOREAN PEOPLE

### 2.1. A brief review of the Korean conflict

The origin of the contemporary Korean conflict can be traced back to the division of Korea into the north and the south in 1948. At that time the domestic and international environment was not favorable for the Korean people, who had just regained their independence after 35 years of Japanese occupation, to establish a single government. Instead, two separate governments following different ideologies were eventually set up, one in the north and the other in the south of the Korean peninsula. In the south, the Republic of Korea (ROK) was formally inaugurated on 15 August 1948 with Dr. SYNGMAN RHEE[10] as its first president.[11] In the north, which had undergone a socialist revolution under Soviet guidance, the regime led by KIM IL-SUNG organized the Chosun (Korean) Workers' Party and the People's Congress in April 1948.[12]

Less than two years after the establishment of the two governments, fully-fledged military hostilities broke out on the Korean peninsula as the North Korean People's Army crossed the Thirty-eighth parallel on 25 June 1950.[13] The South Korean army, with four ill-equipped US divisions, had been rushed into battle and was overwhelmed by the North Korean forces. As time went by, however, the front line was stabilized along the Thirty-eighth parallel and in early 1951 the Korean War reached a stalemate. Through a suggestion for a cease-fire by the Soviet representative in the UN Security Council,

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[10] For details on President SYNGMAN RHEE, see R.OLIVER, *Syngman Rhee: The Man behind the Myth* (New York, 1951); id., *Syngman Rhee and American Involvement in Korea 1942-1960* (Panmun Books Co, Seoul, 1978). See also KIM QUEE-YOUNG, *The Fall of Syngman Rhee* (Institue of East Asian Studies, Berkeley, 1983).

[11] The UN General Assembly recognized the ROK government as the sole legitimate government over that part of Korea [south of the 38th parallel], where the UN Temporary Commission on Korea was able to observe the election. UNGA Res.195 (12 December 1948).

[12] See KIM HAKJOON, *Fifty years' history of North Korea* (Dong-ah Publishers, Seoul, 1995) 124-30.

[13] The English books and articles concerning the Korean War are as follows: R.LECKIE, *Conflict: The history of the Korean War* (New York, 1962); G.WINT, *What Happened in Korea: A study in collective security* (London, 1954); E. O'BALLANCE, *Korea: 1950-1953* (London, 1963); D.Rees, *Korea: the limited war* (New York, 1964); C.BERGER, *The Korean Knot: A military-political history* (Philadelphia, 1964); H.J.MIDDLETON, *The Compact History of the Korean War* (New York, 1965); L.S.KAPLAN, "The Korean war and U.S. foreign relations", in F.H.HELLER (ed.), *The Korean War: A 25-year perspective* (Lawrence, 1977); J.GOULDEN, *Korea: the untold story of the war* (New York, 1982); B.CUMMINGS (ed.), *The Korean-American Relationship, 1943-53* (Seattle, 1983), etc. For a recent study on the origin and character of the Korean War, see CHOE JANG-JIP, *Conditions and Prospects of Korean Democracy* (in Korean, Namam Publishers, Seoul, 1996).

negotiations finally began on 10 July 1951 at the city of *Kaesong*.[14] Little compromise was reached before early 1953.[15] One of the most critical issues was the exchange of the POWs. The deadlock in the talks was broken by two major international events: the victory of DWIGHT EISENHOWER in the US presidential election[16] and the death of STALIN in March of 1953. As a result of these changes, the two Korean sides agreed on the critical POW problem. Finally, a ceasefire agreement was signed on 27 July 1953[17] by the UN Commander-in-Chief[18] and the Communist Representatives[19] at *Panmunjeom*, a small town in the middle of the Korean peninsula. The resulting armistice system has now been in force for the past half-century.

## 2.2. The beginning of peace on the Korean Peninsula

In spite of the cease-fire, the parties continued to clash with each other at every stage of domestic and international politics during the Cold War period. Few initiatives towards an improvement of relations were taken, and by the end of the 1960s the two Koreas regarded each other simply as hostile and illegal insurgents.

In the early 1970s, however, a new development took place between the two sides; the two Koreas, after several secret meetings between high-level government officials,[20] rather suddenly, on 4 July 1972, issued the Joint

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[14] At the opening meeting of the truce talks the delegations from North Korea and China proposed two items for discussion: (1) the determination of the 38th parallel as the military demarcation line and for the establishment of a demilitarized zone, and (2) the withdrawal of all foreign armed forces from Korea. The items on the agenda of the United Nations Command delegation were: (1) agreement on a demilitarized zone across Korea, (2) the cessation of hostilities and acts of armed forces under conditions which would assure non-resumption of hostilities in Korea. See T.C.JOY, *How Communists negotiate* (Macmillan, New York, 1955) 19.

[15] On the process of the truce talks in this period, see KIM HAKJOON, *The Unification Policy of South and North Korea* (S.N.U.Press, Seoul, Korea, 1977) 130-4.

[16] During the campaign, the Republican presidential candidate, D.EISENHOWER, pledged to bring the war to a conclusion. On the change of US policy on Korea at that time, see D.REES, *Korea: the limited war* (McMillan, London, 1964) 385-402. On the issue of the Korean War during the 1952 US presidential election campaign, see R.J.CARIDI, *The Korean War and American Politics: The Republican Party as a case study* (Univ.of Pennsylvania Press, 1968) 209-45.

[17] "Agreement between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand, Concerning a Military Armistice in Korea", UN Doc.S/3079 (7 Aug. 1953). For the original text of the Armistice Agreement, see *Documents on International Affairs 1953* (Royal Institute of International Affairs, Clarendon Press, Oxford, 1954) 386-405.

[18] General of the US Army MARK CLARK.

[19] KIM IL-SUNG, Commander-in-Chief of the North Korean People's Army and PENG DEHUAI, Commander of the Chinese People's Volunteers' Army.

[20] See *Korea Herald* of 4 July 1972.

Communiqué mentioned above and containing "seven principles for peace and reunification of the divided fatherland".[21]

Against the background of these developments the Korean question was again placed on the agenda of the United Nations and the First Committee of the UN General Assembly in 1973 began renewed discussions on the matter.[22] The debates continued in the next two sessions in 1974 and 1975. However, the process was halted by a border incident that occurred on 18 August 1976, in which two US soldiers were killed by North Korean soldiers.[23] Due to this incident, the supporters of the two sides in the United Nations withdrew their respective proposals on the subject.[24] The topic would not again be discussed in the UN General Assembly until the two Koreas simultaneously became UN members on 17 September 1991.[25]

In spite of the idealistic sounding Communiqué of 1972 and the earnest efforts of the international community, the two Koreas could not overcome their deep-rooted and long-standing mutual mistrust, and neither reunification nor a more friendly relationship was attained. There were no further developments; the political and military standoff continued in the following decade.

## 2.3. New peace in the 1990s: The Basic Agreement

A new wave of reconciliation between the two Koreas came with the end of the Cold War. Several important events affected the Korean peninsula. Among them, the dissolution of the former Soviet Union and the reunification of East and West Germany were the most conspicuous events not only in an international political but also an emotional sense. Following these environ-

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[21] In the seven principles the two sides agreed on the following: (1) make independent efforts to achieve the reunification through peaceful means; (2) neither defame nor slander one another; (3) carry out various exchanges in many areas; (4) cooperate positively to seek an early success of the Red Cross Conference; (5) install and operate a direct telephone line between Seoul and Pyongyang; (6) create and operate a Coordinating Committee; and (7) convince that these agreements correspond with the common aspiration of the entire people eager to see early unification of the fatherland. For details, see KIM MYUNG-KI, *South-North Joint Communique and International Law* (in Korean, Beobmunsa Publishers, Seoul, 1975).

[22] The first discussion on the Korean question in the UN was initiated by the United States in the General Assembly on 17 Sept.1947. See E.J.OSMANCZYK (ed.), *The Encyclopedia of the United Nations and International Agreements* (Taylor and Francis, London, 1985) 442.

[23] For details, see *Korea Times* of 19 Aug.1976.

[24] See KOH KWANG-LIM, "The Korean unification question and the United Nations", in: T.BUERGENTHAL (ed.), *Contemporary Issues in International Law: Essays in honor of Louis B. Sohn* (N.P.Engel Publisher, Strasbourg, 1984) 548.

[25] UNGA Res.46/1 (17 September 1991).

mental changes [26]the two Koreas joined the United Nations in 1991. North and South Korea resumed high-level talks and finally, on 13 December 1991, concluded the *Agreement on Reconciliation, Non-aggression and Exchanges and Cooperation between North and South Korea* (The Basic Agreement).[27] This Agreement contained progressive legal measures for the shaping of new inter-Korean relations in the post-Cold War era.

Reflecting a spirit of inter-Korean reconciliation and cooperation, this historic Basic Agreement is divided into four main chapters containing a total of 25 Articles.[28] Chapter I, on *South-North Reconciliation*, states critical provisions relating to the establishment of new inter-Korean relations. In Article 1, the two Koreas agreed not only to accept the legitimacy of each other's political entity, but also to guarantee the continuity of their separate systems.[29] In Article 5, they promised "to transform the present state of armistice into a solid state of peace." This provision represents a great step forward towards establishing a durable *de jure* peace regime on the Korean peninsula.[30] In Chapter II, on *South-North Non-Aggression*, it was agreed not to use military force against each other,[31] but to resolve differences and disputes that might arise between them through "dialogue and negotiation".[32] The provisions of Chapter III, *South-North Exchanges and Cooperation*, have had a long-term and significant impact on promoting inter-Korean cooperation. This is especially so in Article 15 where the two Koreas agreed "to promote an integrated and balanced development of national economy and the welfare of the entire people." Chapter IV, finally, dealt with Amendments and Effectuation and laid down certain administrative matters.

The adoption of the Basic Agreement was not only an unprecedented step, but also a cornerstone of the postwar inter-Korean relationship. As an interim stage between the armistice and a stable peace regime, the Basic Agreement may help the two Koreas start an era of real peace and cooperation.

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[26] In addition to these changes, the death of the North Korean president, KIM IL-SUNG, in 1994, and several floods combined to make the new North Korean regime under KIM JONG-IL look for a way to open its doors to the outside world in order to overcome the crisis. On the political situation of the post-KIM IL-SUNG era of North Korea, see T. HENRIKSEN & J. MO (eds.), *North Korea after Kim Il Sung: continuity or change* (Hoover Institution Press, Stanford, 1997).

[27] English translation in 2 AsYIL (1992) 409 et esq.

[28] For a commentary on the Basic Agreement, see KIM MYUNG-KI, *The Treaties on Basic Agreement between The South and The North* (in Korean) (The Institute of International Affairs, Seoul, 1992).

[29] "The South and the North shall recognize and respect each other's political systems."

[30] See KWAK TAE-HWAN, "Inter-Korean military confidence building: a creative implementation formula", 24 *Korea Observer* (1993) 379-80.

[31] Art. 9 Basic Agreement.

[32] Art. 10 Basic Agreement.

## 3. DEVELOPMENT OF PEACE TREATY-MAKING UNDER CUSTOMARY INTERNATIONAL LAW

### 3.1. A comparison of peace treaties in Western Europe and East Asia

#### *3.1.1. The West*

The usual method of terminating armed conflicts and restoring normal peaceful relations between former belligerent states is to conclude a peace treaty.[33] Western practice pertaining to peace treaty-making dates back to Greek and Roman times.[34] Ancient Greece was familiar with the prototype of a peace treaty. City-states developed an advanced system of balance of power and regularly provided a joint commitment to sanctions against the perpetrator of a breach of the peace.[35] This Greek experience influenced thinking in the Roman period.[36] Under Roman law,[37] a series of peace treaties was concluded.[38] In contrast to the Roman period, peace among European states was rare in the Middle Ages, often falling prey to conflicting political interests of feudal lords and the authority of the Catholic Church.[39]

From the 17th century on, peace finally began to be recognized as a well-established institution among European nations. Among contemporary thinkers,[40] the famous Dutch jurist, Hugo Grotius (Hugo de Groot)[41]

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[33] See J.STONE, *Legal Controls of International Conflict,* 2nd edn. (Maitland Publications, Sydney, 1959) 640.

[34] The first known peace treaty in the history of mankind was concluded between the Egyptian Pharaoh, Rameses II, and the King of the Hittites, *Hattusilis* II. See S.VEROSTA, "Peace Treaties", in R.BERNHARDT (ed.), *Encyclopedia of Public International Law* (henceforth: EPIL) instalment 4 (1982) 102.

[35] On the penal system of ancient Greece, see A.R.W.HARRISON, *The Law of Athens* (Oxford, 1971) 168-85.

[36] Much of Roman law was copied from Greek philosophical writings. See A.STEPHENSON, *A History of Roman Law* (Little Brown and Co., Boston, 1912) 7. See also W. KUNKEL, *An Introduction to Roman Legal and Constitutional History* (English transl., Oxford, 1973) 24.

[37] On Roman Law and its distinction between jus civile and *jus gentium*, see J.A.C.THOMAS, *Textbook of Roman Law* (North-Holland Publishing Co., Amsterdam, 1976) 63-4.

[38] E.g., a treaty concluded between Rome and Carthage in the first year of the Republic (509 B.C.). See H.F.JOLOWICZ, *Historical Introduction to the Study of Roman Law* (Cambridge, 1939) 100.

[39] See VEROSTA, loc.cit.n.34 at 103.

[40] Among those who made great contributions: FRANCISCO VITORIA, FRANCISCO SUAREZ, ALBERICO GENTILI and HUGO GROTIUS. On the theories of jurists of the 17th century, see J.M.KELLY, *A Short History of Western Legal Theory* (Oxford, 1992) 211-9, or A.NUSSBAUM, *A Concise History of the Law of Nations* (Macmillan , New York, 1954) 79-114. On the Spanish origin of the law of nations, see J.B.SCOTT, *Francisco de Vitoria and His Law of Nations* (Oxford, 1934).

[41] On the life and works of HUGO GROTIUS, see H.VREELAND, *Hugo Grotius* (Oxford, 1917); W.S.M.KNIGHT, *The Life and Works of Hugo Grotius* (Sweet & Maxwell, London, 1925); E.DUMBAULD, *The Life and Legal Writings of Hugo Grotius* (Univ.of Oklahoma Press, 1969); and C.S.EDWARDS, *Hugo Grotius: The miracle of Holland* (Nelson-Hall, Chicago, 1981).

elaborated on the legal concepts of war and peace in his masterpiece, *De Jure Belli Ac Pacis* (On the Law of War and Peace).[42] A kind of collective security pact was concluded among the European countries by way of the Westphalia Peace Treaty of 1648.[43] The implied system of maintenance of peace was later followed by the Vienna Congress of 1815[44] and was further developed by the Conventions drawn up by the two Hague "Peace Conferences" of 1899 and 1907, and the subsequent Treaty of Versailles of 1919.[45] These treaties[46] provided the institutional bases for a peace system throughout Europe.

### *3.1.2. East Asia*

East Asian thinking on peace and peace treaties is considered to have started more than two thousand years ago, with the first meaningful institution for peace established in ancient China. During the Spring and Autumn Period (722-481 B.C.), dozens of small states existed with one another as a league of states in China proper. One of the principal functions of the league was the peaceful settlement of disputes between member states,[47] which developed rules and customs[48] for peace enforcement. This might be considered as the prototype of a peace system in East Asia.[49]

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[42] For the original text, see W.WHEWELL, *Hugonis Grotii De Jure Belli et Pacis* (accompanied by an abridged translation) I-III (Cambridge, 1853). On the interpretation of the text, see C.VAN VOLLENHOVEN, *The Framework of Grotius' book De Jure Belli Ac Pacis (1625)* (Amsterdam, 1932).

[43] Signed on 24 Oct.1648 ending the Thirty Years' War (1618-48), the Westphalia peace treaty was a major landmark in the history of the law of nations. It was the first European charter in a modern sense that established peace on the basis of balance of power, introducing the era of a community of sovereign and independent states of equal status. See A.M.ZAYAS, "Peace of Westphalia 1648", EPIL inst.7 at 536.

[44] Terminating the Napoleonic Wars, a European Congress held in Vienna in 1815 concluded the Final Act of the Vienna Congress on 9 June 1815. This Final Act consisted of a principal document and 17 annexes. See F.MÜNCH, "Vienna Congress (1815)", EPIL inst.7 at 523.

[45] The Treaty of Versailles, concluded at the Paris Peace Conference of 1919, was the keystone of the League of Nations. See G.EGERTON, *The League of Nations: an outline history 1920-1946* (The UN Library, Geneva, 1996), 24.

[46] Some major peace treaties concluded in Europe between the 1648 Westphalia Treaty and the 1919 Paris treaties were the Peace Treaties of Utrecht (1713), Aix-la-Chapelle (1748), and Paris (Crimean War, 1856).

[47] Mediation and arbitration were popular methods for settling disputes at that time. See WANG TIEYA, "International Law in China: historical and contemporary perspectives", 221 *Hague Recueil* (1990-II), (Martinus Nijhoff Publishers, The Hague) 219-25.

[48] For example, it was regarded as a grave breach of interstate norms for a league member to use force in settling a dispute without first having obtained the permission of the league leader. See J.A.COHEN & CHIU HUNGDAH, *People's China and International Law,* Vol.2 (Princeton, 1974), 1113.

[49] Opinions differ as to whether this can be regarded as international law in a modern sense. NUSSBAUM has denied that historical events and practices in ancient China have revealed anything

Since *Ch'in*'s unification in 221 B.C. China, being the central and imperial state of Asia, developed a new international order regulating the relations with its neighboring countries on the basis of the customary, so-called "tribute", system.[50] It functioned by maintaining a power balance in East Asia under imperial China and sometimes manifested itself in concrete treaties.[51] As early as the mid-17th century the European law of nations was introduced into East Asia. [52]The first incident where *Ch'ing* accepted the Western law of nations as a universal legal system was the conclusion of the Treaty of Nechinsk with Russia in 1689. Beginning with the Opium War in 1839, with Western firepower, however, brought China a certain practical familiarity with "unequal" treaties. The first unequal treaty imposed upon China was the Treaty of Nanjing signed on 29 August 1842,[53] supplemented by the Treaty of Humen-chai the following year. The 1844 Treaty of Wanghsia between China and the United States and the 1844 Treaty of Whampou between China and France contained similar provisions, replacing the old Canton trade system by a new one based on the modern law of nations.[54] A series of treaties eventually started a new era of Western intrusion and unequal treaties in Chinese history;[55] they were in place for more than a century, until the People's Republic of China (PRC) abrogated them in 1949.[56]

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that could, even in a broad sense of the word, be considered as international law, whereas KOROVIN claimed that it is China, India, Egypt and other ancient Asian states which should be considered the birthplace of international law. See NUSSBAUM, op.cit.n.40 at 10, and E.A.KOROVIN, *International law* (The Institute of State and Law of the Academy of Science of the USSR, Moscow, 1960), 27.

[50] The tribute system linked foreign trade and other aspects of the relations between the Chinese empire and other nations in East Asia to China's culturo-centric world-view of China being not only the largest and oldest among the states of the world, but also the source of their civilization. See *Cambridge History of China* (1986) 201. See also WANG TIEYA, loc.cit.n.47 at 219-25.

[51] The customary law of treaties was highly developed in East Asia in the province of mutual defense and what would nowadays be called diplomatic and consular relations. Historical records show that the first Sino-Korean peace treaty was concluded between the Han dynasty of China and the *Kochosun* dynasty of Korea in 108 B.C.for the termination of a war between them. See LEE KI-BAIK, *A New History of Korea* (Ilchogak Publishers, Seoul, 1984) 38-40.

[52] See J.E.WILLS, "Ch'ing's relations with the Dutch, 1662-1690", in J.K.FAIRBANK (ed.), *The Chinese World Order: traditional China's foreign relations* (Cambridge, 1968) 248.

[53] The main provisions of the Treaty of Nanjing dealt with the opening of five ports to British trade and residence, the cession of Hong Kong to Great Britain, and payment of indemnity.

[54] The most-favored-nation status was accorded to the signatory states in those treaties.

[55] The number of all treaties, agreements, regulations, etc., from 1842 to 1949 is 1175, of which four-fifths are made between China and foreign corporations and enterprises. They formed an important part of the unequal treaty regime in China. See WANG TIEYA (ed), *The Comprehensive Collection of Old Treaties, Agreements, Regulations, etc., between China and Foreign Countries, 1689-1949* (in Chinese, Beijing, 1952-1962).

[56] Art.55 of the Common Program of the Chinese People's Political Consultative Conference of 29 September 1949.

As China had done, Korea and Japan opened their doors to the West by way of the new style of treaties.[57] Japan abandoned its isolationist policy by concluding the US-Japan Treaty of Friendship of 1854.[58] By this treaty, concluded in conformity with modern international law, Japan agreed to open the ports of Shimoda and Hakodate to provide the fuel, food and drinking water necessary for navigation, and to rescue ships and castaways. Similar treaties were concluded with Britain in 1854, Russia in 1855, and the Netherlands in 1856. Korea, meanwhile, opened its doors to the outside world throughthe 1872 Treaty of Kangwha and the 1882 US-Korea Treaty of Friendship and Commerce.[59]

### 3.2. The German peace treaty-making: a case of recent state practice

Following the surrender of the German armed forces on 7 and 8 May 1945, [60]the Allied Powers issued the Berlin Statement of 5 June 1945, whereby they assumed control as "the Supreme Authority in Germany."[61] The Berlin Statement was followed by the Paris peace treaties of 10 February 1947 between the "Allied and Associated Powers" on the one hand, and the various "former Axis Powers" except Japan and Germany on the other hand.[62] A comprehensive settlement of the German question was made complicated by the division of Germany into four zones of occupation. After the failure to reach a solution between the Western and Soviet blocs, two separate governments were eventually established in the former German territory: the Federal Republic of Germany (FRG) in the west and the German Democratic Republic (GDR) in the east. It was not until the early 1970s that the two Germanys began to search for a way of overcoming their conflicts and reshaping their relations. Under the strong impetus of WILLY BRANDT's *Ostpolitik*,[63] they finally concluded a series of treaties and set up a peace

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[57] For details on the actual situation of these three countries at that time, see G.H.CURZON, *Problems of the Far East* (Longman, London, 1894).

[58] See FUJIO ITO, "One hundred years of international law studies in Japan", 13 JAIL (1969) 19.

[59] On Korea's opening of its doors by a series of modern style treaties, see CHAI NAM-YEARL, "Korea's reception and development of international law", in PAE JAE SCHICK et al., *Korean International Law* (Center for Korean Studies, Berkeley, 1981) 7-36. See also CHOI CHONG-KO, *The Reception of Western Law in Korea* (in Korean, Bakyoungsa Publishers, Seoul, 1982).

[60] See Act of Military Surrender of the German Armed Forces, in Official Journal of the Control Council in Germany, Supplement 1 at 6.

[61] See D.BLUMENWITZ, *What is Germany?: Exploring Germany's status after World War II* (Kulturstiftung, 1989) 30.

[62] On the contents of the 1947 Peace Treaty, see E.VON PUTTKAMER, "Peace treaties of 1947", EPIL inst.4 at 117-22.

[63] On Ostpolitik, see R.TILFORD (ed.) *The Ostpolitik and Political Change in Germany* (Saxon House, Lexington, 1975); and L.L.WHETTEN, *Germany's Ostpolitik: Relations between the Federal Republic and the Warsaw Pact countries* (The Royal Institute of International Affairs, London, 1971).

system in German territory. Having opened their doors to each other through the Traffic Treaty of 26 May 1972,[64] the two States then concluded the historical Treaty Concerning the Basis of the Relationship between the FRG and the GDR (the Basic Treaty) on 21 December 1972. The Basic Treaty contained groundbreaking regulations on East and West German State sovereignty, mutual inter-German recognition, representation of Germans, etc.[65] The Basic Treaty was supplemented by implementing protocols concerning the exchange of permanent representatives,[66] the demarcation of a common border,[67] and the mutual understanding of their cultures and societies.[68]

Immediately after the Basic Treaty of 1972 came into effect, East and West Germany joined the United Nations simultaneously on 18 September 1973.[69] This helped accelerate the normalization of inter-German relations. In the Prague Treaty of 11 December 1973 on reciprocal relations the two Germanys reached an agreement on the long-standing question relating to their borders.[70] Through these efforts, the FRG finally reached a mutual understanding with the Soviet Union on the German question. The final outcome was the Conclusionary Act adopted on 1 August 1975 at the Conference on Security and Cooperation in Europe (CSCE) held in Helsinki.[71] The CSCE Conclusionary Act, which was the result of the FRG's *Ostpolitik*[72] and the Soviet Union's West Policy at that time, became an international footing for the German unification.[73]

In 1990 the legal process of German unification suddenly accelerated. On 2 July 1990 the FRG and GDR ratified the Treaty of 18 May 1990

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[64] Just before making the Traffic Treaty, the two Germanys passed the Agreement between the Government of the FRG and the GDR on the Transit Traffic of Civilian Persons and Goods between the GRG and West Berlin (Transit Agreement) on 17 Dec.1971. The Transit Agreement, however, was only a governmental agreement implementing the Four Powers Agreement over Berlin of 3 Sept.1971. For details, see DOEKER and BRUECKNER, *The Federal Republic of Germany and the German Democratic Republic in International Relations* Vol.1 (1979) 377.

[65] Articles 1-4, 6 and 8 of the Basic Treaty of 1972. For details, see E.PLOCK, *The Basic Treaty and the Evolution of East-West German Relations* (Westview Special Studies in International Relations, Westview, Boulder, 1986) 11.

[66] Art.8 of the Basic Treaty.

[67] Supplementary Protocol to Article 3 of the Basic Treaty.

[68] See BLUMENWITZ, op.cit.n.61 at 49.

[69] UN Doc. A/9069 and S/10945.

[70] According to the Prague Treaty, the nullification of the Munich Agreement of 29 Sept.1938 presents no territorial problems for the FRG, since it accepts that Germany only continued to exist after World War II within her 1937 borders. On the question of the German borders of 1937, see BLUMENWITZ, op.cit.n.61 at 24-8.

[71] On the process of the CSCE, see A.PITTMAN, *From Ostpolitik to Reunification: West German-Soviet political relations since 1974* (Cambridge, 1992) 134-49.

[72] See supra n.63.

[73] See the BAHR Paper, published by the Press and Information Department of the government of FRG (cited from PITTMAN's book).

Establishing a Monetary, Economic, and Social Union (The Treaty of German Union).

Table 3-A: Process of Peace Treaty-Making on the German Question.

| *Treaty* | *Contents* | *Parties* | *Date* |
|---|---|---|---|
| The 1947 Peace Treaty of Paris | The former Allies intended to settle the postwar German question. | Allied Powers & Axis Powers except Japan | Feb. 10 1947 |
| Traffic Treaty | The first mutually binding treaty to open the door to the other side ending the hostile confrontation. | FRG & GDR | May 26 1972 |
| The 1972 Basic Treaty | Legal grounds for new inter-German relations: East-West German State sovereignty, mutual recognition, representation of Germans, etc. | FRG & GDR | Dec. 21 1972 |
| The Prague Treaty | Settlement on the long-standing border question. | FRG & GDR | Dec. 11 1973 |
| Conclusion-ary Act of CSCE | Mutual understandings between FRG and USSR on the German question. | FRG & USSR | Aug. 1 1975 |
| The Treaty of German Union | Legal principles for establishing monetary, economic and social union as well as finance and budget. | FRG & GDR | July 2 1990 |
| The Unification Treaty | Agreements with respect to building German unity. followed by the Final Settlement | FRG & GDR | Aug. 31 1990 |

Source: A.D. Handcock & H.A. Welsh (eds.), *German Unification: Process and Outcomes*, Westview, Boulder, 1994.

Consisting of six chapters and 38 articles,[74] the Treaty laid down the basic legal principles for the establishment of monetary,[75] economic[76] and

[74] The Treaty of German Union consists of the following chapters: Basic Principles (Chapter I); Provisions concerning Monetary Union (Chapter II); Provisions concerning Economic Union (Chapter III); Provisions concerning Social Union (Chapter IV); Provisions concerning Budget and Finance (Chapter V); Final Provisions (Chapter VI).

[75] On the principles of monetary union, see Art 10, para. 5 of the German Union Treaty.

social[77] union as well as those for the element of the budget and finances[78] of a unified Germany.[79] Less than two months later, on 31 August 1990, the FRG and the GDR finally signed the epoch-making Treaty on the Establishment of German Unity (The Unification Treaty)[80] in Berlin. The Treaty on the Final Settlement with respect to Germany followed on 12 September of the same year.[81] (See Table 3-A)

The two Germanys thus succeeded in overcoming mutual confrontation and ultimately obtained political unification through a long and hard process. Although the treaties concerning the post-war German question might not have been formulated in the typical form of peace treaties from the viewpoint of the traditional law of war,[82] they are nevertheless a good model for a modern-style pact of peace and as such may serve to assist in the peaceful resolution of international conflicts and restoration of friendly relations. The process that led to German reunification should be a valuable example for the two Koreas. First, the FRG and the GDR approached the issue from a domestic, German, perspective. They did not try to find solutions from outside, but to find an answer to the existing questions between themselves. Such a direct approach may have rendered those questions clearer to them. Second, they succeeded in creating a favorable international environment for peaceful unification, particularly through the CSCE Conclusionary Act with the Soviet Union, one of the most interested parties. Third, the two Germanys integrated the treaties relating to the unification process into their domestic legal systems.

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[76] Arts.11-16 of the Treaty of German Union.

[77] Arts.17-25 of the Treaty of German Union.

[78] Arts.26-32 of the Treaty of German Union.

[79] On ratification of the treaty, the two Germanys on 14-16 July of the same year agreed on an eight-point unification plan.

[80] The Unification Treaty consists of the following chapters: Effect of Accession (Chapter I); Basic Law (Chapter II); Harmonization of Law (Chapter III); International Treaties and Agreements (Chapter IV); Public Administration and the Administration of Justice (Chapter V); Public Assets and Debts (Chapter VI); Labor, Social Welfare, Family, Women, Public Health and Environmental Protection (Chapter VII); Culture, Education and Science, Sport (Chapter VIII); Transitional and Final Provisions (Chapter IX).

[81] On the next day, the FRG concluded the Treaty on Good Neighborliness, Partnership and Cooperation with the Soviet Union in Moscow.

[82] From the viewpoint of the traditional law of war, the chief effect of a peace treaty is only the restoration of a condition of peace between former belligerents. See H.LAUTERPACHT (ed.), *Oppenheim's International Law,* Vol.2, 5th edn. (Longmans, London, 1935) 479.

## 4. LEGAL PROBLEMS PRECEDING THE CONCLUSION OF A PEACE TREATY BETWEEN THE TWO KOREAS

### 4.1. The legal nature of the current relationship between the two Koreas

A preliminary problem to be dealt with in the matter of peace treaty making between North and South Korea is to define the current legal status of inter-Korean relations. Although no full-blown military clash has taken place since the end of the Korean War in 1953, and although the danger of open war on the Korean peninsula has definitely decreased, inter-Korean relations are still governed by the Armistice Agreement. Are the two Koreas at peace or are they not?

Under the traditional theory of the law of war,[83] an armistice is as a temporary suspension of armed hostilities,[84] which are to be resumed on the expiration of the armistice period.[85] An armistice should thus be distinguished from peace in the following sense: peace is based on the idea of normalization of relations between the former belligerents, whereas an armistice denotes only the factual cessation of war. In other words, armistice has only a negative connotation (negation of war), while peace has a positive meaning (including the conduct of diplomatic, economic and other relations).[86] In modern state practice, however, a general armistice[87] is regarded not merely as a temporary halting of hostilities, but as a kind of

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[83] On the traditional theory of the law of war, see L.C.GREEN, *The Contemporary Law of Armed Conflict* (Manchester, 1993) Chaps.1 and 2; I.D. DE LUPIS, *The Law of War* (Cambridge, 1987); R.MILLER (ed.), *The Law of War* (Lexington, 1975); I.BROWNLIE, *International Law and the Use of Force by States* (Oxford, 1963) Part I; J.STONE, op.cit.n.33; A.D.MCNAIR, *Legal Effects of War* (Cambridge, 1948); T.BATY and J.H.MORGAN, *War: its conduct and legal result* (New York, 1915); and P.BORDWELL, *The Law of War between Belligerents* (Chicago, 1908).

[84] The traditional rules of armistice were firstly enshrined in Arts.36 to 40 of the Hague Regulations respecting the Laws and Customs of War on Land (Hague Regulations, Annexed to Conventions II of 1899 and IV of 1907). An armistice is defined in the Hague Regulations as "a suspension of military operations by mutual agreement between the belligerent parties." Each party to an armistice agreement undertakes to notify all its competent authorities and armed forces of the suspension of hostilities. See S.VEROSTA, "Neutralization", EPIL inst.4 at 32. On the UN practice on armistice, see S.D.BAILEY, "Cease-fires, truce and armistice in the practice of the United Nations Security Council", 71 AJIL (1977) 463-7.

[85] Art.36 of the Hague Regulations.

[86] See J.MÖSSNER, "Non-aggression pact", EPIL inst.4 at 33.

[87] Under Art. 37 of the Hague Regulations, an armistice may be general or local in character. The former means the suspension of hostilities pertaining to all military operations anywhere, while the latter refers to the suspension within a prescribed area only.

de facto termination of war,[88] to be completed later by a final peace treaty.[89] Professor JULIUS STONE calls the Korean armistice a typical case of a modern-style armistice.[90] The two opposing sides strongly desired to terminate their armed conflict through the armistice,[91] and they have indeed not resumed armed hostilities since then. Seen from the perspective of the aforementioned modern armistice practice,[92] the Korean armistice may indeed be regarded as a general armistice resulting in the two Koreas supposedly being at peace with each other.[93] In view of the actual situation, however, one can hardly take peace between them for granted in the absence of a real legal and institutional foundation. That is why the current inter-Korean relations should be classified as an interim stage between *de jure* armistice and *de facto* peace.

## 4.2. Qualification of the parties in the Inter-Korean peace treaty-making process

The second question relating to the inter-Korean peace treaty-making process concerns the recognition of the direct parties concerned. The origin of this issue, raised mainly by North Korea, dates back to the negotiation period of the Armistice Agreement. North Korea's arguments concerning the question may be summarized as follows:[94]

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[88] The modern practice of armistice commenced with a number of armistices concluded during World War I. For the relevant texts, see 13 AJIL (1919) Supp. at 80-96. A typical theory on this period has been presented by L.OPPENHEIM. See H.LAUTERPACHT, *Oppenheim's International Law*, Vol.2, 7th edn. (Longmans, London, 1952) at 596-9. The new concept of a general armistice was further developed through the series of general armistice agreements signed in 1949 between Israel on the one side and Egypt, Lebanon, Jordan and Syria on the other (see 42 UNTS 251-351), and reached its zenith in the Korean Armistice Agreement of 1953. On the historical evolution of the legal concept of armistice, see VEROSTA, loc.cit.n.84 at 32-3.

[89] See STONE, op.cit.n.33 at 643-4.

[90] Id. at 644. The same argument may be found in J.G. STARKE's *An Introduction to International Law* (Butterworths, London, 1984) 546.

[91] The ardent hope of the two sides to terminate the armed conflict is apparent in the preamble of the Armistice Agreement, as follows: ".... in the interest of stopping the Korean conflict, and with the objective of establishing an armistice which will ensure a complete cessation of hostilities and of all acts of armed force in Korea until a final peace settlement is achieved."

[92] For details on the modern practice of armistice, see H.S.LEVIE, "The nature and scope of the armistice agreement", 50 AJIL (1956) 880-8.

[93] On the duration of the armistice, Art.V para. 62 of the Korean Armistice Agreement provides that, "The Articles and Paragraphs of this Armistice Agreement shall remain in effect until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement."

[94] Unification Plan by the Koryo Democratic Confederation of 10 October 1980 (cited from KIM MYUNG-KI, *The Unification Policies of the South and the North* (The Institute for International Affairs, Seoul, 1995) 181-4.

> "In the process of negotiation for replacing the current Armistice Agreement with a progressive peace treaty, the North will not talk with the South but with the United States directly. Because the South did not sign the Armistice Agreement, it has no authority to be an opposite party for making a peace treaty."[95]

Despite the fact that no representative of South Korea has officially signed the Armistice Agreement, North Korea's argument on this issue has little relevance in view of the existing *opinio juris* with respect to the following facts:[96] firstly, General MARK CLARK did not sign only as a representative of the US army, but also as the UN Commander-in-Chief on behalf of all the military forces[97] under the flag of the UN.[98] The South Korean army was of course included in this chain of command. Secondly, South Korea participated in the post-Korean War Political Conference at Geneva in April-May 1954 as a party pursuant to Article IV, paragraph 60 of the Armistice Agreement.[99] The fact that neither of the two sides denied South Korea

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[95] North Korea firstly proposed North Korean-US direct contact on 25 March 1974. See "Letter to the United States Congress", *Rodong Shinmun* daily of 26 March 1974. In 1984, the North began to advocate a "Tripartite Meeting", but later reverted to its original policy on 28 April 1994. See *The Korea Times* of 28 April 1994. For details, see KIM HAKJOON, *Unification Policies of South and North Korea 1945-1991: a comparative study* (S.N.U. Press, Seoul, 1992) 412-8.

[96] Regarding the legal characteristics of the Korean armistice agreement, see E.A.SIMON, "The operation of the Korean armistice agreement", 47 *Military Review* (1970) 105-39; S.POLLACK, *The Korean Armistice: Collective security in suspense* (Army Lawyer, Dept.of Army Pamphlet, 1984) 43-52; C.F.MURPHY, "Pueblo EC 121 and beyond: a suggested analysis", 38 *Fordam Law Review* (1970) 439-54. (cited from KIM CHIN, *Korean Law Study Guide* (San Diego, 1995) 38.

[97] The Security Council, in its resolution of 7 July 1950, permitted the UN Member States to dispatch military forces for the maintenance of peace and security on the Korean peninsula and in that context to set up a united command under the UN flag. Therefore, an official signature of the UN Commander-in-Chief may be regarded as a legal act to represent at least the will of these forces and South Korea. See UNSC Res.84 (7 July 1950).

[98] The treaty-making capacity of the United Nations as a legal person was examined by the International Court of Justice in its advisory opinion in the Reparation for Injuries case. In this Opinion, the Court has come to the conclusion that the United Nations has international personality and is able to conclude a treaty, by the following statement: "The Convention on the Privileges and Immunities of the United Nations of 1946 creates rights and duties between each of the signatories and the Organization. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members have clothed it with the competence required to enable those functions to be effectively discharged. " ICJ Yearbook 1948-9 at 66-70.

[99] The article reads: "A political conference of a higher level of both sides be held by representatives appointed respectively to settle through negotiation the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, ...etc." Pursuant to that provision, the representatives of South Korea, the United States and the fifteen other nations that formed the unified forces met with delegates from the Soviet Union, China and North Korea in Geneva between April and June of 1954. It was clearly stated at that conference that the UNC would continue to be stationed in South Korea until the danger of a recurrence of war no longer existed. See 16 Foreign Relations of the United States [FRUS] 1952-54 (The Geneva Conference) (US Dept.of State,

participation at that time shows that the latter was a legitimate party to the Armistice Agreement.[100] Finally, South Korea has been the *de facto* main opposing party to North Korea in the political and military relations since the conclusion of the Armistice Agreement.[101] All these precedents preclude North Korea under international law from denying South Korea the status of party in peace treaty negotiations.

### 4.3. The United Nations Command (UNC) in South Korea and the Inter-Korean peace treaty-making process

The third question with which we are confronted is that of the existence of the United Nations Command (UNC)[102] in South Korea and whether it should be dissolved in the face of the issue of making an inter-Korean peace treaty.

The United States and South Korea hold that the UNC has been legally established and maintained in South Korea to ensure complete compliance with and observance of both letter and spirit of the Armistice Agreement, as stipulated in Paragraph 17 (Article II) of the Armistice Agreement.[103] The establishment and existence of the UNC has, however, created a number of controversial legal problems. First, unlike two other organs, the Military Armistice Commission and the Neutral Nations Supervisory Commission, which can clearly be traced back to the Armistice Agreement,[104] the UNC was not established by mutual accord, but unilaterally, by the United States and South Korea, for political and military reasons, on the basis of UN Security Council resolution 84 of 7 July 1950. Its existence could, therefore, be seen as a violation of the spirit of the Armistice Agreement, which is to

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Washington, D.C., 1981). See also *Documents Relating to the Discussion of Korea and Indo-China at the Geneva Conference (April 16-June 15, 1954)* (British White Paper No. 9186, London, 1954).

[100] See LEE CHANG-HEE, "A method for replacing the Korean Armistice Agreement with a peace treaty system" (in Korean), 39 *The Korean Journal of International Law* (1994) No.1 at 65-6.

[101] In July 1997 North Korea accepted four-party talks among North and South Korea, China and the United States. This symbolized a change in the North Korean position. "South and North Korea, and the United States agree 4-party talk in New York", *Chosun Ilbo* of 2 July 1992 at 2.

[102] The UNC was actually organized as a "unified command" by Security Council resolution 84 (S/1588), but after the armistice it has generally been called the "United Nations Command".

[103] Para.17 reads: "Responsibility for compliance with and enforcement of the terms and provisions of this Armistice Agreement is that of the signatories hereto and their successors in command. The Commanders of the opposing sides shall establish within their respective commands all the measures and procedures necessary to ensure complete compliance with all of the provisions hereof by all elements of their commands. They shall actively cooperate with one another and with the Military Armistice Commission and the Neutral Nations Supervisory Commission in requiring observance of both the letter and the spirit of all of the provisions of this Armistice Agreement."

[104] Art. II, section B (Military Armistice Commission) and section C (Neutral Nations Supervisory Commission) of the Armistice Agreement.

ensure a complete cessation of all acts of armed force in Korea.[105] Second, the legal nature of the UNC is quite ambiguous. It was established during the war and is a unique entity in the history of the United Nations. It has definitely a kind of authority different to that of the UN armed forces in peace keeping operations.[106] The *opinio juris* in South Korea, that the UNC is a subsidiary organ[107] of the United Nations,[108] has very little ground. During the war, neither the Security Council nor the General Assembly of the UN adopted any legal or policy instrument that endowed this unified command with the official status of a subsidiary organ of the United Nations. The UN merely authorized each military force under the unified command limited power to use the UN flag "in the course of operations against North Korean forces."[109] Besides, after the ceasefire in July 1953 the United Nations did not take any follow-up measures for the maintenance of the UNC. In the light of the wording of Security Council resolution 84[110] and the following omission of the UN, the UN flag should in fact not have been used, as of the time that the actual military operations against North Korea's People's Army were terminated by the armistice.

The dissolution of the UNC in South Korea was first discussed as part of the official agenda of the 29th session of the UN General Assembly in 1974. North Korea proposed the unconditional dissolution of the UNC and the withdrawal of foreign troops from South Korea. South Korea claimed that the UNC was essential for the implementation of the Armistice Agreement. Against this backdrop, the General Assembly adopted Resolution 3333 (XXX),[111] which was a compromise but stood closer to the South Korean

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[105] Preamble to the Armistice Agreement.

[106] On the definition of the UN peace keeping operation, see A.CASSESE (ed.), *United Nations Peace Keeping: legal essays* (Sijthoff & Noordhoff, Alphen aan de Rijn, 1978) 15-6. On the background of the institution of peace keeping operations, see W.R.ERYE, *A United Nations Peace Force* (Oceana, New York, 1957). For documentation on peace keeping operations, see W.G.SHARP (ed.), *A collection of primary documents and readings governing the conduct of multilateral peace operation* (American Heritage, New York, 1995).

[107] On the subsidiary organs of the UN, see Art.7 (2) of the UN Charter.

[108] See e.g., LEE CHANG-HEE, loc.cit.n.100 at 67; JHE SEONG-HO, "South Korea's strategy against the proposal of North Korea to conclude the peace treaty" (in Korean), 1 *Seoul Journal of International Law* (1994) 123.

[109] S/1588 para.5 (7 July 1950). On this issue, see CHEE CHOUNG-IL, "Legal aspects of the United Nations Command in Korea", in CHEE CHOUNG-IL (Ed.), *Korea and International Law* (Seoul Press, Seoul, 1993) 84-96.

[110] Ibid.

[111] "The General Assembly expresses the hope that the Security Council will in due course give consideration to those aspects of the Korean question which fall within its responsibilities, including the dissolution of the United Nations Command in conjunction with appropriate arrangements to maintain the Armistice Agreement which is calculated to preserve peace and security in the Korean peninsula." Text of resolution in *Yearbook of the United Nations* 1974 at 173.

position.[112] Immediately after the adoption of the resolution, both sides began to prepare for another confrontation at the next General Assembly session. At the 30th session in 1975 a pro-North Korean draft resolution proposed the dissolution of the UNC "immediately and unconditionally," and the withdrawal of all foreign troops there under the UN flag. The North Korean representative specifically emphasized that, if all foreign troops were withdrawn from South Korea concurrently with the dissolution of the UNC, no gap would in fact be created.[113] On the other hand, a pro-Western draft resolution for the first time agreed on the need for such dissolution, but only after agreement was reached on intermediate measures, because without such arrangements, a military and legal vacuum could arise which might jeopardize the existing mutual understanding. The US representative also announced that the US would propose the holding of a conference not only to discuss means for the preservation of the Armistice Agreement but which could also explore other means to reduce tensions on the Korean peninsula.[114] Remarkably, the General Assembly on 18 November 1975 passed two quite contradictory resolutions (3390 A & B) on the question of the UNC in South Korea.[115] Through Resolution 3390A, South Korea agreed to the dissolution of the UNC but only in conjunction with alternative arrangements for maintaining the Armistice Agreement; North Korea, through Resolution 3390B, asserted its wish to dissolve the UNC and to have all foreign troops stationed in South Korea under the flag of the United Nations withdrawn.[116] Despite their contradictory contents, the two General Assembly resolutions coincided on the desirability of the dissolution of the UNC in South Korea. From this point on, the UNC was deprived of its legal basis[117] and the UN was officially presumed to have abdicated its responsibility for restoring peace and security on the Korean peninsula.

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[112] See LYOU BYUNG-HWA, *Peace and unification in Korea and international law* (Occasional Papers in Contemporary Asian Studies 2, Maryland University School of Law, 1986) 82.

[113] See KOH KWANG-LIM, loc.cit.n.24 at 547.

[114] Ibid.

[115] LYOU BYUNG-HWA, op.cit.n.112 at 83-6.

[116] *UN Chronicle* 1975 No.12 at 18-21.

[117] Prof. LEE CHANG-HEE, loc.cit.n.100 at 62, maintains that the UNC lost its legal basis since the two Koreas simultaneously became members of the UN in 1991. He contends that Security Council resolution 702 of 17 Sept.1991 legally replaced that of 7 July 1950 which branded North Korea as a peace-breaking country and served as the legal basis for the establishment of the UNC. This legal reasoning may be problematic, however. The United Nations did not explicitly branded North Korea as a peace-breaker, but determined, through Security Council resolution (S/1501), that the armed attack upon the Republic of Korea by forces from North Korea constituted a breach of the peace. Legally speaking, the breach of peace committed by the armed attack of North Korea had terminated by the cessation of hostilities and the conclusion of the Armistice Agreement on 27 July 1953.

## 4.4. The stationing of US armed forces in South Korea and the legal implications for Inter-Korean peace treaty-making efforts

The final issue to be dealt with is that of the stationing of the US armed forces in South Korea. These forces were sent to the Korean peninsula in 1950[118] in order to repel North Korea's armed attack on South Korea.[119] In spite of the armistice of 1953, they were not withdrawn and have continued to be stationed in South Korea for strategic considerations, forming a critical issue in the postwar inter-Korean relations. On the one hand, North Korea has consistently demanded their withdrawal from South Korea, regarding their presence as a grave hindrance to peace and stability on the Korean peninsula;[120] on the other, South Korea and the United States have rejected withdrawal, maintaining that the forces constitute an important stabilizer of the military balance on the Korean peninsula and in Northeast Asia as a whole.[121]

The stationing of the US armed forces is based on a ROK-US Mutual Defense Treaty[122] and a Status of (US) Forces Agreement (SOFA). The Mutual Defense Treaty came about after arduous negotiations[123] and was concluded on 1 October 1953,[124] just after the signing of the Armistice Agreement, in accordance with the South Korean government's wish to have a kind of defense treaty with the United States. It was meant to guarantee military stability and security on the Korean peninsula.[125] Like other defense

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[118] The 7th Infantry Division of the US Army first landed in Korea on 8 Sept.1945 to receive the Japanese surrender on the Korean peninsula, but was evacuated in 1949. See KIM JUNG-IK, *The future of the US-Republic of Korea military relationship* (McMillan, New York, 1996) 31.

[119] On the US military intervention in the Korean War, see S.AMBROSE, *Rise to Globalism: American foreign policy since 1938* at 114-126. See also P.PIERPAOL, *Truman and Korea: the political culture of the early cold war* (University of Missouri Press, Columbia, 1999).

[120] See LYOU BYUNG-HWA, op.cit.n.112 at 107-10.

[121] Id., at 99-105.

[122] The international legal basis for the ROK-US Mutual Defense Treaty may be found in Art.52 para.1 of the UN Charter. It provides that "Nothing in the present Charter precludes the existence of regional arrangements for the agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action."

[123] On the negotiation process of the Mutual Defense Treaty, see KIM HYUN-DONG, *Korea and the United States: The evolving trans-Pacific alliance in the 1960s* (Research Center for Peace and Unification of Korea, Seoul, 1990) 73-88.

[124] It entered into force on 17 November 1954.

[125] Another hidden reason for the RHEE SYNGMAN administration of South Korea to conclude a mutual defence treaty with the United States was to raise enough funds for the postwar restoration of the Korean economy based on the military stability on the Korean peninsula under the auspices of the US forces. In the negotiation process of the Mutual Defense Treaty, President RHEE urged the US to help the South Korean government modernize its army. With the so-called free ride security policy, the RHEE administration started the postwar restoration project. See KIM HONG-NAK, *Perspectives on US-Korean Security Relations: Emerging patterns of regional security in Northeast Asia and the future of the US-ROK alliance* (Council on US-Korean Security Studies, Proceedings

treaties concluded after World War II, the ROK-US Mutual Defense Treaty, in its preamble and six articles, deals with suitable measures for the deterrence of external armed attack,[126] for the settlement of international disputes,[127] and some other administrative issues.[128]

The status of the US forces in Korea is, meanwhile, regulated by the SOFA.[129] Its initial version was embodied in the Taejon Agreement of 1950.[130] In it, South Korea granted the United States exclusive jurisdiction[131] over American servicemen in Korea during the Korean War. Later a modified SOFA was drawn up under Article 4 of the Mutual Defense Treaty authorizing subsequent agreements regarding the disposition of American troops.[132] The new SOFA[133] superseded the earlier Taejon Agreement.[134]

In spite of all these arrangements, the stationing of US armed forces in South Korea has remained a critical issue from an international political perspective. Legally speaking, there is little room for North Korea as a third country to intervene in the stationing of US armed forces in South Korea, since the Mutual Defense Treaty is of a bilateral nature and concluded under the sovereign jurisdiction of the contracting parties. There is no significant postwar practice of a state's substantially intervening in the stationing of foreign forces in the territory of another (neighboring) country. North Korea

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of the Fourth Annual Conference, 1988, Hawaii) 92-3.

[126] Art.2 of the Mutual Defense Treaty.

[127] Art.1 of the Mutual Defense Treaty.

[128] Arts.3-6 of the Mutual Defense Treaty.

[129] The official name of the Korean SOFA is *Agreement regarding Facilities and areas and the Status of United States Armed Forces in the Republic of Korea.* It was concluded under Art.IV of the ROK-US Mutual Defense Treaty. The SOFA is an executive agreement concluded on the basis of the executive power of the US President. On executive agreements, see L. HENKIN, *Foreign Affairs and the US Constitution*, (Oxford, 1996), pp. 215-26.

[130] Agreement of 12 July 1950. Text in *United States Treaties and Other International Agreements* [UST] 5:2, TIAS No.3012. For details, see D.W.BOWETT, *United Nations Forces* (Praeger, New York, 1964) 57.

[131] Different from the Korean SOFA which grants exclusive criminal jurisdiction over American servicemen in Korea to the US, the NATO SOFA provided for dual or concurrent jurisdiction over American troops. Art.VII of the NATO SOFA. See Student comments, "Due process challenge to the Korean Status of Forces Agreement" (Student comments), 57 *The Georgetown Law Journal* (1969) 1097.

[132] "The Republic of Korea grants, and the United States of America accepts, the right to dispose of United States land, air and sea forces in and about the territory of the Republic of Korea as determined by mutual agreement." Art.4 of the Mutual Defense Treaty.

[133] A highly topical question of the SOFA is that of the criminal jurisdiction laid down in Art. XXII. It mirrors the system of original and concurrent jurisdiction incorporated in the earlier NATO SOFA. On the criminal procedure of American servicemen under Art. XXII of SOFA, see LEE J.Y., "Fair trial standards and Korean Criminal Law and procedures", 6 *The Korean Journal of Comparative Law* (1978) 15-42.

[134] See "Due process etc.", loc.cit.n.131 at 1099. For the Korean perspective of the SOFA, see LEE SOG-U, *A Study on the Korean Status of Forces Agreement* (Soulsi Publishers, Seoul, 1995).

might oppose the military activities of US forces in and around South Korea by invoking the right of self-defense under the UN Charter.[135] If North Korea were to consider the military operation of US forces to be beyond a reasonable defensive scope and threatening its national security,[136] it could require the United States to call off such an operation on grounds of constituting a menace to its peace and security and invoke its wrongful nature under international law, resulting in state responsibility.[137] Despite these juridical possibilities, such a response would probably not be effective because a breach of an international obligation of a state has usually been interpreted restrictively in current international law.[138] The Korean question is of a highly political content and the best way of resolving it seems to be by reaching an accord between the two sides directly involved.

## 5. A REVIEW OF THE PROCEDURES TO BE FOLLOWED IN MAKING AN INTER-KOREAN PEACE TREATY

### 5.1. An inter-Korean peace treaty and the Vienna Convention of 1969

The legal procedure to be followed for the making of an inter-Korean peace treaty may be generally found in the Vienna Convention on the Law of Treaties of 1969 (The Vienna Convention).[139] Regarding the capacity

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[135] The scope of self-defense should be consistent with the purposes and principles of the United Nations. See Art.52, para.1 of UN Charter. On the theory of self-defense in international law, see L.F.DAMROSCH and D.J.SCHEFFER, *Law and Force in the New International Order* (Westview, Boulder, 1991).

[136] One of the controversial military issues is found in the annual "Team-Spirit" joint military exercises.

[137] Pursuant to Art.3 of the International Law Commission's draft articles on State Responsibility, "An international wrongful act of a state may happen when (a) conduct consisting of an action or omission is attributable to the state under international law; and (b) that conduct constitutes a breach of an international obligation of the state."

[138] For details, see P.MALANCZUK, "Countermeasures and self-defense as circumstances precluding wrongfulness in the International Law Commission's draft articles on state responsibility", in M.SPINEDI & B.SIMMA (eds.), *United Nations Codification of State Responsibility* (Oceana, New York, 1987) 246-51. See also J.CRAWFORD's Second Report to the ILC. This new version of the draft articles on state responsibility was adopted at the 51st session of the Commission at its 1999 session. See A/CN.4/498.

[139] On the process of how the Vienna Convention of 1969 came about, see *The Yearbook of the International Law Commission* 1966 Vol.2 at 1, 51 and 169; *United Nations Conference on the Law of Treaties*, First Session, Official Records, A/CONF.39/11; Second Session, A/CONF.39/11 Add.1. See also, *inter alia*, I.M.SINCLAIR, *The Vienna Convention on the Law of Treaties* (Manchester, 1984); T.O.ELIAS, *The Modern Law of Treaties* (Oceana Publications, 1974); R.P.DHOKALIA, *The Codification of Public International Law* (Manchester, 1970); S.ROSENNE, *The Law of Treaties: A guide to the legislative history of the Vienna Convention* (A.W. Sijthoff, Leiden, 1969). Text of the Convention in, *inter alia*, 8 ILM (1969).

of the parties concerned to the peace treaty making, first, Article 6 of the Vienna Convention endows all states with the power to make treaties.[140] This means that only a state can be a subject of a treaty[141] under current international law.[142] Moreover, states that express their consent to being bound by a treaty will be the parties directly concerned.[143] In the case of inter-Korean peace treaty making, accordingly, the two Koreas would be the parties directly concerned if they independently and clearly show their consent to being bound by the treaty.

Once committed to the making of a peace treaty, the governments of the two sides should talk about drafting the treaty text. The treaty text would include, by and large, such elements as preamble, national entity, political and territorial clauses, military *détente*, and economic and financial clauses.[144] When the contents of the treaty are agreed upon, the draft of the peace treaty would have to obtain the final consent of, and be adopted by, the two sides. Upon the adoption of the treaty text, they would establish the text as authentic and definitive by such procedures as may be provided for in the text or as agreed to otherwise.[145] However, the adoption and the authentication of the text would not in themselves create obligations for the two Koreas. The peace treaty would finally enter into force in such a manner and upon such a date as it may provide, or as soon as the consent to be bound by the treaty is expressed by the parties concerned.[146] As is stipulated in

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[140] "Every State possesses capacity to conclude treaties." For details, see Sinclair, op.cit., at 29-30.

[141] On the self-determination of state under international law, see J.CRAWFORD, *The Creation of States in International Law* (Oxford, 1979) 84-106. On the traditional theory of the state in international law, see J.B.SCOTT, *Law, the State, and the International Community*, 2 Vols. (Columbia Univ.Press, New York, 1939). See also H.KELSEN, *General Theory of Law and State* (transl. A.WEDBERG, Harvard, 1945); id., *Pure Theory of Law* (transl. from German original of 1934, Univ. of California Press, Berkeley, 1967) 279-319; B.AKZIN, "Analysis of state and law structure", in S.ENGEL (ed.), *Law, State, and International Legal Order* [Essays in honor of Hans Kelsen] (University of Tennessee Press, Knoxville, 1964) 2-17.

[142] Under the orthodox positivist doctrine, states alone are recognized as legal persons in public international law. This absolute state sovereignty has become obsolete in the twentieth century, because of the increased need for international organizations to operate independently on the international level, separate from the member states, requiring a legal personality of its own both within the domestic legal order and under public international law. For example, the European Union has the right to make treaties on behalf of member states. See H.SCHERMERS & N.BLOKKER, *International Institutional Law* (Martinus Nijhoff Publishers, The Hague, 1995) 976-7. On the legal personality of states and international organizations, see H.LAUTERPACHT, *International Law: Collective papers*, Vol.2 (Cambridge) 489; J.W.VERZIJL, *International Law in Historical Perspective* Vol.2 (A.W.Sijthoff, Leiden, 1970); M.N.SHAW, *International Law* (Cambridge, 1997) 139 *et seq.*

[143] Art.12 para.1 of the 1969 Vienna Convention.

[144] On the model of a peace treaty, see W.GREWE, "Peace treaties", EPIL inst.4 at 106-7.

[145] Art.10 (a) of the 1969 Vienna Convention.

[146] Art. 24, paras 1 and 2 of the 1969 Vienna Convention.

Article 11 of the Vienna Convention,[147] the most popular means of expressing consent are signature and ratification.[148] In the case of an inter-Korean peace treaty, signature by the qualified treaty-making organs[149] and ratification by the parliaments of the two Koreas would be the most appropriate method. When the peace treaty enters into force, it should be transmitted to the UN Secretariat for registration[150] in accordance with Article 102 paragraph 1 of the UN Charter.[151]

## 5.2. The replacement of the armistice agreement with a peace treaty

In the case of an inter-Korean peace treaty, an additional problem is the replacement of the Armistice Agreement with the peace treaty. This procedure, which consists of terminating the previous treaty and the entering into force of the new treaty,[152] raises some legal problems under the Vienna Convention on the Law of Treaties of 1969.

The first step in the replacement of the Armistice Agreement would be to terminate the Armistice Agreement itself. Termination of a treaty means the ending both of the treaty itself and of the rights and obligations it has created.[153] With regard to this question the Vienna Convention contains relevant rules in its Part IV (Articles 54-64). Under Article 54, a treaty may be terminated (a) "in conformity with the provisions of the treaty" or (b) "at any time by consent of all the parties after consultation with the other contracting States."[154] The Korean Armistice Agreement does not include rules on its termination and thus the only way to terminate the Agreement under the Vienna Convention system is for the parties directly concerned to agree on its termination.[155] On the same subject, however, the Vienna Convention

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[147] "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

[148] For details, see MALANCZUK, op.cit.n.6 at 131-2.

[149] Art.7, paras 1 and 2 of the 1969 Vienna Convention. The qualified treaty-making organs should produce appropriate full powers to represent the state, or the intention of the state to consider that organ as representing that state should appear from the latter's state practice.

[150] Art.80 para.1 of the 1969 Vienna Convention.

[151] "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."

[152] For details, see A.E.DAVID, *The Strategy of Treaty Termination* (Yale, 1975) 56-8.

[153] See N.KONTOU, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford, 1994) 8.

[154] For details, see MALANCZUK, op.cit.n.6 at 141.

[155] Art.54 of the Vienna Convention. Outbreak of general armed hostilities in Korea would be another reason for terminating the Armistice Agreement under the current system of the law of treaties (Art.73 of the Vienna Convention). It is, however, not sensible to include outbreak of war

contains yet another provision, Article 56, paragraph 1(a) and (b),[156] which recognizes a right of unilateral denunciation or withdrawal subject to certain conditions. If a treaty is silent on its termination and does not provide for denunciation or withdrawal, a right of denunciation or withdrawal is acknowledged if (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal"; or (b) "a right of denunciation or withdrawal may be implied by the nature of the treaty."[157] In light of the modern trend towards general armistices,[158] North and South Korea may supposedly be entitled to invoke the article because the Armistice Agreement signifies, by its nature, that *de facto* termination of the Korean War by the armistice is to be consummated by a final peace treaty.

From a rather academic point of view one could envision a fundamental change of circumstances (*rebus sic stantibus*) as a ground for the termination of the Armistice Agreement.[159] Pursuant to Article 62 paragraph 1(a) and (b) of the Vienna Convention, *rebus sic stantibus* may be invoked as a ground for treaty termination or withdrawal if (a) the changed circumstance itself constitutes "an essential basis of the consent of the parties to be bound by the treaty" and (b) the effect of the change is "radically to transform the extent of obligations still to be performed under the treaty".[160] The relevant question is, then, whether the essential basis of the Korean armistice system has indeed changed. Admittedly, external circumstances have changed considerably, especially since the two Koreas simultaneously joined the UN in 1991. However, a strict interpretation of the wording of Article 62, paragraph 1 of the Vienna Convention does not really show any radical transformation

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in the present context, as the termination of the Armistice Agreement by the outbreak of war would imply the collapse of the de facto peace. For details, see MALANCZUK, op.cit.n.6 at 145.

[156] Art.56 para.1(b), which was added to the text of the Vienna Convention of 1969, mainly reflects the view of most British writers, contrary to that of many continental authors, according to whom there could never be an implied right of denunciation or withdrawal under customary international law. See MALANCZUK, op.cit.n.6 at 142. On the British opinion, see A.D.MCNAIR, *The Law of Treaties: British practice and opinions* (Columbia, New York, 1938) 362-4. On this question, the position of the ICJ has become clear since it decided in *Nicaragua vs. USA* that Art.56 was an accurate statement of customary law. See ICJ Reports 1984, 392.

[157] Art.56 of the 1969 Vienna Convention. For details, see I.SINCLAIR, op.cit.n.139 at 186-8.

[158] See STONE, op.cit.n.33 at 644.

[159] On the doctrine of Rebus Sic Stantibus in international law, see A.VAMVOUKOS, *Termination of Treaties in International Law* (Oxford, 1985) 60-151.

[160] In the Fisheries Jurisdiction case, the ICJ held: "International law admits a fundamental change in circumstance which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it. This principle has been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship." ICJ Reports 1973 para.36.

of inter-Korean relations.[161] Consequently, there is hardly reason for *rebus sic stantibus* to be applied to the current Korean situation.

Once the Armistice Agreement is officially terminated in accordance with the Vienna Convention, there will be an option to take one of two different paths: first, the new peace treaty simultaneously enters into force, replacing the Armistice Agreement or second, an interim stage be introduced before the final effectuation of the peace treaty. The first alternative would not raise any problems. In the case of the second alternative, however, the two Koreas would have to define clearly the legal nature of that interim stage.

## 6. EVALUATION AND CONCLUSION

In this article, we have examined the legal problems related to the establishment of a de jure peace regime on the Korean peninsula, focusing on the making of a formal inter-Korean peace treaty under international law.

In order to construct a stable peace regime on the Korean peninsula, the two Koreas have to meet certain critical legal conditions. The initial step is to clarify the current legal status of the inter-Korean relationship. With the many changes over the last decades, the two Koreas are neither at peace nor in a state of armistice in the traditional sense. Having analyzed the substantive characteristics of the Korean armistice under the modern international law of war, we have come to the conclusion that the current legal state of inter-Korean relations should be regarded as an interim stage between *de jure* armistice and *de facto* peace. Starting from this assumption, further conditions have been discussed. In regard to qualification as the parties directly concerned the present inquiry has clearly shown that North and South Korea are without any shadow of a doubt to be classified as such.

The next question concerns the existence of the UNC in South Korea. Whether it should be dissolved before the peace treaty-making process begins has been a long-standing issuebetween the two sides. The UNC has been deprived of its legal basis not only by the General Assembly Resolutions 3390 (A & B), but also by the simultaneous entry of the two Koreas into the UN in 1991. Its official dissolution would certainly create a better climate towards establishing a peace regime on the Korean peninsula.

In addition to these two conditions, the stationing of the US armed forces in South Korea has been examined. We have found that this is a political rather than a legal issue. Legally speaking, there is little ground for North Korea to raise objections against the stationing itself, except when an actual military operation is considered to be gravely threatening to its national security and to constitute a breach of an international obligation. Since a breach of an international obligation by a state is very strictly defined in

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[161] For state practice on fundamental change of circumstances with respect to treaties, see VAMVOUKOS, op.cit.n.159 ibid.

current international law, the best way of resolving this question seems to be to reach an accord directly between the parties concerned.

On the basis of a review of the legal conditions, we have touched upon the procedure of inter-Korean peace treaty making under the Vienna Convention on the Law of Treaties of 1969. Under the Vienna Convention, an inter-Korean peace treaty could be brought about through the following procedure. First, North and South Korea should agree on who will be the parties to the peace treaty. Our inquiry has shown that the two Koreas are qualified to act as the parties directly concerned. Next, they should express their consent to be bound by a peace treaty after which they would draft and adopt a treaty text including the crucial issues of establishing a genuine peace regime on the Korean peninsula. The process would be completed by the ratification of the treaty.

The finalization of the peace treaty, however, requires North and South Korea to complete another vital procedure: the replacement of the Armistice Agreement with the peace treaty. Because the Armistice Agreement does not meet the requirements for treaty termination as laid down in Article 54 of the Vienna Convention, the best way to terminate the Armistice Agreement seems for the two Koreas explicitly to agree on this step and for their respective agreements to be binding. The final step would then be the entry into force of the new peace treaty.

# BILATERAL INVESTMENT TREATIES: THE CHINESE APPROACH AND PRACTICE

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## 1. INTRODUCTION

Recent years have witnessed a substantial increase in the influx of foreign direct investment (FDI) into the People's Republic of China (China). According to the UNCTAD World Investment Reports, China has since 1992 been the second largest recipient of FDI among all the economies in the world. This is partly attributable to the attraction of its market size. However, it should be pointed out that despite China's prominence in the eyes of critical Western observers as an outsider in terms of international society, it should be pointed out that China's FDI-friendly laws and regulations, together with its bilateral investment treaties (hereinafter referred to as BITs),[1] have had a substantial and positive bearing on the influx of FDI.

This paper purports to examine Chinese BIT practice and experience. Needless to say, the Chinese attitude towards FDI determines the features of Chinese BITs. Part 1 will deal with this issue. Part 2 will present a general survey of Chinese BITs. The emphasis will be put on Parts 3 and 4, dealing respectively with the features and the implementation of Chinese BITs.

## 2. AN OVERVIEW OF CHINESE ATTITUDES TOWARDS FOREIGN DIRECT INVESTMENT FROM THE PERSPECTIVE OF POLITICAL ECONOMICS

The fifty-year history of the People's Republic of China can be roughly divided into two stages coinciding with the changes in China's foreign policy: from 1949 to 1979 and then from 1979 up to the present.[2] The first period saw China's self-imposed economic isolation from the outside world and a hostile attitude towards foreign investment. Since 1979, however, China has adhered to an open-door policy aiming at improving its national power and, accordingly, from that time on began a process of attracting foreign investment. This second period was temporarily interrupted by the consequences of the 1989 Tiananmen incident.[3]

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[1] The text of the BITs hereinafter cited may be found in the annual publication *Zhonghua Renmin Gongheguo Tiaoyueji* [Collection of treaties of the People's Republic of China], (*Shijie Zhishi Chubanshe* [World Knowledge Press], Beijing, 1982-1998). Although almost every BIT between China and other countries normally has an authentic English version, some provisions quoted in this paper are based on the author's own translation of the Chinese version. In the event of inconsistency between the authentic English version and the author's translation, the authentic version, of course, applies.

[2] The Third Plenary Session of the Central Committee of the Eleventh Communist Party of China in 1978 was a watershed.

[3] Soon after the Tiananmen incident, all the major business partners of China, particularly the United States and the European Community (as it then was), imposed sanctions on China. Some sanctions have not yet been fully lifted, up to the time of writing.

## 2.1. Before 1979

The first period of the history of the PRC saw a rejection of private property in accordance with orthodox Marxism and because of strong resentments on the part of China, relating to the State's bitter experience of colonial oppression and foreign intervention. The concept of private property that has been at the core of the law, including the international law on investment, in Western countries[4] became an obsolete entity in the socialist context; the definition and protection of private property was not a task of paramount importance for the Chinese Constitution. As a matter of fact, the then Chinese Constitutions[5] did not clearly recognize the legitimacy of private ownership of means of production .[6]

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[4] According to PETERSMANN's excellent study on property in the constitutional context, the notion is based on the idea of basic human rights. Both the United States and Europe deal with this issue either in their constitution or in conventions concerning constitutional human rights. See E.-U.PETERSMANN, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

[5] There have been four consecutive Constitutions since the founding of the People's Republic of China, i.e. those of 1954, 1975, 1978, and 1982. Each of these constitutions was drafted as an original and was not the amended version of an earlier one. The 1982 Constitution has been amended three times, in 1988, 1993, and 1999.

[6] According to socialist dogma, ownership is divided into those of production means and of consumption goods. Private ownership is confined to consumption goods, such as income, savings, house, etc. The 1954 Constitution, the first in the history of the People's Republic of China, did lay down a provision for the protection of "the right of capitalists to own means of production and other capital according to law". At the same time, however, the first Constitution clearly called for control of the negative aspects of capitalist industries and for the gradual transformation of capitalist ownership to a socialist one (*see* Art.10 of the 1954 Constitution). Even this limited recognition of private ownership turned out to be short-lived as capitalism was eliminated by the end of 1956. From then until 1979 non-public ownership in relation to "production means" did not exist and was not formally recognized by the Chinese Constitutions until 1982, even though foreign-funded enterprises and other businesses came into existence from 1979 on. The 1982 Constitution, while re-affirming the public sector as the foundation of the socialist economic system, vaguely mentioned "individual economy [*geti jingji*] of working people in urban or rural areas" (Art.11 of the 1982 Constitution reads: "Subject to the law, the individual economy of working people in urban and rural areas supplements socialist public ownership. The state protects the lawful rights and interests of the individual economy."), which literally means self-employed individual ownership. It was not until 1988 that the amendment to the 1982 Constitution introduced provisions on the private sector [*siying jingji*], thus providing, to some degree, a constitutional guarantee of private property. The 1988 amendment in this regard states: "The state permits private economy to exist and develop within the boundary of the law. Private economy is a supplement to the socialist public sector. The State protects the lawful rights and interests of the private sector. The state guides, assists and supervises the private sector by administrative control." It is apparent that the framers of the constitutional amendment did not contemplate the private sector to be on the same footing as the public sector in that the 1988 Amendment identified the private sector as a supplement to the public one. Moreover, the Chinese Constitution and its amendments fail to recognize the right to property as a means of production (Art.13 of the Constitution, before the 1999 amendment, referred to private property as opposed to public property: "The State protects the lawful income,

Strong resentment of China's bitter experience of imperialist oppression and foreign intervention also introduced a completely new dimension into the notions of international law.[7] The late HUAN XIANG, senior diplomat and one-time Chairman of the Chinese Society of International Law, observed of "traditional international law":

> "Principles and rules of international law since Hugo Grotius's time, (in general) reflected the interests and demands of the bourgeoisie, the colonialists and in particular the imperialists. The big and strong powers have long been bullying the small and weak nations, sometimes even resorting to armed aggression. International law has often been used by the imperialists and hegemonists as a means to carry out aggression, oppression and exploitation and to further their reactionary foreign policies. Apologies for aggression and oppression can often be found in the writings on international law."[8]

Consequently, in relation to foreign investment the inviolability of private property together with the requirement of state responsibility for injury to aliens was publicly repudiated. The early 1950s witnessed the confiscation of almost all of capitalist industry by the Chinese government through "socialist transformation". Compensation was made in the form of a fixed rate of interest, falling significantly below the traditional "prompt, adequate and effective" standard. Some foreign concessions were expropriated under the auspices of rescinding foreign privileges that were perceived to be the result of plunder under unequal treaties.[9]

It is noteworthy that the foregoing measures taken by China were paralleled by the concerted action of the newly independent countries to assert

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saving, house and other lawful property ownership rights."). The position of the private sector was strengthened by the 1999 constitutional amendment. The newly amended Constitution declares that "the individual economy, the private sector and other non-public sectors are important components of socialist market economy". This provision can be arguably interpreted as a recognition of the legitimacy of private ownership of means of production.

[7] For a comment on the Chinese attitude towards international law from the Chinese point of view, see WANG TIEYA, "International law in China: historical and contemporary perspectives", 221 *Recueil des cours* (1990-II) 263-352. For a detailed discussion of China's attitudes towards international law in this period, see J.A.COHEN and H.CHIU, *People's China and international law* (Princeton, 1974); also, SHAO-CHUN LENG (Ed.), *Law in Chinese foreign policy: Communist China and selected problems of international law* (Dobbs Ferry, 1972).

[8] HUAN XIANG, "Strive to build up New China's science of international law", in *Selected Articles from Chinese Yearbook of International Law* (Beijing, 1983) 3.

[9] Art.55 of the Common Programs of the Chinese People's Political Consultative Conference, which acted as the de facto constitution before the first Constitution was promulgated in 1954, provided that:

"[t]he Central People's Government of the People's Republic of China must study the treaties and agreements between the Kuomintang Government with foreign governments and, depending on their contents, recognise, annul, revise or re-conclude them."

permanent sovereignty of states over the national wealth and resources and to safeguard their economic independence. In the post-war era, the developing countries constituted a thrusting force and their attitude towards investment and expropriation issues gained prominence in the international fora. As a result, the traditional principles of international law such as state responsibility for injuries to aliens and *pacta sunt servanda* were undermined; a new version of international law with respect to foreign investment, represented by the doctrine of the "permanent sovereignty of states over natural resources", began to take shape. The United Nations General Assembly resolutions on the subject are illustrative in this regard.[10] China, sharing with these newly independent nations or developing countries the humiliation caused by colonialism, naturally sided with them in calling for the emergence of a "contemporary international law". China put forward the *Five Principles of Peaceful Co-existence* as "principles for contemporary international relations".[11] The *Five Principles* consist of mutual respect for each other's sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence. They seem to be no more than a repetition of the principles embodied in the United Nations Charter,[12] while allowing for an expansive and flexible explanation. The unremitting Chinese support for the new doctrines was partly driven by the ambition of the then Chinese leadership to act as spokesman for the developing world.

In conclusion the Chinese attitude towards FDI in the period before 1979 can be summarized as follows:

(1) States have the sovereign right to control the entry of FDI and to regulate the activities of foreign investors in their territories;

(2) The right to nationalise foreign property is an inherent attribute of national territorial sovereignty, and the exercise of this fundamental right is not subject to any pre-conditions such as "public purpose, due process and compensation", and

(3) State contracts or concessions are to be observed, subject to the sovereign power of host countries to mandate re-negotiation, revision or even unilateral modification on the basis of changed circumstances or public interests.

It is understandable for a country in a period of self-imposed isolation to maintain an almost hostile attitude toward FDI. As there was practically no inward FDI flow due to that policy of self-imposed isolation, the Chinese

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[10] For instance, UNGA Res.1803 (XVII) and 2158 (XXI) on Permanent Sovereignty over National Resources, 3201 (S-VI) on the Declaration on the Establishment of a New International Economic Order, and 3281 (XXIX).

[11] The "*Five Principles*" first appeared in a Sino-Burmese agreement in 1954 and were later incorporated in a Sino-Indian agreement of 1956. Since then China has never spared its efforts to advocate the principles. The reference to the principles can be seen in almost every bilateral diplomatic communiqué to which China is a party.

[12] Article 2 of the Charter of the United Nations.

attitude towards FDI was not consolidated into the form of a systematically elaborated investment policy.

## 2.2. After 1979

Changes in policy (particularly, in foreign policy) can lead to a change in attitude towards the international law on foreign investment. When China shifted overnight from its self-imposed isolation policy to an open-door policy, its attitude toward FDI also underwent a dramatic change. The process of integrating the Chinese economy into the world economy warranted a hospitable attitude towards FDI. In fact, never in history was the Central Kingdom more eager to attract FDI to boost its economic development. As a result a great many laws and regulations on the subject were promulgated. China also began to conclude BITs with other nations. It is obvious that utilitarianism or even mercantilism has been the driving force behind the investment legislation.

It should be noted that a new version of Marxism also had an impact on the attitude towards foreign investment. On the one hand, Marxists see FDI as the inescapable result of mass social production and thus as a necessary step in the transition from feudalism to capitalism and ultimately to socialism; on the other hand, it focuses on the potentially detrimental effects of FDI on developing states.[13] Consequently, China's attitude towards FDI in this period was rooted in mixed feelings of attraction and aversion to FDI, or, in Chinese terms, the tone was encouraging as well as restrictive, with the emphasis on encouragement.[14] Seen in the light of history, the new Chinese attitude, despite its utilitarian nature, is positive.

## 2.3. The tone of the new attitude towards foreign investment

The new Chinese attitudes towards FDI can be characterized by the so-called "three guiding principles" of international economic co-operation and exchange, i.e. the principles of sovereignty, equality and mutual benefit, and reference to international practice.[15] The three principles appeared, to a certain extent, to be a copy of the *Five Principles of Peaceful Co-existence* referred to earlier.

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[13] See, KENNETH J. VANDEVELDE, "The political economy of a bilateral investment treaty", 92 *AJIL* (1998) 623.

[14] JINSONG YU, *Guoji Touzi Fa* [International investment law] (*Falü Chubanshe* [Law Press], Beijing, 1994) 149.

[15] See MEIZHENG YAO, "Legal protection of international investment", in *Selected Articles from Chinese Yearbook of International Law* (Beijing, 1983) 169-186.

The principle of sovereignty is the key concept of the new Chinese attitude. As put by a Chinese publicist, the other principles flow from the notion of sovereignty.[16] Although the notion of sovereignty is restricted in the international practice of Western countries and in the Western writings on international law, China still holds a preference for the absolute perception of the notion.[17] The abrupt decision to utilize FDI, the screening of FDI to serve developmental purposes and even the change in attitude towards expropriation could be explained through the principle of sovereignty.

Equality logically derives from the principle of sovereignty. The principle of equality means, in relation to FDI, equality between the capital-exporting and the capital-importing countries, on the one hand, and between nationals and corporations of different countries on the other. However, the core of equality and benefit lies in mutual benefit; linking equality with mutual benefit results in combining juridical and economic equality, making equality substantive rather than merely formal. In essence, the principle of equality and mutual benefit requires that a balance of the rights and obligations of the parties concerned be maintained.

The principle of reference to international practice is new. International practice means, first of all, widely accepted and workable practice with respect to the business activities of companies and the economic administration of the government. Sometimes it is also referred to as the generally recognised principles and rules governing inter-state relations. It was put forward when China had just emerged from its long period of alienation from international business activities. The principle of reference to international practice implies that China is willing to comply with that recognised international practice as a substitute for international law.

## 2.4. The still-evolving attitude towards foreign investment

The 1989 Tianenman incident temporarily interrupted the process of China's integration into the international community that had begun in 1979. China once again became isolated, suffering from this isolation after both the incident itself and the successive collapse of the Central and Eastern European communist regimes. Fortunately, the isolation was never complete; a certain degree of engagement, particularly in the field of economic co-operation, was maintained. The elaborate engagement policy on the part of the major powers had its positive impact on both China and the outside world. The positive significance for China was obvious; as for the outside world, since a minimum

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[16] MING WEI, "*Hepin Gongchu Wuxiang Yuanze Zai Xian Dai Guojifa Shang de Yiyi* [The implications of the five principles of peaceful coexistence for modern international law], *Chinese Yearbook of International Law* 1985: 242.

[17] See CHEN TIQIANG, *Guojia Zhuquan huomian yu Guojifa* [Sovereignty, immunity and international law], *Chinese Yearbook of International Law* 1983: 31-35.

of economic contacts was maintained China kept adhering to the principles it had put forward. Interestingly, through maintaining the attitude developed in the post-open-door era, new trends emerged; their effect was that, on the one hand, a new FDI policy evolved in a more investment-friendly way, i.e. proceeding in the direction of liberalization, while, on the other hand, that policy started shifting to the selective promotion of FDI. Its aim was to convert the Chinese economy to a more sophisticated industrial structure.[18]

## 3. OVERVIEW OF THE CHINESE BITS

BITs serve different purposes: insofar as host countries are concerned, the most important purpose of BITs is to attract foreign investment in the interest of development. It is observed that BITs may contribute to this objective in a variety of ways, especially by helping to establish a favourable investment climate, building confidence and sending a positive signal to prospective investors.

From the outset of its change in attitude towards FDI, the Chinese government appreciated that foreign investors would have increased confidence in investing in a country where the government has concluded a BIT with the government of the investors' country. The year 1982 saw the conclusion of the first Chinese BIT, between China and Sweden, which was a landmark in the history of the subject. Albeit a late-comer in attracting FDI and the conclusion of BITs, China has made remarkable progress in this regard. Up to July 1999 China had concluded 94 BITs.[19]

The Chinese practice started with BITs with developed countries. In fact, of the twenty-two Chinese BITs that were concluded before June 1989 (the time of the Tiananmen incident), fifteen belonged to this category. This was no coincidence. As a matter of fact, the countries were selectively targeted for the purpose and developed countries were prioritized. For example, China has BIT links with all OECD member countries except the United States and

[18] UNCTAD doc.TD/B/COM.2/5- TD/B/COM.2/EM.1/3.

[19] UNCTAD source, available at: http://www.unctad.org/en/docs/poiteiiad2.en.pdf.

Canada.[20] [21] All these BITs, except those with Portugal, Spain, Greece and Iceland[22] were concluded before June 1989.

For China the developed world has remained the main source of inward foreign investment.[23] However, it reiterated that its open-door policy was "all-directional", which meant that it was "opening up not only to the developed western countries, but also to the developing world". Consequently, from the outset China also negotiated BITs with developing countries. In fact, concluding BITs with developing countries has assumed extra political significance in that it highlights China's commitment to South-South cooperation. Particularly in the aftermath of the Tiananmen incident, partly due to the sanctions imposed by almost all the developed countries, China accelerated its pace in concluding BITs with developing countries. In fact Chinese BITs with developing countries (including the former Central and Eastern European socialist countries or countries in transition) since June 1989 has outnumbered those with the developed world.

The Chinese BITs with developed countries share similar features because these countries share a similar level of economic development and more or less similar interests in investment issues. For example, though varying from one to another due to the different respective states of balance of power between China and its respective treaty partner, all the BITs with developed countries show little deviation from European-style BITs on which almost all of them are based. In fact, in all cases the model BIT proposed by these developed countries was the OECD Draft Convention on the Protection of Foreign Property.[24]

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[20] The OECD currently has twenty-nine members, of which only few (Czech Republic, Hungary, South Korea, Mexico, Poland, Turkey) are developing or transitional countries. Furthermore, they (except Turkey) have become members only recently (after 1994).

[21] China has entered into investment insurance agreements with the United States and Canada in 1979 and 1984, respectively, in order to guarantee subrogation rights under political risk insurance policies issued by their respective governmental agencies to their investors in China. While not normally dealing with general matters such as non-discrimination, the investment insurance agreements establish rules for the settlement of] investment disputes by arbitration between China and the two countries respectively. Nevertheless, these agreements are inherently inadequate to deal with the wider issues arising from trans-national investment between China and the two countries.

The conclusion of a Sino-US BIT was obstructed by the US standpoint that adequate and effective protection of intellectual property rights is an essential element of an attractive investment climate, and its demand that at the time of signature of a BIT the treaty partner make a commitment to implement all obligations under the] WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement within a reasonable period of time. China was not prepared to do so.

[22] China concluded BITs with Portugal and Spain in 1992, with Greece in 1992 and with Iceland in 1994.

[23] According to an OECD source, the outward investment by OECD member countries account for 75 percent of the global FDI.

[24] The 1967 OECD Resolution that introduced the Draft Convention stated that: "(it) embodies recognised principles relating to the protection of foreign property combined with rules to render

As far as the BITs with developing countries are concerned, these countries have, in spite of their similar development level, far more varied concerns than do developed countries. Accordingly, the Chinese BITs with the developing world show a corresponding variety. Some BITs with developing countries are duplicates of the model BITs of the developed world, while others are based on the model BIT proposed by the Asian-African Legal Consultative Committee (AALCC).[25]

BITs are reciprocal in nature. So are the Chinese BITs: they apply equally to investments from other countries in China and to Chinese investments in the other country in question. In Chinese practice, however, the purpose of its BITs has mainly been the promotion and protection of foreign investment in China. It is no exaggeration to suggest that reciprocity has to a large extent been a matter of prestige rather than reality. Though China has begun overseas investment it has remained a net recipient of investment inflow. In other words, China primarily still plays the role of host country or capital-importing country in the arena of international investment. Unlike most of the developed countries, China has not yet a model BIT of its own and it has therefore had, to a certain degree, to accept the terms and conditions put forward by its developed partners in their respective model BITs. The fact is that China is basically a capital-importing, or host, country and, therefore, apparently not in a position to impose its own terms and conditions on its partners.

With the increase in its national strength, China is set to invest abroad. Under these circumstances, the Chinese companies that have invested or intend to invest abroad are pressing for liberalisation provisions in the Chinese BITs, offering them a sense of security for their investments. China has, as a matter of fact, begun to facilitate outward investment. Even in relation to developed countries, China is no longer a country that only attracts investment from its partners without itself investing abroad. An extreme case is that of Australia. China's investments in Australia in 1990 exceeded those of Australia in China.[26] Accordingly, China has sometimes adopted a flexible attitude towards liberalisation during BIT negotiations.

After these general remarks on Chinese BITs we should now pay attention to the specific Chinese attitudes towards FDI as reflected in the different BITs and which differ from one another. As accurately pointed out by a foreign

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more effective the application of these principles." The Draft was originally intended to become a worldwide, multilateral instrument but never reached that stage. However, it was recommended to OECD member states as a model for investment protection treaties. For a further discussion of the link between the OECD Draft Convention and a model BIT for developed countries, see RUDOLF DOLZER, *Bilateral investment treaties* (1995) 1- 3.

[25] The AALCC formulated a model BIT from the perspective of the developing countries as a whole. The AALCC model BIT has three versions, with a slight difference in between. See DOLZER, op.cit. at 5.

[26] In 1990 Australian investment in China amounted to US$350 million, whereas Chinese investment in Australia was US$400 million.

jurist, however, China's acceptance of the widely recognised model BITs signifies its new emphasis on treaty-based rules specifically designed to govern FDI. It not only shows China's eagerness to attract FDI, but also means that China has abandoned its long-standing attitudes towards issues such as expropriation.

## 4. FEATURES OF THE CHINESE BITS

The structure and even the wording of the Chinese BITs are often similar or almost identical to each other. A typical BIT starts with a preamble. The first article deals with the scope of application by providing definitions. The second article affirms the promotion and protection of investments. The following four articles are concerned with the substantive obligations of the Contracting Parties, including the treatment of investment and the guarantee against non-political risks. The seventh and eighth articles usually provide for procedures for dispute settlement between the investor and the host country and between the Contracting Parties. Finally, the last articles regulate the scope of application with respect to time, i.e. the treaty's entry into force and duration, and its territorial scope. We shall see that the earlier BITs are briefer than the later ones and that the BIT is often supplemented by a later protocol or exchange of notes that is deemed to be an integral part of the BIT.

### 4.1. Preamble

As do Chinese laws, all Chinese BITs contain a preamble. The preamble states the object and purpose of the treaty. Examination of these preambles shows that a relatively standard phraseology has evolved in practice. A typical preamble is as follows:

> "The Government of the People's Republic of China and the Government of ... (hereinafter referred to as Contracting Party), desiring to intensify economic co-operation between both States, particularly, intending to create favourable conditions for investments by nationals and companies of either Party in the territory of the other Party on the basis of the principles of equality and mutual benefit and non-discrimination, recognising that the encouragement and mutual protection of such investments are conducive to stimulating the business initiative and to increasing the prosperity of both States, have agreed as follows: ... "[27]

Compared with the model BITs, the Chinese BITs have two typical features: first, the principles of equality, mutual benefit and non-discrimination

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[27] For example, the preamble to the China-New Zealand BIT (1988).

are incorporated in the preamble of every Chinese BIT; second, all Chinese BITs deliberately avoid any reference to "private" business initiatives. The former reflects the long-standing Chinese attitude towards international law and international relations (international economic relations in particular). The latter reflects the *status quo* in the Chinese economic structure, i.e. the dominance of public ownership.[28]

## 4.2. Scope of application

In any BIT, the scope of application is largely determined by the definitions of such terms as "investors" and "investment". A cursory look would reveal that none of the Chinese BITS was designed to cover all investment activity whatever its form. Only capital movement is covered, while movement of natural persons is left aside. Some Chinese BITs make only cursory mention of the obligation of the contracting parties to facilitate the entry and sojourn of personnel, with the Sino-Australian BIT constituting an exception by granting investors the right to employ top managerial personnel of their choice, regardless of nationality.[29]

### *4.2.1. Investors*

Every Chinese BIT contains a definition of the notion of "investors". It is no surprise that, unlike the customary BITs, some of the earlier Chinese BITs exclude Chinese natural persons from the benefits of the treaty. Only Chinese economic entities are referred to as "investors". Although in some other earlier Chinese BITs natural persons were included as investors,[30] these provisions were of no practical importance due to the prevailing limitations on the economic activities of natural persons under Chinese municipal law. Chinese BITs concluded after the 1988 amendment to the Constitution of the People's Republic of China did include natural persons in the category of investors without exception. For example, the Sino-Bulgarian BIT provides that the term "investors" means:

> " [...] In respect of the People's Republic of China:
> a) natural persons who have the nationality of the People's Republic of China;
> b) economic entities [...] "[31]

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[28] See *supra*, n.6.

[29] See Art.IV of the Sino-Australian BIT (1988).

[30] See, for instance, Art.1(2)(a) of the Sino-Finnish BIT (1984), where "investors" are also deemed to include "physical persons who have nationality of the People's Republic of China".

[31] Article 1(2)(b) of the Sino-Bulgarian BIT (1989).

The change in this regard is probably attributable to the transition from a socialist centralized economy to a market economy, as a result of which the Constitution of the country was amended to the effect that private ownership of means of production was recognized.[32]

Despite the entitlement of natural persons to protection under the BITs, their determination by reference to their nationality can pose problems as far as Chinese law is concerned. According to the Chinese Nationality Law, dual nationality is not recognised.[33] In theory, an overseas Chinese person may have to choose between his/her Chinese nationality and that of his/her state of residence. In fact, however, such a person, no matter whether s/he also holds the citizenship of a state that is party to a Chinese BIT, is automatically regarded a Chinese if s/he has not officially relinquish his/her Chinese nationality.[34] S/He falls under the jurisdiction of China and is excluded from the protection of the BIT as a national of the other contracting party. Given that an estimated 70 per cent of the influx of FDI comes from overseas Chinese, although not necessarily from natural persons but in corporate form, it may be that the non-recognition of double nationality has a potential impact upon the influx of FDI. A possible solution would be the adoption of a permanent resident approach, by which permanent residents of other countries are treated as foreign nationals, irrespective of their simultaneous Chinese nationality. Whereas the approach of non-recognition of double nationality forces an overseas Chinese to give up his/her Chinese nationality if s/he wishes to become a beneficiary of a BIT between China and his/her other state of nationality, the permanent resident approach entitles the overseas Chinese to enjoy the benefits of a BIT without having to relinquish his/her Chinese nationality.

With respect to legal persons and other economic entities, most of the Chinese BITs seem to adopt a standard combining incorporation and domicile in delineating the categories of economic entities that can be considered economic entities of the Contracting Parties. The Sino-Japanese BIT, for example, specifically sets forth:

> "Companies constituted under the applicable laws and regulations of one Contracting Party and having their seat within its territory shall be deemed companies of that Contracting Party."[35]

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[32] See *supra*, n.6.

[33] Art.3 of the Nationality Law of the People's Republic of China.

[34] According to Art.10 of the Chinese Nationality Law, renunciation of Chinese nationality becomes valid upon approval by the competent Chinese authority. The Law does not make it clear whether implied representation of intention to renounce one's Chinese nationality, e.g. showing a foreign passport to the competent Chinese authorities, has the same effect.

[35] Art.1(4) of the Sino-Japanese BIT (1988).

Given that the domicile of a company means the principal place of business under Chinese law,[36] the standard in fact excludes companies incorporated in China but having their principal place of business in other countries from the application of the BIT concerned.

Some Chinese BITs merely adopt the standard of incorporation. The China-New Zealand BIT, for example, states:

> "The term 'companies' means (a) in respect of the People's Republic of China, any companies, economic entities and other legal persons incorporated or constituted in accordance with the laws and regulations in its territory; (b) in respect of New Zealand, any companies, partnership, firms, association and organisations incorporated, constituted or registered in New Zealand, irrespective of their qualification for legal persons or not."[37]

Other Chinese BITs adopt the standard of control, meaning that companies incorporated or domiciled in a third country but controlled by nationals of either Contracting Party are treated as companies of the Contracting Party concerned. The Sino-Swedish BIT belongs to this category, but the standard applies only in respect of Sweden; this means that companies domiciled in Sweden or, albeit domiciled in a third country but controlled by a Swedish citizen or enterprise, are treated as Swedish investors.[38] Other Chinese BITs treat companies incorporated in either Contracting Party or controlled by nationals of either Contracting Party as companies of that Contracting Party, thus further broadening the scope of application. A typical example is the Sino-Kuwaiti BIT.[39] The Sino-Malaysian BIT is another example. However, under the latter BIT, companies controlled by nationals of either Contracting Party but incorporated in a third country are not deemed companies of the Contracting Party unless the third country refrains from extending protection to the companies concerned.[40]

The Chinese BITs use two different approaches in defining "investors". One approach is that each Contracting Party applies its own definition; the other is that a common definition is laid down in the BIT, which applies to "investors" from either Contracting Party. The reason for the former method is that China has its own, somewhat more demanding, regulations regarding the incorporation and business activities of companies and other economic entities. For example, under Chinese law not all companies or entities, let

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[36] Art.39 of the General Principles of Civil Law.

[37] Art.1(4) of the Sino-New Zealand BIT.

[38] Art.1(2) of the Sino-Swedish BIT.

[39] Art.1(4) of the Sino-Kuwaiti BIT (1985).

[40] Art.1(10) of the Sino-Malaysian BIT (1988).

alone individuals, have the right to conduct business with foreign companies.[41] It may therefore be advisable to leave the definition of companies and other entities to the laws of their respective own countries. Some Chinese BITs even incorporate the relevant Chinese company regulations to the effect that the status of investors is reserved to those Chinese state-owned economic organisations that have acquired the right to participate in foreign economic transactions. The Sino-German BIT, for example, defines "investors" as, *inter alia*:

> "... In respect of the People's Republic of China, companies, firms or other economic organisations which are recognised by the Chinese Government, registered and entitled to co-operate with foreign countries on economic matters. ..."[42]

However, as a result of the intensifying rate of reforms, more state-owned enterprises will be *de facto* privatised and economic organisations will be deregulated. The exclusion of Chinese private business from foreign economic transactions will, as a consequence, likely cease to have real effect.

Finally, it is worth noting that, in respect of China, Chinese-foreign equity and contractual joint ventures and wholly foreign-funded enterprises which are established in Chinese territory and which invest in the other Contracting Party to the Chinese BIT, are regarded as Chinese entities.[43] Yet a foreign-funded enterprise that is established in China is treated in practice as a foreign investor in the event that it invests in China.

### *4.2.2. Investment*

In the Chinese BITs "investment" is without exception defined as meaning "every kind of asset". To this end a broad, non-exhaustive list of assets is provided. A typical example is that of an elaborately formulated definition of investment, illustrated by a list of five groups of specific rights which include traditional property rights, rights in companies, monetary claims and titles to performance, intellectual property rights as well as concessions and

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[41] Under the current Chinese law, only entities that have been granted the right to deal in transactions with foreigners or foreign business (*duiwai jingying quan*) can do so. Individuals could not be a party to a joint venture contract nor other economic contract with foreign elements according to the Chinese-Foreign Joint Venture Law, and the Law of Foreign Economic Contract. For instance, Art.2 of the Law of Foreign Economic Contracts (*shewai jingji hetong fa*) provides: "The scope of application of this Law is contracts between the enterprises or other economic organisations of the People's Republic of China and foreign enterprises and other economic organisation or individuals...." In fact individuals were not even recognised by the Law of Economic Contracts (*jiji hetong fa*) before 1993 (when a new amendment allowed natural persons, i.e. "individuals" to become a party to contracts covered by the law) as legitimate partner to a municipal economic contract (as opposed to foreign economic contract).

[42] Art.1(3) of the Sino-German BIT (1983).

[43] Art.41 para.2 of the General Principles of Civil Law.

similar rights. The Sino-Singaporean BIT, for example, contains the following provision:

> " [...] [T]he term 'investments' shall mean every kind of assets as permitted by each Contracting Party in accordance with laws and regulations and shall include, in particular, but not exclusively:
> (a) movable and immovable property and any other property rights such as mortgages, liens and pledges;
> (b) shares, stock, debentures of companies or interests in the property of such companies;
> (c) claims to money or to any performance under contract having a financial value;
> (d) intellectual property rights and good-will;
> business concessions conferred by law or under contract, if permitted by law, including concessions to search for, cultivate, extract, or exploit natural resources [...]"[44]

While "investment" is thus defined as widely as possible, some notions in the definition are new to China.[45] Goodwill, for example, has no parallel in Chinese legal notions, and its protection poses a problem in China.

The definition of investment gives rise to another issue. Some Chinese BITs, particularly those with the developing countries, confine the benefits of the treaty to investment that is "accepted" or "permitted" by the host contracting party. For example, the Sino-Thai BIT set out a provision to that effect.[46] The Sino-Malaysian BIT has, in its definition clause, a provision to the same effect.[47] Obviously, the provision relates to the Chinese position that foreign investments do not have unconditional entry. Other Chinese BITs adopt more liberal wording, stating that they apply to investments effected "in accordance with the laws and regulations" of the host countries. In effect, the laws and regulations of the host country, rather than the BIT itself, determine whether a particular foreign investment may be made. This implies that investments incompatible with these laws and regulations are thus not protected by the BIT. Noticeably, the provision may be acting in a discriminatory manner by distinguishing between two categories of foreign investment originating from the same contracting state: one that is protected by the treaty because it is approved by the receiving state and another which is not so protected because it lacks such approval.

With respect to the scope of application, a typical BIT covers not only the investments made after its conclusion, but also those made before that

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[44] Art.1(3) of the Sino-Singaporean BIT (1985).

[45] For example, Art.5 para.1 of the Chinese-Foreign Equity Joint Venture Law, which lists the assets that may be contributed to the registered capital of the proposed equity joint venture, provides: "Each party to a joint venture make its investment in cash, in kind or in industrial property rights, etc."

[46] Art.2(1) of the Sino-Thai BIT (1985).

[47] Art.1 of the Sino-Malaysian BIT.

time. Most Chinese BITs follow the usual pattern in this regard, despite the fact that the purpose of the BITs is, for China, to provide an incentive for future foreign investment. Against the historical backdrop that the Chinese government expropriated large portions of existing foreign property soon after the founding of the People's Republic of China, this provision would appear more significant. However, a few Chinese BITs prescribe that they shall apply to investments made after a certain date previous to their conclusion.[48] Since some of the existing investment is not within the province of these BITs, the proviso in fact undermines the purpose of the BITs to protect investment.

The Sino-UK BIT is different from all other Chinese BITs. Article 1 provides that the term "investment" includes investments existing at the date of entry into force of the agreement, but provides in an Exchange of Notes that the term shall not apply to certain investments – those in respect of which investors have at the date of entry into force of the agreement "ceased to exercise control or other powers or in respect of which at that date they have ceased to obtain income, payment or such benefit".

With respect to the territorial scope of application, the same Sino-UK BIT is worth special mention. As disclosed by EILEEN DENZA and others, in a comment on the UK experience of BITs, the Chinese government had strongly insisted on political grounds that the BIT should not extend to include Hong Kong before the colony's handover by the UK to the PRC on 1 July 1997.[49] Therefore, the BIT adopted a compromise in Article 12: this provides that the agreement may be extended to such territories for whose international relations the UK government is responsible, as may be agreed in an Exchange of Notes. Thus, it was made possible for China to exclude the application of the BIT to those Hong Kong companies then investing in China unless China expressly agreed to extend the applicability of the BIT to Hong Kong. Interestingly, after the hand-over of Hong Kong the investments by Hong Kong companies in the UK are no longer automatically entitled to protection under the BIT unless the UK government expressly agrees so to do.

### 4.3. Admission of investment

Despite the fact that the Chinese BITs impose an obligation on each contracting party to encourage and facilitate investment from the other contracting

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[48] For instance, Art.8 of the Sino-Swedish BIT which was concluded in 1982 states: "The agreement applies to investments made after 1 July 1979." Art.7 of the Sino-Soviet BIT also deals with the same issue.

[49] E.DENZA *et al*, "Investment protection treaties: United Kingdom experience", 36 ICLQ (1987) 918.

party,[50] they all fail to create an obligation to admit foreign investment unconditionally. Usually, a Chinese BIT provides that each contracting party shall admit investment from the other contracting party in accordance with its own law. For example, Article 2(1) of the Sino-Japanese BIT clearly states:

> "Each Contracting Party shall, to the extent most possible, promotes investment within its territory by nationals and companies of the other Contracting Party, and accord, in accordance with relevant its laws and regulations, license."

It is interesting to note that the Sino-Danish BIT refers to the administrative practice of the host country as well as its laws.[51] According to their standard phraseology the Chinese BITs create an obligation on the part of both contracting parties to *facilitate* the entry of investors from the other contracting party rather than to *recognize a right* to such entry. In fact, each proposed investment project, irrespective of the form and the amount of investment is, under current Chinese investment law, subject to a screening process by the competent government authorities.[52] As in other developing countries that maintain screening processes for foreign investment, the screening in China is designed to serve the priorities of the national economy and, probably, political purposes.[53] The government can use the screening process to secure the precedence of public ownership in the ownership structure of a certain industry that is ideologically regarded as part of the economic base of the communist regime. Since China has traditionally been an administrative power-dominant society and, particularly, a highly centralised economy until its commitment to market economy in the past decade, the screening process, no doubt, is of particular importance for the government to be able to play a role in the functioning of the economy. Behind this approach stands the idea that China will not allow to enter into China investment that it does not want.

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[50] See, e.g., Art.2(1) of the Sino-Soviet BIT (1990): "Each contracting party shall encourage investment in its territory by investors of the other contracting party...". The Sino-Singaporean BIT makes the obligation to encourage investment more assertive in its languages: "Each Contracting Party shall, having regard to its plans and policies, encourage and facilitate investments in its territory by the nationals and companies of the other Contracting Party."

[51] Art.2 of the Sino-Danish BIT (1985).

[52] See Art.3 of the Chinese-Foreign Equity Joint Venture Law, Art.5 of the Chinese-Foreign Contractual Joint Venture Law, Art.6 of the Wholly Foreign-funded Enterprises Law.

[53] A typical example is the exclusion of foreign investment involvement in the press, broadcasting and other media industry, an exclusion viewed as crucial to the rule by the party.

## 4.4. Treatment of investment

The treatment standard is the core part of BITs. The predominant standard of treatment in the Chinese BITs is the "fair and equitable treatment" standard. Almost all the BITs in question have a provision to this effect[54] although a variety of phrases can be found, such as "adequate protection and security", "most constant protection and security" and "full protection and security" ("d'une pleine protection et d'une entière sécurité"). It is argued that, in relation to arbitrary, discriminatory or abusive treatment that is contrary to customary international law, unfair and inequitable treatment is a much wider concept; it may readily include the impact of administrative measures in, for example, the field of taxation and licensing, such that the right to fair and equitable treatment warrants wider protection than most-favoured-nation treatment and national treatment.[55] Yet the provision is *per se* so general as to require clarification. The critical issue here is whether "fair and equitable treatment" is equivalent to the traditional "minimum international standard". The prevailing attitude among Chinese publicists in this regard is against equating "fair and equitable treatment" with "minimum international standard".[56] The reason behind the unappeasable aversion may be traced back to the humiliation caused by the unequal treaties and the regime of extraterritoriality imposed on China in the colonial period under the guise of the so-called minimum international standard. Therefore, while the general standard of fair and equitable treatment appears likely to secure "full protection and security", it may lead to a different understanding in the Chinese context.

Following the general pattern, the Chinese BITs adhere to the standard of most-favoured-nation treatment. The clause is too familiar to need further comment, except in its elaborated exceptions. In this connection, the Chinese BITs with Sweden, Thailand and the Netherlands are worth attention.

The principle in its general form entitles the beneficiary to the more favourable treatment awarded to a third party both before and after the treaty (with the beneficiary) has entered into force. However, the Sino-Swedish BIT prescribes that the contracting parties have the right to retain more favourable treatment for a third party in accordance with the previous commitments made to that third party.[57]

An interesting provision can be found in the Sino-Dutch Treaty, which reads: "A difference may be made between investors investing in free trade zones or engaging in frontier trade and investors not investing in such zones or engaging in such trade".[58] This provision is not only an exception to the

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[54] For example, see Art.3(1) of the Sino-Lithuanian BIT (1993).

[55] F.A.MANN, "British treaties for the promotion and protection of investment", 52 BYIL (1981) 243.

[56] For example, see JINSONG YU, op.cit.n.14 at 250-251.

[57] Art.2(3) of the Sino-Swedish BIT.

[58] Art. 3.5 of the Sino-Netherlands BIT (1985).

most-favoured-nation standard, but constitutes a kind of positive discrimination. It plainly takes into consideration the different treatment that is offered in the Chinese Special Economic Zones (SEZ) and in the frontier trade cities.

It is necessary to distinguish the treatment of the entry or admission of foreign investment from that of the operation of investment in the context of national treatment.[59] As mentioned before, the Chinese BITs do not grant the right of entry or, in other words, there is no national treatment in respect of investment admission. As to the operation of investment: China has so far also been reluctant to grant national treatment to investors from the other state party to the Chinese BITs.[60] The need for protection of national industries from competition and for the maintenance of state enterprise monopoly offers some explanation of this policy.

The Sino-UK, Sino-Japanese and Sino-Icelandic BITs offer interesting exceptions to the standard of national treatment. The three BITs contain a rule that, in fact, reduces the significance of the national treatment standard to a merely symbolic one. For example, the Sino-Icelandic BIT states:

> "Unless otherwise stipulated in the above paragraphs 1 and 2, either contracting party shall, to the extent possible, accord treatment in accordance with the stipulations of its laws and regulations to the investments of nationals or companies of the other contracting party the same as that accorded to its own nationals or companies."[61]

The balancing of the qualifications "to the extent possible" and "in accordance with the stipulations of its laws and regulations" can lead to no other conclusion but that of being the product of Chinese flexibility. Noteworthy in this regard is the phrase "national treatment" which differs from the widely accepted one "no less favourable", thus excluding the possibility for the foreign investor to enjoy treatment more favourable than that accorded to the Chinese counterparts.

Quite often, the Chinese BITs adopt a comprehensive set of treatment standards, combining fair and equitable treatment, non-discriminatory treatment and most-favoured-nation treatment. The Sino-Australian BIT incorporates the three standards in one article, although in most other Chinese BITs they are scattered among diverse articles. Though these standards overlap in one way or the other, they supplement each other in ensuring a desirable treatment for investors. The fulfilment of the entailing obligations by the Chinese government requires, to some extent, the fulfilment of an implied

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[59] Some Chinese BITs, such as the Sino-Japanese BIT, specifically distinguish treatment of the entry or admission of foreign investment from that of the operation of investment.

[60] According to Art.3 of the Sino-Japanese BIT, national treatment as well as most-favoured-nation treatment is awarded to investors with respect to their operation in the host country while, according to Article 2(2) only most-favoured-nation treatment is awarded with respect to the admission of investment.

[61] Art.3(3) of the Sino-Icelandic BIT (1994).

obligation, *viz.* the transparency of laws and regulations. If a policy remains "internal", it is by its nature not accessible to every foreign, or even domestic, investor and, consequently, can be regarded neither as non-discriminatory nor as satisfying the obligation of MFN treatment and national treatment. Therefore, some of the Chinese BITs, e.g., the Sino-Turkish BIT, require the contracting parties to guarantee transparency.[62]

Finally, the Chinese BITs as a rule set forth that the most favourable treatment among those stipulated in laws or in contracts between investors and the host government or those stipulated in the BIT concerned shall apply.

## 4.5. Expropriation

Expropriation is the central issue of the international law on investment as well as the most controversial part of the Chinese attitude towards foreign investment. A prevailing, albeit controversial, approach of BITs to this issue may be put in this way:

> "Expropriation can occur only in accordance with international law standards, that is, for a public purpose, in a non-discriminatory manner, under due process of law, and accompanied by payment of prompt, adequate, and effective compensation."[63]

Compared with the "international law standard", the Chinese practice in this regard, although still different from that standard, has substantially diverged from its long-standing attitude since the early 1980s. A self-restrained provision on expropriation in the Wholly Foreign-funded Enterprise Law of 1986 states in its Article 5:

> "The State does not nationalise and expropriate wholly foreign-funded enterprises, except under special circumstances; for the social and public good wholly foreign-funded enterprises may be expropriated in accordance with legal procedures and upon corresponding compensation."

The Chinese BITs reflect this new attitude. Without exception all these BITs provide that investments of nationals or companies of a Contracting Party may not be expropriated except for a public purpose and then against reasonable compensation. A typical provision in this regard reads as follows:

> "Investments of nationals or companies of either Contracting Party in the territory of the other Contracting Party shall not be subjected to expropriation or nationalisation

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[62] Art.2(4) of the Sino-Turkish BIT (1990).

[63] See the US Bilateral Investment Treaty Program, at http://www.state.gov or http://www.ustr.org.

> or any measures equivalent thereto, except for public use, in accordance with appropriate legal procedures and upon payment of compensation."[64]

However, since many foreign investments take the form of Chinese-foreign joint ventures that are Chinese legal entities, the protection of equity and other interests in these joint ventures is of great concern. The Chinese-Foreign Equity Joint Venture Law failed to close the legislative loophole when it omitted to set forth a provision with regard to expropriation of foreign equity in Chinese-foreign joint ventures similar to the one in the Law on Wholly Foreign-funded Enterprises. In this connection, some Chinese BITs provide for a specific rule to this end. For example, the text of Article 5 paragraph 2 of the China-UK BIT reads:

> "If companies incorporated in any place of the territory of one Contracting Party in which nationals or companies of the other Contracting Party hold shares are expropriated by the previous Contracting Party in accordance with its appropriate laws, the Contracting Party shall guarantee the application of the provision of Paragraph 1 of this Article general provision of expropriation to secure that nationals or companies of the other Contracting Party receive reasonable compensation in connection with the investments concerned."

Clearly countries resort steadily less frequently to massive expropriation for achieving their particular economic purposes and thus increase the prominence of the standard of compensation in individual cases of expropriation. The Chinese BITs are flexible in relation to standards of compensation, deliberately avoiding an explicit reference to prompt, adequate and effective compensation, although the wordings used have an effect similar to a reference to that standard. The Chinese BITs usually mention compensation in general, some provide for "appropriate compensation" and others for "reasonable compensation", but the general phrase is always supplemented by phrases such as "without delay", "effectively realisable" and "freely transferable". With respect to the amount of compensation, the Chinese BITs prescribe that this shall be "the value of the expropriated investment immediately before the measure becomes public knowledge". Some BITs provide for the "equivalent to the true value of the expropriated property at the time of declaration of the expropriation".[65] It is interesting to note in this context that the earlier Chinese BITs seem deliberately to have avoided any reference to "market value" which may contribute to disagreements between the Chinese government and foreign investors. For example, the Sino-UK BIT refers to the real value instead of the more usual "market value". However, the BITs concluded after 1992, e.g., the Sino-UAE one, adopt the standard of market value.[66]

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[64] Art.6(1) of the Sino-Indonesian BIT (1994).

[65] See, e.g., Art.4 of the Sino-Icelandic BIT.

[66] Art.6(4) of the Sino-UAE BIT (1993).

As to the modality of payment of compensation, nearly all the Chinese BITs warrant that "payment shall be freely convertible and transferable and without delay". The Sino-Icelandic BIT even provides for a time limit of maximum six months for the payment.[67]

## 4.6 Transfer of funds

The Chinese BITs as a rule stipulate that capital, return and other lawful benefits can be converted into foreign currency and transferred overseas. The Sino-UK BIT provides:

> "Each Contracting Party guarantees to nationals or companies of the other Contracting Party the right to transfer freely to the country where they reside their investments and returns and payments made pursuant to a loan agreement in connection with any investment."[68]

The Sino-Netherlands BIT provides in detail the different categories of transferable funds as follows: (1) profits, interests, dividends and other current income; (2) funds necessary for the acquisition of raw or auxiliary materials, semi-fabricated or finished products; (3) funds necessary to replace capital assets in order to safeguard the continuity of an investment; (4) additional funds necessary for the development of an investment; (5) earnings of employees of an investor or an enterprises in which the investor has invested; (6) the proceeds of the liquidation of capital; (7) funds in repayment of loans; (8) management fees; (9) royalties.[69]

Freedom of the transfer of funds being generally ensured, such transfer must be accomplished in consonance with the procedures set forth in laws and regulations. Article 8 (2) of the China -Japan BIT specifically states that the transfer shall be without prejudice to foreign exchange control carried out by either Contracting Party in accordance with its laws and regulations. Under the Chinese foreign exchange regulations any transfer of funds must be effectuated from the balance of foreign exchange deposit accounts with a Chinese Bank. The Sino-Thai BIT explicitly states:

> "... [I]n relation to the People's Republic of China, the free transfer shall be effected in accordance with the foreign exchange control laws and regulations of the People's Republic of China, from the foreign exchange deposit account of the nationals and companies of the Kingdom of Thailand or of the enterprises in which the nationals

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[67] Art.4 of the Sino-Icelandic BIT.

[68] Art.6(1) of the Sino-UK BIT (1986).

[69] Art.4 of the Sino-Netherlands BIT.

> and companies of the Kingdom of Thailand have invested either solely or jointly in the territory of the People's Republic of China."[70]

Under the Chinese BITs, the Chinese government promises to provide special guarantees where the foreign investors' foreign exchange account balance is not sufficient to make the required transfer. For example, the Sino-UK BIT obliges the Chinese government to permit the transfer of local currency as converted into foreign exchange upon request by the British investor for the following items: (1) the proceeds resulting from full or partial liquidation of the investment; (2) royalties derived from copyrights, industrial property rights, or know-how and good will, (3) payments under a loan agreement in connection with an investment guaranteed by the Bank of China and (4) profits, interest, capital gains, dividends, fees and any other form of return of a British national or company specifically permitted by the competent authority of China to carry out economic activities mainly in the territory of China.[71]

There are exceptions to the general freedom of transfer. For example, the Sino-UK BIT states in its Article 6(2) that freedom of transfer "is subject to the right of each Contracting Party in exceptional balance-of-payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws". The Sino-Thai BIT interestingly provides that in case of transfer difficulties "the nationals and companies of the Thai Kingdom who have invested in the People's Republic of China may apply to the competent authorities of the People's Republic of China, who shall accord their "sympathetic consideration" and render "favourable assistance."[72]

### 4.7. Civil strife

Civil strife includes war, armed conflict, revolution, national or regional emergency, revolt, or riots in the territory of one Contracting Party that cause disturbance to the operation of investments of the other Contracting Party. In this respect some BITs omit mention altogether, while others pass superficially over the issue, since civil strife does not emanate from any wilful act of the host government which is, consequently, not liable for compensation. However, where the government decides to make compensation for the loss incurred as the result of civil strife, the relevant standard of compensation shall apply. Most Chinese BITs contain a provision such as the following, to be found in the Sino-UK Treaty:

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[70] Art.1(a) of the Protocol to the Sino-Thai BIT.

[71] Art.6.4 of the Sino-UK BIT.

[72] Art.2(b) of the Protocol to the Sino-Thai BIT.

> "Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflicts, revolution, a state of national emergency, revolt or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party no less favourable treatment than that which the Latter Contracting Party accords to nationals or companies of any third State."[73]

Understandably the Chinese BITs do not prescribe national treatment for such situations since the Chinese entities, most of which are state-owned enterprises, would have to rely on the government for assistance in case of loss due to civil strife.

## 4.8. Dispute settlement

With respect to disputes, a distinction is generally drawn in BITs between state-state and state-investor disputes. The former are treated as disputes between equals, while the latter are disputes between a sovereign and an alien under the state's territorial jurisdiction. The international means for the settlement of the first mentioned disputes are well established, such as consultation, mediation and conciliation. The state-investor disputes were, for a long time, deemed by some countries, especially in Latin America, to fall exclusively under the jurisdiction of the host countries.[74] Due to the controversial nature of the international approach the first Chinese BIT (with Sweden) even omitted a provision on the settlement of state-investor disputes. BITs usually grant foreign investors the right to submit these disputes to international arbitration, notwithstanding the requirement of the host country first to exhaust the remedies available in that country's domestic courts.

The Chinese tradition of avoiding litigation has had a substantial effect on the model of dispute settlement in the Chinese BITs. All these treaties attach a certain degree of importance to the role of consultation or "amicable means" in the settlement of disputes, irrespective of whether a state-state or a state-investor dispute is concerned.

With respect to state-state disputes, the Chinese BITs without exception require that disputes be amicably settled "to the extent possible, through diplomatic channels" or "through consultation", or "through negotiation or conciliation". Only after the diplomatic channels or consultations have failed to settle the dispute within a certain period of time may the parties refer the dispute to an *ad hoc* Arbitration Tribunal. The pursuance of a negotiated

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[73] Art.4(1) of the Sino-UK BIT.

[74] For a Latin-American perspective of settlement of state-investor disputes, see, *generally*, DONALD R.SHEA, *The Calvo Clause: a problem of Inter-American and international law and diplomacy* (Univ. of Minnesota Press, Minneapolis, 1955).

settlement of disputes prior to initiating arbitration proceedings without doubt shows the Chinese lack of affinity for international arbitration.

The more recent Chinese BITs have made consultation an even more prominent mechanism for the settlement of state-state disputes. For example, the Chinese BITs with both Turkey and Vietnam lay down consultation procedures. Article 6 of the China-Turkey BIT reads:

> "The Contracting Parties agree to, upon request of the other party, hold consultation promptly with a view to the settlement of any disputes arising from this Agreement and to discuss any matters regarding interpretation and application of this Agreement."

Moreover, consultation between the two contracting parties appears to be designed not only as a mechanism for dispute settlement, but also as a mechanism for the supervision of the implementation of the BIT. This will be discussed in Part 5.

With respect to state-investor disputes, the earlier Chinese BITs differ widely from those concluded later. Firstly, the more recent BITs are more liberal in allowing investors to resort to international arbitration, while the earlier Chinese BITs either omitted altogether any provision regarding the settlement of these disputes, or emphasised local remedies. The first Chinese BIT, the Sino-Swedish BIT, was silent on this point. The BITs with Kuwait, Denmark, the Netherlands, France, Belgium-Luxembourg and Norway all contain procedures for local remedies, which investors are required to exhaust before seeking resort to international arbitration.[75] The Chinese BITs with France and New Zealand refer to international arbitration as a means specifically for the settlement of state-investor disputes concerning the amount of compensation in event of expropriation.[76] The provision reflects the assumption that state-investor disputes are more likely to arise in relation to compensation in the event of expropriation than on the question of the international lawfulness of expropriation. In this regard, the Chinese BITs with Kuwait and Australia, BITs with France and New Zealand to the effect that under these BITs disputes other than those concerning the amount of compensation can be referred to international arbitration provided the disputing parties agree to do so,[77] differ from the Chinese BITs with France and New Zealand.

Secondly, the earlier Chinese BITs distinguish between disputes arising from expropriation and other types of dispute. The China-Finland BIT is an example. It requires all state-investor disputes, except those arising from expropriation, unless agreed otherwise, to be settled through local remedies

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[75] For example, according to Art.8 of the Sino-French BIT the state-investor investment dispute shall first be referred to the Administrative authority or the competent municipal court for a solution. Only where a solution acceptable to both disputing parties fails to be reached, the dispute may be submitted to arbitration procedures.

[76] Art.8(3) of the Sino-French BIT, Art.13(3) of the Sino-New Zealand BIT.

[77] Art.8(3) of the Sino-Kuwaiti BIT, Art.12(2) (b) of the Sino-Australian BIT.

in accordance with the laws and regulations of the host state.[78] With respect to state-investor disputes arising from expropriation, it further distinguishes between the issues of lawfulness and compensation. In case of a dispute regarding the lawfulness of the expropriation, the BIT provides that the competent municipal court is the only institution responsible for the settlement of the dispute. As for disputes concerning compensation, either the competent municipal court or an *ad hoc* Arbitration Tribunal may settle the dispute.[79]

The China-Turkey BIT has special provisions in this regard.[80] It starts by requiring the disputing parties to solve the dispute through consultation. If the process of consultation fails to end in a settlement, the dispute may be referred, for a non-binding opinion, to a third party to be chosen by agreement between the disputing parties.

Thirdly, if the above two procedures fail to solve the dispute, it shall, except where it has arisen from expropriation or nationalisation, be referred to the competent municipal court. The treaty further provides that disputes arising from expropriation or nationalisation shall be submitted to an *ad hoc* Arbitration Tribunal or to ICSID (provided both parties have acceded to the Convention on the Settlement of Investment disputes between States and Nationals of other States). The condition of consultation and mediation prior to initiating arbitral or judicial proceedings clearly shows the strong Chinese preference for an informal settlement mechanism.

As to the rules on arbitration, the Chinese BITs are not uniform. Some BITs have opted for the UNCITRAL rules;[81] other BITs have enabled the Arbitration Tribunal to lay down its own rules[82] and still other BITs refer to the ISCID rules.[83] The absence of acceptance of the ISCID rules in some of the earlier Chinese BITs reflects the Chinese concern to safeguard its long-standing perception of sovereignty.[84] However, since China acceded to the 1965 ICSID Convention in 1992, China and its treaty partners have begun to refer to the ICSID rules rather than to the UNCITRAL rules in their negotiations on BITs; China and France, after China joined the ICSID convention, have even called for the adoption of the ISCID rules in an exchange of notes relating to their BIT..

The Chinese BITs usually do not prescribe the applicable law in the event of international arbitration in state-investor disputes. Exceptionally, however,

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[78] Art.3 of the Protocol to the Sino-Finnish BIT.

[79] Art.2 of the Protocol to the Sino-Finnish BIT.

[80] Art.7 of the Sino-Turkish BIT.

[81] For example, Art.4(3) of the Protocol to the Sino-French BIT.prescribes reference by the Arbitration Tribunal to the UNCTRAL.

[82] For example, Art.9(3) of the Sino-Soviet BIT states that the Arbitration Tribunal formed by the parties in dispute may lay down arbitration rules with reference to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

[83] Art.13(6) of the Sino-Singaporean BIT is such a provision.

[84] See CHEN, loc.cit n.17.

some treaties specifically state that the municipal law of the host country as well as international law shall be the applicable law in disputes concerning the amount of compensation in the case of expropriation.[85] The Sino-Kuwaiti BIT prescribes:

> "The Arbitration Tribunal shall reach its decision in accordance with provisions of this Agreement, relevant domestic laws, agreements concluded between the contracting parties and general principles of international law."

Obviously, the inclusion of domestic law reduces the symbolic significance of international arbitration. Moreover, it is worthwhile to note in this context that the Chinese BITs tend to confine international law to rules of general international law recognised by both the Contracting Parties. We find this, *inter alia*, in Article 12 of the Sino-UK BIT.

## 5. IMPLEMENTATION OF THE CHINESE BITs

### 5.1. Mechanism for monitoring the implementation of BITs

There are very few data on the practice of the implementation of the Chinese BITs and the information available on their application is mostly anecdotal. China usually complies well with its BITs, yet some BITs are, paradoxically, relatively unknown among the foreign investors (in contra-distinction to providers of finance and insurance) despite the concern of investors with precisely the issues regulated by the BITs. It is, therefore, encouraging that a special mechanism has been established in some Chinese BITs in order to supervise their implementation. The BITs with Japan, the (former) Soviet Union, Turkey, Bulgaria, Vietnam, Croatia, Tajikistan and Lithuania all provide consultative procedures to that effect. However, the clauses embodying the consultative mechanism vary from very general statements of intent to quite detailed regulation of the specific framework for such consultation. For example, Article 14 of the Sino-Japanese BIT reads:

> "Both Contracting Parties shall establish a Joint Committee, consisting of representatives of the Governments of both Contracting Parties, for the purpose of reviewing the implementation of the present Agreement and the matters related to investment between the two countries, holding consultations on the operation and the matters related to the operation of the present Agreement in connection with the development of legal systems or policies of either or both of the two countries with respect to the receiving of foreign investment, and, as necessary, making appropriate recom-

[85] E.g. Art.8(3) of the Sino-Kuwaiti BIT.

mendations to the Governments of both Contracting Parties. The Joint Committee shall meet alternately in Beijing and Tokyo at the request of either Contracting Party."

The consultative mechanism would allow the Contracting Parties periodically or, for that matter, at any time, to exchange views with the possibility of revising unsatisfactory provisions or relevant municipal laws and regulations, in order to achieve the smooth implementation of the BIT.

## 5.2. The impact of China's WTO accession on the implementation of BITs

China's entry into the World Trade Organisation (WTO), will most certainly facilitate the implementation of the Chinese BITs. The WTO's mechanisms for the implementation of its rules may well strengthen the rules and disciplines embodied in the BITs. The General Agreement on Tariffs and Trade (GATT), the predecessor of the WTO and one that was basically focused on a multilateral trading system, started to pay attention to investment rules because of the growing process of world economic integration and the increasing interdependence between trade and investment. Thus the Agreement on Trade-related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS) have now become major sources of the investment rules in the WTO framework .[86]

A comparison between the WTO investment-related agreements and the Chinese BITs will reveal that virtually identical rules are to be found in both. As a substantial move in its bid for earlier WTO accession, China agreed to implement the TRIMs Agreement upon accession. Thus, China agrees to eliminate and cease the enforcement of trade and foreign exchange balancing requirements and local content requirements, to refuse to enforce contracts containing such requirements, and to impose or enforce laws or other provisions relating to the transfer of technology or other know-how only if these are in accordance with the WTO agreements on the protection of intellectual property rights and trade-related investment measures. The implementation of China's WTO commitments will be instrumental in the realisation of the main purpose of the Chinese BITs, i.e. facilitating investment.

As a multilateral institution, the WTO is uniquely positioned to implement investment rules and disciplines. Its dispute settlement mechanism is a major instrument to this end.[87] Because of the frequent coincidence of the invest-

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[86] For a review of the investment rules in the WTO agreements, see THOMAS L.BREWER, et al, "Investment issues at the WTO: the architecture of rules and the settlement of disputes", 1 *Journal of International Economic Law* (1998) 457-470.

[87] For the role of the WTO dispute settlement mechanism, see JOHN H.JACKSON, "Designing and implementing effective dispute settlement procedures: WTO dispute settlement, appraisal and prospects", in: ANNE O.KRUEGER (Ed.), *The WTO as an International Organization* (1998) 161-180.

ment rules contained in the BITs and those contained in the WTO investment-related agreements, it should be possible, in the event of breach of the relevant rules, for the aggrieved party to have resort to the WTO dispute settlement mechanism.

## 5.3. Municipal legal environment and the implementation of BITs

The interaction between the Chinese BITs and the municipal legal environment is an important factor in the implementation of these BITs, which, to some extent, depends on the municipal legal environment. Therefore, it is desirable to approach the issue of the implementation of the Chinese BITs from the perspective of the municipal legal environment.

The flexibility of the language of bilateral treaties is well known. Whatever the balance of the bargaining powers between the two parties may be, neither is in a position to impose all the terms and conditions as it wishes without any concessions. Vague wording is thus often used to allow either to opt for its own interpretation. "Fair and equitable treatment", for instance, lacks the clarity of a definition and allows for different interpretations. Some terms and phrases need clarification through reference to municipal law,[88] such as "admission of investment subject to the respective national law". Given the differences between the respective legal systems of China and of its partners, it is sometimes extremely difficult to agree on an identical or even similar interpretation. This renders the provisions less effective.

Since the municipal laws of the contracting parties of a BIT play a part in its implementation, it is useful to have a look at how Chinese law, particularly China's foreign investment law including its developments and trends, may have a bearing on the implementation of the Chinese BITs. In this context it is useful to refer briefly to the system of implementation of treaties within the framework of Chinese municipal law, in the event of conflict between the provisions of a treaty and the relevant municipal law. The Chinese government had long been uncomfortable with the rule of *pacta sunt servanda*. It is sometimes rescinded in treaties in accordance with its subsequently promulgated laws. However, the change in attitude of China towards international law can also be perceived in this regard. The General Principles of Civil Law now explicitly state:

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[88] As an American commentator, C.ENGHOLM, noticed: "The Chinese, however, perceive negotiating as part of a process rather than as a goal-oriented activity; they view the signing of an agreement as the starting point rather than an armistice." The Chinese BITs, like any agreements, can not exhaust all the provisions, thus making room for municipal law to play a part in defining investment issues. Art.10 of the Sino-New Zealand BIT explicitly provides: "In order to avoid misunderstanding, the Contracting Parties hereby declare that all investments shall be subject to the appropriate law of the Contracting Party where the investments are located."

> "If any international treaty concluded or acceded to by the People's Republic of China contain provisions different from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones with regard to which the People's Republic of China has made a reservation."[89]

In view of the fundamental status of the General Principles of Civil Law the inclusion of this provision demonstrates China's strong commitment to honouring international obligations. It may thus be argued that the municipal law, even if incompatible with the BITs, poses no obstacle to their implementation.

It could be asked how municipal law could play a supplementary role in the absence of a provision or a clear definition in the BITs. It is, unfortunately, currently not possible to elaborate on the still evolving Chinese law on foreign investment and, consequently, the following brief review of the Chinese foreign investment regime, as quoted from a study of that regime by the present author, should suffice:

> "It is not difficult to perceive the architectural shortcomings of China's FDI regime: lack of definitional clarity, failing to generate adequate transparency, not inherently liberalising. It is basically an incentive-based one, made up of complicated fiscal incentives and other incentives that are designed for different areas and different purposes.
>
> However, it is too much to expect China to perfect its FDI regime by the standard of developed countries. Important is the emerging trend in the evolution of its FDI regime. The trend is characterised by a number of far-reaching changes in rule-making with respect to foreign investment. Among such changes are:
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> - the gradual removal of incentives;
> - move towards national treatment – an effort to level the playing field for domestic enterprises and foreign investment enterprises;
> - more transparency;
> - translates into liberalisation of China's FDI regime.
>
> However, these trends may, from time to time, be counterbalanced by China's intentions to keep FDI in compliance with its economic development objectives, which are subject to change.
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> It is important to bear in mind that the adjustment of FDI regime is not only for the sake of FDI regime per se, but because the whole economic environment upon which FDI policy rests is changing. As long as China continues to compete with other countries for FDI, given that it is unlikely for China to reverse its drive towards a market-oriented economy, China's FDI regime will continue to evolve together with

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[89] Art.169 of the General Principles of Civil Law.

> the shaping of the overall legal framework, characterised by the process of liberalisation."[90]

By way of final conclusion it may be argued that, notwithstanding its present difficulties and imperfections, the Chinese foreign investment regime is definitely in favour of foreign investment. There are encouraging signs that Chinese law is likely to supplement the Chinese BITs in a positive way.

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[90] Q.KONG, "Foreign investment regime in China", 57 *Heidelberg Journal of International Law* (1997) 869-898.

# VIETNAM AND JOINT DEVELOPMENT IN THE GULF OF THAILAND

Nguyen Hong Thao*

## 1. INTRODUCTION

The United Nations Convention on the Law of the Sea (UNCLOS) came into force on 16 November 1994, creating a new juridical order for the sea, including a new partition of natural resources. The twenty-first century will continue to be an era of maritime delimitation settlements. More than 400 maritime boundaries must be defined, one third of which have been determined by bilateral agreements or by jurisprudence.[1] The South China Sea, with twenty maritime disputes, is one of the most prominent regions in the world in this respect.

The Gulf of Thailand is characterized by a slow process of maritime delineation, as is the South China Sea. There are several reasons for this. First, political disagreements hamper countries from smoothly reaching an agreement. Secondly, the region has been profoundly affected by its colonial experience and the interpretation of colonial treaties. Cambodia and Thailand have disagreed over the interpretation of the Franco-Thai treaty of 1907 concerning the attribution of the Island of *Koh Kut*. Vietnam and Cambodia do not share a common position on the role of the *Brevie* line in their mutual relationship.[2] Thirdly, there are many islands and islets in the region. While the maritime disputes in Asia concentrate mostly on the aspect of sovereignty

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The views presented in this article are not necessarily those of any Vietnamese official.

[1] R.R.CHURCHILL, "Joint development zones: international legal issues", in HAZEL FOX (Ed.), *Joint development of offshore oil and gas*, Vol.2 (The British Institute of International and Comparative Law, 1990) 56.

[2] J.R.V.PRESCOTT, *The Gulf of Thailand: maritime limits to conflict and cooperation* (Malaysian Institute of Maritime Affairs (MIMA), Kuala Lumpur, Malaysia, 1998) 9-11.

*Asian Yearbook of International Law,* Volume 8 (B.S. Chimni *et al.*, eds.)

over islands,[3] the maritime disputes in the Gulf of Thailand deal principally with the question of the existence of islands on the delimitation of maritime territories.[4]

Delimitation in the Gulf is not easy. The confrontation between two blocs in the recent past (Indochina and ASEAN, the civil war in Cambodia) prevented the interested parties from making compromises in their efforts to achieve the final and definitive boundary delimitation. In their quest to settle disputes peacefully and exploit natural resources without prejudice to the final delimitation, there is a tendency for the interested parties to enter into provisional arrangements, such as joint development. On 21 February 1979 a Memorandum of Understanding (MOU) on joint development was concluded between Thailand and Malaysia. An agreement on Vietnamese-Cambodian historic waters, concluded on 7 July 1982 in Ho Chi Minh City, put a maritime area under a joint utilization regime.[5] Before concluding an agreement on their maritime boundary in August 1997, Thailand and Vietnam had also considered the possibility of a regime of joint development for the area of overlap.[6] Later, Vietnam and Malaysia in their Memorandum of Understanding of 5 June 1992 agreed on applying a joint exploitation regime for a "defined area". In 1999, Vietnam, Thailand and Malaysia agreed in principle on a regime of joint development for a small area of overlap. When the tripartite accord becomes effective, the Gulf will be the first region under

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[3] Kuril Islands (Russia-Japan); Takeshima Island (Japan-South Korea); Senkaku Islands (Japan-China-Taiwan); Paracel Islands (Vietnam-China); Spratly Islands (Vietnam, China, Taiwan, Malaysia and Philippines).

[4] NGUYEN HONG THAO, *Le Vietnam face aux problèmes de l'extension maritime dans la mer de Chine méridionale* (thesis, Paris I, 1996) 402-428.

[5] Art.3 of the Agreement reads, *inter alia*: "Pending the settlement of the maritime border between the two States in the historical waters ...
- Patrolling and surveillance in these territorial waters will be conducted jointly by the two sides.
- The local population will continue to conduct their fishing operations and the catch of other sea products in this zone according to the habits that have existed so far.
- The exploitation of natural resources in this zone will be decided by common agreement".

[6] The Protocol of the first meeting of the Thai-Vietnamese Joint Committee on culture, economic, science and technique cooperation in October 1991 contained the following points:
"(a) both sides should cooperate in defining the limits of the maritime zones claimed by the two countries;
(b) both sides should try to delimit the maritime boundary in the overlapping area between the two countries, and
(c) such delimitation should not include the overlapping zones which are also claimed by any third country.
Both sides also agreed that, pending such delimitation, no development activities or concessions in the area of overlap should be assigned or awarded to any operator. The two sides informed each other that there are no development activities or concessions in the area claimed by Vietnam which overlaps the Joint Development Area between Thailand and Malaysia.
In this context, the Thai side proposed that failing the attempt in (b) the two sides might consider implementing the Thai concept of joint development area".

a multilateral agreement on joint development. In fact, the region holds a most advanced position in the world as far as joint development models are concerned.[7]

Three points arise in such a context: Why is this model to be preferred in the Gulf where Vietnam is mostly involved? What are the factors that have caused the joint development agreement to become successful? What lessons can be drawn from this experience? This paper will deal with these questions in three sections:

1. The situation in the Gulf
2. Comparison between the Thai-Malaysian MOU of 1979 and the Vietnamese-Malaysian MOU of 1992
3. From MOU 1979 to MOU 1992: factors contributing to success in an agreement of joint development.

## 2. THE SITUATION IN THE GULF

The Gulf of Thailand is characterized by a pattern of overlapping areas: areas claimed by Thailand, Cambodia and Vietnam, by Thailand and Vietnam, by Thailand and Cambodia, and by Thailand and Cambodia, while the tripartite Thai-Malaysian-Vietnamese joint development area overlaps the Vietnamese-Malaysian "defined area". Moreover, between June 1971 and May 1973 South Vietnam, Cambodia and Thailand made respective unilateral claims over the continental shelf in the Gulf of Thailand.[8]

Up to now, three agreements on maritime delimitation in the Gulf have been concluded: two between Malaysia and Thailand,[9] and a third between Vietnam and Thailand.[10] The coastal states in the Gulf have usually applied the method of the "median line" in drawing their unilateral claims, but they have different views on the effect of the existence of islands on such delimitation. Since 1972, Thailand and Malaysia have agreed on a limit of 29 miles measured from the edge of the coast into the sea; however, the two sides disagreed on the effect of the islet of *Ko Losin* on the delimitation. The Thai

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[7] From 15 cases of areas under a joint development regime in the world, three are located in the Gulf of Thailand.{Besides, the Cambodia-Vietnam historic water in the gulf of Thailand can be considered primary as the forth joint development area}

[8] South Vietnam promulgated the outer limits of its continental shelf on 9 June 1971, the Thai proclamation on the limits of its continental shelf was made on 18 May 1973, and the Malaysian map showing the outer limits of its continental shelf was published on 21 December 1979.

[9] Treaty relating to the delimitation of the territorial seas of the two countries and Memorandum of Understanding on the delimitation of the continental shelf boundary between the two countries in the Gulf of Thailand, of 24 Oct. 1979. See PRESCOTT, op.cit.n.2 at 92-94.

[10] Agreement on the delimitation of the maritime boundary between the two countries in the Gulf of Thailand, of 9 August 1997. See NGUYEN HONG THAO, "Vietnam's first maritime boundary agreement", IBRU, *Boundary and Security Bulletin*, Vol.5 No. 3 (Autumn 1997) 74-79.

islet stands 1.5 metres above sea level; it is uninhabited and has no economic significance of its own. According to Malaysia, this islet can have no effect on the maritime delimitation. In contrast, Thailand persists that *Ko Losin* does indeed have some impact. The equidistant lines as drawn by both sides have created an overlapping area. The disagreement led to a temporary solution. On 21 February 1979 a Memorandum of Understanding (MOU) on a joint development area was concluded. Lines indicating the two unilateral claims delimited the area under discussion: the extended claim by Thailand of 1973, and a 1979 claim by Malaysia.[11] The gas reserves in the Thai-Malaysian Joint Development Area were estimated at the end of 1996 to be 6.5 trillion cubic feet.[12]

There is also an overlapping area of 2,500 km² resulting from claims by Malaysia and Vietnam. On 9 June 1971, South Vietnam opened the bidding with a claim to the seabed, delimited by the median line between the coastal islands belonging, respectively, to Malaysia and to Vietnam. In 1979, the Malaysian authorities published charts showing the Malaysian claim to the continental shelf, with an outer limit as determined by the median line between the Malaysian island of *Redang* and the Vietnamese cape *Camau*, with no consideration of the Vietnamese coastal islands.

Since 1986 Malaysia has intensified hydrocarbon development in the Gulf. Having drilled more than 300 exploratory wells, ESSO (USA) estimates that the area may have reserves of about two billion barrels of oil and 20,000 trillion cubic feet of gas. Malaysia has signed three petroleum contracts with foreign enterprises, whose areas overlap the area claimed by Vietnam. The blocks (PM 8 and PM 5) granted to ESSO (USA) have overlapping areas of 200 square kilometres and 300 square kilometres respectively. The contract signed with HAMILTON (USA and Australia) has 1440 square kilometres of overlap with a Vietnamese block (block 46). Besides, mention may be made of the area of 800 square kilometres claimed by three countries – Vietnam, Malaysia and Thailand – in the Thai-Malaysian Joint Development Area (JDA). In May 1991, HAMILTON announced that the test of *Bunga Orkid-1* in the PM-3 bloc showed a rate of 4,400 barrels of petroleum a day. In the Malaysian-Vietnamese overlapping area the gas reserves were estimated to be 1.1 trillion cubic feet.[13] Protests arose immediately from the Vietnamese authorities. On 30 May 1991, a note was sent to the Malaysian Foreign Ministry reaffirming that the friendship and the cooperative spirit between the two countries did not allow either country unilaterally to grant to a third party the right to explore and exploit petroleum in the overlapping area. Vietnam was ready to negotiate with Malaysia on the subject of the delimitation of the continental shelf between the two countries on the basis

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[11] KRIANGSAK KITTICHAISAREE, *The law of the sea and maritime boundary delimitation in Southeast Asia* (Oxford University Press, Singapore, 1987) Appendix 6.

[12] PRESCOTT, op.cit.n.2 at 12.

[13] Id. at 14.

of respecting each other's sovereignty and mutual interests, in conformity with international law and practice. As a consequence, all projects of petroleum exploration and exploitation carried out by PETRONAS (the national petroleum company of Malaysia) were suspended pending the result of the negotiations with the Vietnamese side.

Geologically, the overlapping area is located in the Malay basin, 1,000 kilometres in length and 300 kilometres in breadth. With a sediment thickness of between eight and nine kilometres, the basin holds the promise of favourable oil findings. HAMILTON's tests confirmed these prospects. It pushed the two parties rapidly to find a mutually acceptable solution. During an official visit by the Vietnamese prime minister VO VAN KIET to Kuala Lumpur in early 1992, it was agreed to start negotiations on the delimitation of the continental shelf.[14] The first round of Malaysian-Vietnamese negotiations, held in early June 1992 in Kuala Lumpur, were successful and resulted in the MOU of 5 June 1992.[15] In it the two sides agreed on a "defined area", located off the northeast coast of West Malaysia and off the southwest coast of Vietnam, falling under the overlapping claims of the two states. In this area the two parties agreed to explore and exploit petroleum in that area in accordance with a joint development model, in a spirit of understanding and cooperation, pending and without prejudice to a definitive delimitation. The arrangement excluded any area simultaneously claimed by a third country.

The "defined area" is very long (more than 100 miles) but narrow (less than ten miles). As a result of its narrowness, any petroleum field discovered will probably only partially be located in the area. This explains why the two parties rapidly arrived at a practical arrangement: the joint development of the "defined area". Where a petroleum field is located partly within and partly outside the "defined area" of the continental shelf of Malaysia and Vietnam, both parties shall arrive at mutually acceptable terms for the exploration and exploitation of petroleum therein. Malaysia and Vietnam agreed to assign PETRONAS and PETROVIETNAM, respectively, to undertake, on their respective behalves, the exploration and exploitation of petroleum in the "defined area" and to enter into appropriate commercial arrangements. The Commercial Arrangement of 25 August 1993 between PETRONAS and PETROVIETNAM showed a new step in the development of models of co-operation in comparison with the Thai-Malaysian MOU of 1979 on joint development.

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[14] *Nhan Dan Daily* of 25 January 1992.

[15] Text in J.R.V.PRESCOTT, *The Gulf of Thailand : maritime limits to conflict and cooperation*, (MIMA, 1998) at 96-100.

## 3. COMPARISON BETWEEN THE THAI-MALAYSIAN MOU OF 1979 AND THE VIETNAMESE-MALAYSIAN MOU OF 1992

The Thai-Malaysian MOU of 1979 and the Vietnamese-Malaysian MOU of 1992 have the identical purpose of introducing a system of joint development of petroleum resources by the two parties concerned. Both consist of eight articles. Article I of both instruments defines the contours of the joint development areas. The Thai-Malaysian area of 7,300 square miles is delimited by seven points. The southern boundary of the area deviates from the equidistant line between the coastal lines of the two countries so that the area overlaps the tripartite Vietnamese-Thai-Malaysian area. The Vietnamese-Malaysian joint development area is delimited by a series of straight lines linking six points. The coordinates of these points are determined in Article I of the respective MOU.

The first principle to be found in both MOUs concerns the management of resources in the joint development areas. The Thai-Malaysian MOU established the Malaysian-Thai Authority (referred to as the Joint Authority) for the purpose of the exploration and exploitation of non-living natural resources of the seabed and subsoil in the overlapping area for a period of fifty years from the date of entry into force of the MOU. The Joint Authority consists of two co-chairmen, one from each country, and an equal number of members from each country. An MOU dealing specifically with the constitution and establishment of the Joint Authority was signed by the two countries on 30 May 1990. In the case of Vietnam and Malaysia, another model of management was opted for. Article III of the MOU of 1992 stipulated that Malaysia and Vietnam agreed to assign PETRONAS and PETROVIETNAM, respectively, to undertake, each on its own respective behalf, the exploration and exploitation of petroleum in the "defined area". For this purpose, PETRONAS and PETROVIETNAM were to enter into a commercial arrangement, the terms and conditions of which would be subject to the approval of the respective governments. The arrangement, concluded on 25 August 1993, provided for the establishment of an eight-member Co-ordination Committee on the basis of equal representation, with each of the respective national oil companies appointing four members. This Committee was to issue policy guidelines for the management of petroleum operations and to operate on the basis of unanimity. In contrast to the Thai-Malaysian model, the chairmanship of the Committee would alternate between the parties every two years. As to existing petroleum sharing contracts (PSC) signed by Malaysia before the conclusion of the arrangement, the two parties agreed that the contractors concerned would continue carrying out their operations in the Defined Area as provided under the PSCs. This was a compromise from the Vietnamese side, both for technical and economic reasons and in order to speed up optimum exploration and exploitation in the arrangement area. Nevertheless, the PSC contractors would have duly to inform both Parties about the progress of their operations and any amendments and changes of, and supplements

to, the PSCs would be subject to prior agreement of both Parties. The validity of the existing PSCs would not adversely affect the equal sharing of economic benefits between both Parties. Significantly, PETROVIETNAM would authorize PETRONAS to manage the petroleum operations under the existing PSCs, under the broad direction of the Co-ordination Committee in accordance with the provisions of the MOU, the commercial arrangement, and the PSCs.

We can see that, in respect of the management of the joint development, the Vietnamese-Malaysian model appears more flexible than the Thai-Malaysian model. The Co-ordination Committee is appointed by national petroleum companies rather than directly by the governments as in the Thai-Malaysian model. Any dispute or disagreement arising from or in connection with commercial and petroleum operations are to be settled by the two national companies under the broad direction of the Co-ordination Committee. Any resolution or decision reached by this Committee is to be consistent with the friendly nature, prudence and modern practice of the international petroleum industry. Disputes or disagreements that cannot be settled amicably by the Co-ordination Committee are to be submitted to the governments of Malaysia and Vietnam for settlement. Thus the governments would not interfere too intrusively in the business operations. The model also shows the good intention of the Vietnamese party to promote existing petroleum operations. By refraining from demands for changes in existing Malaysian PSCs, the Vietnamese party agreed to undertake joint activities by giving complete responsibility to PETRONAS.

The second principle contained in both MOUs is the equal sharing of all costs, expenses, liabilities and benefits resulting from the petroleum activities in the joint development areas under the MOUs and other, subsidiary, arrangements. However, the implementation of the principle in each of the two cases is different. In the Thai-Malaysian model, all costs incurred and benefits derived by the Joint Authority from activities carried out in the joint development area shall equally be borne and shared by both parties. In the Vietnamese-Malaysian model, on the other hand, while the two parties also assume and bear equally all costs and benefits carried out under the commercial arrangements, the system of joint management is replaced by a total mandate granted to PETRONAS, which undertakes all PSC operations in the Defined Area under the direction of the Co-ordination Committee. PETRONAS carries out all joint development operations and remits to PETROVIETNAM its equal share of the net revenue free of any taxes, levies or duties. Consequently, the law applicable to petroleum operations in the joint development area is the petroleum law of Malaysia. Vietnam agreed to this arrangement in order to avoid interfering with the existing PSCs relating to the Defined Area and because it did not yet have a petroleum law at that time.[16]

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[16] Text in J.R.V.PRESCOTT, *The Gulf of Thailand: maritime limits to conflict and cooperation* (MIMA, 1998) at 96-100.

[16] Vietnamese Petroleum Law was approved on 6 July 1993.

Article IV of the Thai-Malaysian MOU affirms that the national authorities of either party are entitled to exercise rights relating to fishing, navigation, hydrographic and oceanographic surveys, prevention and control of marine pollution and other similar matters in the joint development area, and that these rights shall be recognized by the Joint Authority. The MOU also establishes a criminal jurisdiction line, which divides the joint development area into two unequal parts: 930 square miles and 1,100 square miles for Malaysia and Thailand respectively.[17] The line is not meant to serve as the boundary line of the continental shelves of the two countries in the joint development area and is not in any way prejudicial to the sovereign rights of either Party in the joint development area. The above provisions show that, beside the issue of petroleum resources, the Thai and Malaysian authorities have also to face problems of illegal fishing and similar matters in the joint development area. In contrast, Vietnamese-Malaysian relations are less severely affected by the fishing issue because of the abundance of living resources and the large maritime spaces that are available to both countries. This explains why the Vietnamese-Malaysian MOU does not deal with matters other than the petroleum activities in the joint development area.

The third principle relating to the joint development areas concerns the matter of unity of deposit. Both MOUs envisage the situation of a single geographical petroleum or natural gas structure or field, or other mineral deposit of whatever character, extending beyond the limits of the joint development area. In this situation, the parties concerned shall share all relevant information and shall seek to reach agreement regarding the manner in which the structure, field or deposit will be most effectively exploited. For example, Article II of the Vietnamese-Malaysian MOU [reads]:

> "Where a petroleum field is located partly in the Defined Area and partly outside that area in the continental shelf of Malaysia or the Socialist Republic of Vietnam, as the case may be, both parties shall arrive at mutually acceptable terms for the exploration and exploitation of petroleum therein".

With regard to the issue of dispute settlement, both MOUs prescribe that any difference or dispute arising out of the interpretation or implementation of the provisions of the MOU shall be settled peacefully by consultation or negotiation between the two parties on the basic of good neighborliness and in conformity with international law.

The Thai-Malaysian MOU has a validity of fifty years. If no satisfactory solution is found for the problem of delimitation of the boundary of the continental shelf within this fifty-year period, the Joint Authority will continue to function indefinitely. The Vietnamese-Malaysian MOU, on the other hand, does not specify any term. The commercial arrangement concluded by the

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[17] PRESCOTT, op.cit.n.2 at 33.

two national petroleum companies states that it remains effective until either (i) the MOU expires, or (ii) the arrangement is terminated by agreement of both parties and/or both governments, or (iii) the termination of the PSC.

While adhering to the same idea of institutional and organizational joint development in facing similar maritime issues in the same region, the Thai-Malaysian and the Vietnamese-Malaysian models are different and produce different results. The Thai-Malaysian MOU was signed in 1979 but the two parties exchanged their instruments of ratification only on 30 May 1990. Two contracts were concluded relating to their joint development area, one between PTTEP and PETRONAS *Carigali*, another between PETRONAS *Carigali* and *Triton Oil*, both contracts having come into effect only in early 1994. Apart from these contracts UNOCAL has been granted petroleum concessions for some areas in the Gulf. It took fifteen years for the Thai and Malaysian authorities to overcome legal obstacles in realizing their model. In the case of the Vietnamese-Malaysian model, after four years from the conclusion of the commercial arrangement, on 29 July 1997, the first petroleum was extracted from the *Bunga Kekwa* field. This event has marked the great success of this model of joint development in the Gulf.

## 4. FROM THE THAI-MALAYSIAN MOU OF 1979 TO THE VIETNAMESE-MALAYSIAN MOU OF 1992: FACTORS IN THE SUCCESS OF AN ARRANGEMENT FOR JOINT DEVELOPMENT

### 4.1. Legal basis and the political will of the parties

Cases of joint development can be found in areas both having or lacking determined boundaries, and in cases both involving and not involving conflicts.[18] In the North Sea Continental Shelf cases, the International Court of Justice held: "[I]f ... the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or failing agreement, equally, unless they decide on a regime of joint jurisdiction, use, or exploitation for the zone of overlap or any part of them".[19]

A legal basis for joint development can be found in paragraph 3 of Articles 74 and 83 of UNCLOS 1982:

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[18] Fox, op.cit.n.1; L.LUCCHINI and M.VOELCKEL, *Droit de la mer*, Vol.2 part 1: Délimitation (Pedone) 115-118; T. ONORATO and MARK J.VALENCIA, "International cooperation for petroleum development: the Timor Gap Treaty", *Foreign Investment Law Journal* vol. 5, n° 1, (Spring 1990), p. 59-78.
MARK J.VALENCIA, "Taming troubled waters: joint development of oil and mineral resources in overlapping claim areas", *San Diego Law Review* vol. 23, n° 3 (1986), 343-351.

[19] North Sea Continental Shelf Cases, judgement of 20 February 1969, ICJ Rep. 1969: 3.

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

The Convention on the Law of the Sea does not define exactly what the "provisional arrangements of a practical nature" to be taken are. In practice, the creation of a joint development area constitutes an effective provisional arrangement permitting countries to overcome their territorial disputes and facilitating the exploitation of natural resources in the transitional period. The countries concerned shall negotiate in good faith to reach "provisional arrangements of a practical nature". They are free to choose any mode of arrangement for the overlapping areas in conformity with international law. While preventing any prejudicial exploitation and avoiding any waste of non-utilization of natural resources, the application of a joint development regime for the whole or a portion of an area of overlap constitutes an attractive and agreeable measure pending a final delimitation. Significantly, the MOUs relating to the Gulf of Thailand were not based on conventional international law. They were concluded before UNCLOS entered into force (on 16 November 1994). It could be asked whether these MOUs find their legal foundation in customary international law.

ONORATO argues that joint development may constitute a rule of customary international law, on the basis of three considerations: first, a state may not unilaterally exploit a common international petroleum deposit despite timely objections raised by another interested state; second, the method of exploitation of a such deposit must be agreed on by the states involved; third, these states should enter into good faith negotiations in order to arrive at an agreement or at least at a provisional arrangement until a final agreement is reached.[20] Quoting the ICJ opinion of 1982 in the Tunisian and Libyan continental shelf case and citing state practice in 14 cases, conventional international law, general principles of law, and principles of soft law, GAO ZHIGUO emphasizes that joint development is a binding rule of international law.[21] Here, in our opinion, one should be prudent. Firstly, international law indeed prescribes states to conduct negotiations in a spirit of good faith with the aim of reaching an agreement or, at least, a "provisional arrangement of a practical nature" pending a final agreement. This signifies that a joint development solution serves the purpose only of a provisional arrangement.

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[20] T.ONORATO, "Apportionment of an international common petroleum deposit: a reprise", 26 ICLQ (1977) 324.

[21] ZHIGUO GAO, "The legal concept and aspects of joint development in international law", 13 *Ocean Yearbook* (1998) 123: "Joint development is an emerging rule of customary international law, or at least a principle of soft law, under which unconsented, unilateral, and arbitrary development of shared resources in a disputed area between states is prohibited and unacceptable".

Thus, the option of a joint development arrangement is not obligatory whereas the pursuit of a final solution is. The concept of joint development can indeed be found in state practice, in conventional international law and in international jurisprudence. However, there is no uniform definition of "joint development" in conventional international law and various definitions are to be found in legal literature.[22] Secondly, the number of cases of joint development arrangements is not sufficient for an *opinio juris* to have emerged on the matter. A maritime delimitation is always the principal and final aim of the states concerned and joint development is only a temporary solution. It appears that there is in fact no rule of international law prescribing joint development.

In the Gulf of Thailand cases, the states in question have preferred to express their common will in the form of a "Memorandum of Understanding" rather than in an "agreement". Although the MOU is undoubtedly one of the various possible forms of an international agreement, including, if the parties so wish, the stages of signature and ratification, it seems to offer a way of expressing a state's commitment at a lower level than that of a treaty. If we examine the contents of the MOUs concerned, we shall see that they do not settle all aspects of the existing disagreement; they manifest only the will of the states concerned to establish a joint development area by way of provisional solution to bridge their existing differences on the delimitation issue. The Vietnamese-Malaysian MOU seems to be more flexible when it delegates the responsibility of negotiating the details of the management of petroleum activities in the Defined Area to the respective petroleum companies. It shows the two countries' prudence and it also shows that joint development is not a matter of obligation under customary international law. The arrangement was reached as a result of the political will and the economic demands of the countries concerned. Thailand and Malaysia wanted to reach an accommodation in the spirit of ASEAN and were prompted by the desire to promote petroleum exploration and exploitation in order to avoid the consequences of the 1974 oil crisis. The Memorandum of Understanding

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[22] There are several definitions of "joint development":
- 'there are two types of joint development schemes: one is the type in which boundary delimitation has been solved and the other is a regime of joint development with the boundary delimited' (M.MIYOSHI, "The basic concept of joint development of hydrocarbon resources on the continental shelf", 3 *International Journal of Estuarine and Coastal Law* (1988) 3).
- 'the cooperation between States with regard to the exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims' (R.LAGONI, *Report on joint development of non-living resources in the exclusive economic zone* (Warsaw Conference of the International Committee on the Exclusive Economic Zone, International Law Association, 1988) 2).
- 'JDZ will be considered as being an area where two or more States have, under international law, sovereign rights to explore and exploit the natural resources of the area and where the States concerned have agreed to engage in such exploration and exploitation under some form of common or joint arrangement' (CHURCHILL, loc.cit.n.1 at 55).

between Vietnam and Malaysia came about smoothly because of the discovery of new petroleum structures and deposits and because of the changing political situation in the region, shifting from confrontation to dialogue. The long time that passed between signature and ratification of the Thai-Malaysian MOU shows clearly that the method of joint development is not the consequence of a rule of customary international law.

Finally, it is remarkable that joint development is not exclusively applied in cases of disputed areas. After an agreement on maritime delimitation was concluded by Thailand and Vietnam in 1997, the two countries continued to conduct joint management of natural resources in the delineated zone.

## 4.2. Economic factors

In the areas falling under claims of overlapping, it is generally difficult to reach an agreement on delimitation, which needs the necessary political will and sufficient time. That situation hampers foreign investment since no companies are prepared to take the risk of investing in the development of an area with an uncertain status. Apart from that, international law does not encourage unilateral exploration and exploitation in a disputed area. In such circumstances joint development can be an effective way to by-pass existing obstacles. The value of joint development lies in its ability to avoid disputes and act in a way that favours economic development. Thailand was in favour of concluding a Memorandum of Understanding with Malaysia in 1979, because of Thailand's heavy dependence on oil imports, much greater than those of Malaysia. However, in its dispute with Vietnam, Thailand preferred to concentrate on a definitive solution by way of delimitation rather than aiming for joint development. Finally, Vietnam and Malaysia rapidly reached an accord on joint development because of their respective economic interests in the discovered deposits.

Knowledge of the availability of natural resources at the seabed and subsoil of the area concerned plays an important role in finding a solution for the dispute. The less knowledge is available, the easier it is to reach a compromise. The discovery of new structures or deposits causes the States concerned to push their claims to the maximum extent. On the other hand, joint development implies a solution of "no gain no loss" and seems to exert a calming influence on the states concerned. The equal share of costs and benefits guarantees also equal rights for the parties. When the prospects for the full exploitation of the natural resources are present, the issue of delimitation is not a difficult subject of negotiation.

Although joint development is a useful tool in resolving disputes between states with overlapping legal claims to the same area, the practice is not simple. A joint development arrangement is temporary in nature and is limited to its economic objective. If it does not achieve positive results, it should be abolished. The South Korea-Japan joint development scheme is an example.

Signed in 1974, the agreement was to apply to an area of 80,000 square kilometres and was projected for 50 years from 1978. However, the lack of economically relevant output hampers the agreement's implementation.

### 4.3. Other factors

Another important factor involves co-operation and a good relationship between the states concerned. The admission of Vietnam into ASEAN has contributed in creating favorable conditions for reaching a solution of the delimitation issue by furthering co-operation in the spirit of ASEAN between states in the region.

Joint development can be a positive device only if it is linked to a convenient management model. The Thai-Malaysian MOU of 1979 envisaged the establishment of a Joint Authority to manage the activities in the joint development area. However, the two parties could not reach a common position in determining its powers, which was the reason why the Joint Authority came into force only in 1994, fifteen years after the signature of the MOU.

Good management of joint development depends also on the dimensions of the joint development area. If the area is small, the states concerned can arrive at a common view on the joint development of the whole area more easily than, for example, in the case of the Vietnamese-Malaysian joint development area. On the other hand, a large joint development area such as the South Korean-Japanese area of 1974 had to be divided into nine smaller sub-zones in 1987 in order to attract foreign investment.

If the number of countries involved is small, an agreement on joint development can be reached relatively easily. That is why all existing agreements of joint development in the world are bilateral in nature. The tripartite overlapping area of 800 square kilometres involving Thailand, Vietnam, and Malaysia, located inside the Thai-Malaysian joint development area of 1979, will be the first multilateral joint development arrangement in the world. The negotiations held by the three countries since 1999 have resulted in an agreement in principle on the joint development for the tripartite area. The area is delimited by the line showing the Vietnamese claim of 1971, and the northern boundary of the Thai-Malaysian joint development area of 1979. All non-living resources of the tripartite area should be equally divided between the parties. The parties will continue to discuss technical questions such as organization and the choice of operators.

Joint development usually deals with petroleum exploration and exploitation. However, the approach can also be applied to cases involving disputes over an exclusive economic zone or over fishing management, as evidenced by: the Papua New Guinea-Australia agreement of 18 December 1978; the Iceland-Norway (*Jan Mayen*) agreement of 22 October 1981; the Indonesia-Australia (*Timor Gap*) treaty of 11 December 1989; the joint statements of

1989 and 1990 on the Falkland Islands by the United Kingdom and Argentina; the Sino-Japanese agreement of 11 November 1997, the Sino-South Korea agreement of 2000 on the common fishery zones and the Sino-Vietnamese agreement of 2000 on fishing cooperation in the *Beibu* Gulf.

The joint development system has given rise to a series of problems about the applicable law, security, customs, taxation, share of costs and benefits, and environment. However, the management of natural resources in the joint development areas primarily raises the question of administration. This is the factor that deserves the utmost consideration in our quest for effective solutions.

## 5. CONCLUSION

The experience of joint development in the Gulf of Thailand shows that, assuming the existence of an adequate political will and spirit of good neighborliness, joint development offers a convenient solution for states dealing with maritime delimitation disputes, allowing them to bypass the principal issue temporarily and, pending a final delimitation, to allow the exploitation of natural resources on a provisional basis, thereby effecting some economic development.

# LEGAL MATERIALS

# STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

## JAPAN

### JUDICIAL DECISIONS[1]

**The requirements of Articles 20(3), 2(1), 26 and 27 of the International Covenant on Civil and Political Rights; Rights of Ainu as a Minority and an Indigenous People**

**Sapporo District Court, 27 March 1997**
Hanrei Jiho [Judicial Reports] No.1598 (1997) 33

X ET AL. *v.* HOKKAIDO EXPROPRIATION COMMISSION (the State intervened)

The plaintiffs, who belonged to a minority of the Japanese population and who were landowners in the Nibutani area, brought an action against the Hokkaido Expropriation Commission for the revocation of a decision on the expropriation of land for the construction of the Nibutani dam, contending that the authorization for the dam project was illegal.

The Court ruled that it was necessary to balance the public interests that would be served by the project and the public or private interests that would suffer from it, in order to meet the requirement of Article 20 paragraph 3 of the Land Expropriation Law ("The project must contribute to the proper and reasonable use of the land").

Article 2 paragraph 1, Article 26 and Article 27 of the International Covenant on Civil and Political Rights guarantee to persons belonging to a minority the right to enjoy their own culture and oblige the Contracting Parties to give careful attention to this right. The plaintiffs belong to the Ainu who are not only a minority part of the population in Japan, but who also constitute an indigenous people.

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* Edited by KO SWAN SIK, General Editor.

[1] Contributed by SABURI HARUO, University of Nagoya; Member of the Study Group on Japanese Judicial Decisions relating to International Law.

*Asian Yearbook of International Law,* Volume 8 (B.S. Chimni *et al.*, eds.)

The public interests that would be served by the project are the prevention of flood in the area and the constant delivery of water for agriculture, industry and city consumption and the production of electric power. On the other hand, as for the interests and values that would suffer from the project, the area to be expropriated was a sacred place for the Ainu people, a place with the highest percentage of Ainu population in Japan and the place where the study of Ainu culture started. There was a close and unique relationship between Ainu culture and the natural environment cultivating that culture. The substance and spirit of Ainu culture with its close relationship with nature were maintained to the present day. Consequently the area to be expropriated clearly has ethnic, cultural, historical and religious values for the Ainu people. Those values are indeed also important for those citizens who are not Ainu.

Balancing these public and private interests and values, the last mentioned interests and values are to be considered human rights within the meaning of Article 27 of the International Covenant on Civil and Political Rights and Article 13 of the Japanese Constitution. Consequently, when an administrative state organ takes a policy decision that holds the possibility of injuring these rights, it should give due consideration to the culture and other aspects of indigenous people so as not to unreasonably violate these people's rights.

For these reasons and on the basis of the evidence, the Minister must be considered to have neglected both the necessary procedures for research and study in order to decide if the values served by the project would prevail over the values that would suffer loss, and the values that were to be respected most. Accordingly, the authorization for the project of the construction of the Nibutani dam was illegal; this brought with it the illegality of the decision on the expropriation of the land needed for the construction of the Nibutani dam.

## The relationship between High Seas, Territorial Sea and Fishery Zone; Effect of the extension of the territorial sea

***Hiroshima High Court, Matsue Branch, 11 September 1998***
Hanrei Jiho (Judicial Reports) No.1656 (1998) 56

PROSECUTOR *v.* X

This is the judgment rendered on the appeal against the decision of the Matsue District Court, Hamada Branch, of 15 August 1997 (this *Yearbook* Vol.7 at 287)H High Court ruled that the original judgment should be reversed, and remanded the case to the Matsue District Court.

The High Court ruled that the original judgment could not be approved for the following reasons. *First*, the area in question had become part of the Japanese territorial sea by the new Law of 1977 that adopted the system of straight baselines for the delimitation of the territorial sea. Since it is an established principle of international law that a coastal state has sovereignty over its territorial sea, it is reasonable that Japan has judicial jurisdiction over the area.

*Second*, the original judgment held that Japan renounced the exercise of sovereignty over the part of the area outside the fishery zone under the 1965 Japan-Korea Agreement on Fisheries. This was based on the understanding that the Agreement

referred not only to the high seas but also to the territorial sea. This interpretation was, however, not correct for the following reasons:

First, international law divides the sea into territorial sea and high seas. The fishery zone is the sea area beyond and adjacent to the territorial sea where the coastal state may exercise exclusive jurisdiction over fishery matters. This zone is established in the high seas and is not located in the territorial sea. The zone cannot be in the territorial sea.Second, against this background it may be concluded that the Agreement presumed the sovereignty of the coastal state over its territorial sea and aimed at the solution of fishery problems on the high seas. Thus the Agreement referred to a fishery zone under international law and not to the territorial sea.

## THE PHILIPPINES*

JUDICIAL DECISIONS
(Supreme Court)

### Immunity of Asian Development Bank and its President and officers from legal processes

G.R.No.113191, 18 September 1996

DEPARTMENT OF FOREIGN AFFAIRS *v.* NATIONAL LABOR RELATIONS COMMISSION

*First Division*

The Asian Development Bank (ADB) was sued by a dismissed employee for illegal dismissal and charged with violating the "labor-only" contracting law. ADB and the Department of Foreign Affairs (DFA) notified the Labor Arbiter that the ADB, its President and officers were covered by an immunity from legal processes except for borrowings, guaranties or the sale of securities pursuant to Article 50(1) and Article 55 of the Agreement Establishing the Asian Development Bank (the "Charter")[1] in relation to Section 5 and Section 44 of the Agreement Between the Bank and the Government of the Philippines regarding the Bank's Headquarters (the

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* Contributed by MARIA LUISA B.BUNGGO, Trade Remedies and Customs Valuation Development Alternatives, Inc.

[1] Article 50(1) of the Charter provides: "The bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities."Article 55 thereof provides: "All Governors, Directors, alternates, officers and employees of the Bank, including experts performing missions for the Bank:
1) shall be immune from legal process with respect of acts performed by them in their official capacity, except when the Bank waives the immunity.
2) ... "

"Headquarters Agreement").[2] The DFA lodged this petition for certiorari with the Supreme Court when the NLRC refused to vacate the judgment rendered against ADB.

The Supreme Court ruled that ADB was immune from suit as provided in both its Charter and the Headquarters Agreement, stating: "The provisions of both instruments clearly state that, except in the specific cases of borrowing and guarantee operations, as well as the purchase, sale and underwriting of securities, ADB enjoys immunity from legal process of every form. The Bank's officers, likewise, enjoy such immunity for all acts performed by them in their official capacity. The Charter and Headquarters Agreement granting these immunities and privileges are treaty covenants and commitments voluntarily assumed by the Philippine government which must be respected."

The Court cited its previous holding in *World Health Organization* v. *Aquino*, where it held:

> "It is a recognized principle of international law and under our system of separation of powers that diplomatic immunity is essentially a political question and courts shall refuse to look beyond a determination by the executive branch of the government, and where the plea of diplomatic immunity is recognized and affirmed by the executive branch of the government... it is then the duty of the courts to accept the claim of immunity upon appropriate suggestion by the principal law officer of the government, ... or other officer acting under this direction. Hence, in adherence to the settled principle that courts may not so exercise their jurisdiction... as to embarrass the executive arm of the government in conducting foreign relations, it is accepted doctrine that "in such cases the judicial department of government follows the action of the political branch and will not embarrass the latter by assuming an antagonistic jurisdiction."

The Court found that the filing by the DFA, in behalf of ADB, is itself an affirmation of the government's own recognition of the immunity of ADB. Being an international organization that has been extended a diplomatic status, ADB is independent of municipal law, in order that it be free from any interference by the local government in its operations and make it free of any subjection to local jurisdiction which might impair its capacity as such body to discharge its responsibilities impartially on behalf of its member-states.

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[2] Section 5 of the Headquarters Agreement reads: "The Bank shall enjoy immunity from every form of legal process, except in cases arising out of, or in connection with, the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities."

Section 44 thereof provides: "Governors, other representatives of Members, Directors, the President, Vice-President and executive officers as may be agreed upon between the Government and the Bank shall enjoy, during their stay in the Republic of the Philippines in connection with their official duties with the Bank:

....

(b) Immunity from legal process of every kind in respect of words spoken or written and all acts done by them in their official capacity."

**Constitutionality of participation in treaty on worldwide trade liberalization; lack of jurisdiction in the field of "the unchartered ocean of social and economic policy making"; (non-) self-executing character of Constitutional provisions; voluntary restriction and limitation of sovereignty by participation in treaties; generally accepted principles of international law automatically part of municipal law**

G.R.No.118295, 2 may 1997

TANADA, et al. *vs.* ANGAR, et al.

*En banc*

In December 1994, the Philippines ratified the Agreement Establishing the World Trade Organization (hereinafter the "WTO Agreement") through Senate Resolution No. 97. Following the ratification, certain members of the Senate and several non-government organizations filed the present tax-payer suit assailing the Philippine ratification of the WTO Agreement as violating the mandate of the 1987 Constitution to "develop a self-reliant and independent national economy effectively controlled by Filipinos."[3] The issue, as framed by the Court, was whether the "Philippine Constitution prohibits Philippine participation in worldwide trade liberalization and economic globalization? Does it proscribe Philippine integration into a global economy that is liberalized, deregulated and privatized?"

The Court ruled that the ratification by the Philippines of the WTO Agreement was constitutional, stating that petitioners' reliance on Article II, section 19 was misplaced:

> "By its very title, Article II of the Constitution is a "declaration of principles and state policies." ... These principles in Article II are not intended to be self-executing principles ready for enforcement through the courts. They are used by the judiciary as aids or as guides in the exercise of its power of judicial review, and by the legislature in its enactment of laws. As held in the leading case of Kilosbayan, Inc. vs. Morato, the principles and state policies enumerated in Article II and some sections of Article XII are not 'self-executing provisions, the disregard of which can give

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[3] Specifically, the petitioners anchored their arguments on Section 19, Article II and Sections 10 and 12 of Article XII.

Section 19, Article II provides: "The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos."

Section 10, Article XII provides "... The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos."

Section 12, Article XII provides "The State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive."

> rise to a cause of action in the courts. They do not embody judicially enforceable constitutional rights but guidelines for legislation."

The Court stated further that "(t)he reasons for denying a cause of action to an alleged infringement of broad constitutional principles are sourced from basic considerations of due process and the lack of judicial authority to wade 'into the uncharted ocean of social and economic policy making."

The Court clarified its ruling in *Manila Prince Hotel* vs. *GSIS*, stating that its application was limited to "the 'grant of rights, privileges and concessions covering national economy and patrimony' and not to every aspect of trade and commerce. It refers to exceptions rather than the rule. The issue here is not whether this paragraph of Sec. 10 of Article XII is self-executing or not. Rather, the issue is whether, as a rule, there are enough balancing provisions in the Constitution to allow the Senate to ratify the Philippine concurrence in the WTO Agreement. And we hold that there are."

Further, the Court stated:

> "All told, while the Constitution indeed mandates a bias in favor of Filipino goods, services, labor and enterprises, at the same time, it recognizes the need for business exchange with the rest of the world on the bases of equality and reciprocity and limits protection of Filipino enterprises only against foreign competition and trade practices that are unfair. In other words, the Constitution did not intend to pursue an isolationist policy. It did not shut out foreign investments, goods and services in the development of the Philippine economy. While the Constitution does not encourage the unlimited entry of foreign goods, services and investments into the country, it does not prohibit them either. In fact, it allows an exchange on the basis of equality and reciprocity, frowning only on foreign competition that is *unfair*. [Emphasis in original.]
>
> ....
>
> The WTO reliance on "most favored nation," "national treatment," and "trade without discrimination" cannot be struck down as unconstitutional as in fact they are rules of equality and reciprocity that apply to all WTO members. Aside from envisioning a trade policy base on "equality and reciprocity," the fundamental law encourages industries that are "competitive in both domestic trade environment, but one in favor of the gradual development of robust industries that can compete with the best in the foreign markets. Indeed, Filipino managers and Filipino enterprises have shown capability and tenacity to compete internationally. And given a free trade environment, Filipino entrepreneurs and managers in Hong Kong have demonstrated the Filipino capacity to grow and to prosper against the best offered under a policy of *laissez faire*."

Finally, on the question of sovereignty, the Court stated:

> "However, while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations. Unquestionably, the Constitution did not envision a hermit-type isolation of the country from the rest of the world. In its Declaration of Principles

and State Policies, the Constitution 'adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity, with all nations.' By the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws. One of the oldest and most fundamental rules in international law is *pacta sunt servanda* – international agreements must be performed in good faith. 'A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties... A state which has contracted valid international obligations is bound to make in its legislations (*sic*) such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.'

By its inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights. Thus, treaties have been used to record agreements between States concerning such widely diverse matters as, for example, the lease of naval bases, the sale or cession of territory, the termination of war, the regulation of conduct of hostilities, the formation of alliances, *the regulation of commercial relations*, the settling of claims, the laying down of rules governing conduct in peace and the establishment of international organizations. The sovereignty of a state therefore cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture: (1) limitations imposed by the very nature of membership in the family of nations and (2) limitations imposed by treaty stipulations. ..."

In closing, the Court made the following statement:

"... Notwithstanding objections against possible limitations on national sovereignty, the WTO remains as the only viable structure for multilateral trading and the veritable forum for the development of international trade law. The alternative to WTO is isolation, stagnation, if not economic self-destruction. ..."

**Conflict of laws; Jurisdiction of Philippine Courts to be based on the paramountcy of the private interest of the litigant, enforceability of the judgment, fair trial, avoidance of inconvenient forum; Factors determining choice of applicable law**

G.R.No.122191, 8 October 1998

SAUDI ARABIA AIRLINES *v.* COURT OF APPEALS, MILAGROS P. MORADA and HON. RODOLFO A. ORTIZ

*First Division*

Petitioner Saudi Arabian Airlines ("SAUDIA"), based in Jeddah, Saudi Arabia, employed private respondent MORADA as a flight attendant. In 1990, while on a layover in Jakarta, Indonesia, private respondent, after a night out with two male fellow-crew members, was attacked by one of her co-workers. The attack was averted

by hotel personnel who contacted Indonesian police and effected the arrest of the perpetrators. Because of the incident in Jakarta, the private respondent was subjected to harassment by SAUDIA pressuring her to drop the accusations against her attacker and his accomplice. She refused to do so, and instead found herself tried before a Saudi Court, in proceedings not made known to her, for the events that transpired in Jakarta. The case was later dismissed by the Prince of Makkah on the ground that private respondent was wrongfully convicted. Thereafter, SAUDIA terminated private respondent, whereupon private respondent filed a case for damages against SAUDIA.

The Court ruled that there was indeed a "conflict of laws" issue before it. As stated by the Court:

> "A factual situation that cuts across territorial lines and is affected by the diverse laws of two or more states is said to contain a foreign element.' The presence of a foreign element is inevitable since social and economic affairs of individuals and associations are rarely confined to the geographic limits of their birth or conception.
>
> The forms in which this foreign element may appear are many. The foreign element may simply consist in (*sic*) the fact that one of the parties to a contract is an alien or has a foreign domiciles, or that a contract between nationals of one State involves properties situated in another State. In other cases, the foreign element may assume a complex form.
>
> In the instant case, the foreign element consisted in the fact that private respondent MORADA is a resident Philippine national, and that petitioner SAUDIA is a resident foreign corporation. Also, by virtue of the employment of MORADA with the petitioner SAUDIA as a flight stewardess, events did transpire during her many occasions of travel across national borders, ... that caused a 'conflicts' situation to arise."

Applying the rules of "conflicts" the Court found the Regional Trial Court (RTC) to be possessed of jurisdiction over the case:

> "Pragmatic considerations, including convenience of the parties, also weigh heavily in favor of the RTC of Quezon City assuming jurisdiction. Paramount is the private interest of the litigant. Enforceability of a judgment if one is obtained is quite obvious. Relative advantages and obstacles to a fair trail are equally important. Plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant, e.g. by inflicting upon him needless expense or disturbance. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Weighing the relative claims of the parties, the court a quo found it best to hear the case in the Philippines. Had it refused to take cognizance of the case, it would be forcing plaintiff (now private respondent) to seek remedial action elsewhere, i.e., in the Kingdom of Saudi Arabia where she no longer maintains substantial connections. That would have been unfair to her as well as a burden.
>
> Moreover, by hearing the case in the Philippines no unnecessary difficulties and inconvenience have been shown to either of the parties. The choice of forum of the plaintiff (now private respondent) should be upheld."

As to the choice of applicable law, the Court made the following statement:

> "(T)he choice-of-law problems seek to answer two important questions: (1) What legal system should control a given situation where some of the significant facts occurred in two or more states; and (2) to what extent should the chosen legal system regulate the situation.
>
> ...
>
> Although ideally, all choice-of-law theories should intrinsically advance both notions of justice and predictability, they do not always do so. The forum is then faced with problem of deciding which of these two important values should be stressed.
>
> Before a choice can be made, it is necessary for us to determine under what category a certain set of facts or rules fall. This process is known as "characterization," or the "doctrine of qualification". It is the 'process of deciding whether or not the facts relate to the kind of question specified in the conflicts rule.' The purpose of characterization is to enable the forum to select the proper law. Our starting point of analysis here is not a legal relation, but a factual situation, event, or operative fact. An essential element of conflict rules is the indication of a "test" or "connecting factor" or "point of contact". Choice-of-law rules invariably consist of a factual relationship (such as property right, contract claim) and a connecting factor or point of contact, such as the *situs* of the *res*, the place of celebration, the place of performance, or the place of wrongdoing."

**Death penalty not violative of the Constitution, nor of the International Covenant on Civil and Political rights**

G.R.No.132601, 12 October 1998

ECHEGARAY *v.* THE SECRETARY OF JUSTICE and THE DIRECTOR OF THE BUREAU OF CORRECTIONS, THE EXECUTIVE JUDGE OF THE REGIONAL TRIAL COURT OF QUEZON CITY AND THE PRESIDING JUDGE OF THE REGIONAL TRIAL COURT OF QUEZON CITY, BRANCH 104

*Per Curiam*

In 1996, the Court affirmed the conviction of petitioner LEO ECHEGARAY for the crime of rape of the ten-year-old daughter of his common-law spouse and the imposition upon him of the death penalty for the said crime. Petitioner then filed a Motion for Reconsideration questioning the constitutionality of Republic Act No. 7629 (the Death Penalty Law) and the imposition of the death penalty for the crime of rape. The Court in February 1998 found that Congress had complied with the requirements for the re-imposition of the death penalty law and thus, the death penalty law was constitutional. In the intervening time, Congress passed a law changing the

mode of execution from electrocution to lethal injection in Republic Act No. 8177,[4] and as provided in said law, the Secretary of Justice promulgated the Rules and Regulations to Implement R.A. No. 8177 and directed the Director of the Bureau of Corrections to prepare the Lethal Injection Manual. Petitioner then filed a Petition for Prohibition, Injunction and/or Temporary Restraining Order arguing that R.A. 8177 and its implementing rules are unconstitutional for: (a) violation of the constitutional proscription against cruel, degrading or inhuman punishment, (b) violation of Philippine international treaty obligations, (c) being an undue delegation of legislative power, and (d) being discriminatory.

The Court ruled that execution by lethal injection does not constitute cruel, degrading or inhuman punishment under Section 19, Article III of the 1987 Constitution.[5] Citing its ruling in *Harden* vs. *Director of Prisons*, the Court held: "[P]unishments are cruel when they involve torture or lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the constitution. It implies there 'something inhuman and barbarous, something more than the mere extinguishment (*sic*) of life.' Would lack of particularly then as to the details involved in the execution by lethal injection render said law 'cruel, degrading or inhuman'? The Court believes not. ... [T]he implementing details of R.A. 8177 are matters which are properly left to the competence and expertise of administrative officials."

The Court likewise ruled that the re-imposition of the death penalty did not violate international treaty obligations, particularly, the International Covenant on Civil and Political Rights which was signed and ratified by the Philippines on December 19, 1966 and October 23, 1986, respectively. As stated by the Court:

> "Indisputably, Article 6 of the Covenant enshrines the individual's right to life. Nevertheless, Article 6 (2) of the Covenant explicitly recognizes that capital punishment is an allowable limitation on the right to life, subject to the limitation that it be imposed for the "most serious crimes." Pursuant to Article 28 of the Covenant, a Human Rights Committee was established and under Article 40 of the Covenant, States Parties to the Covenant are required to submit an initial report to the Committee on the measures they have adopted which give effect to the rights recognized within the Covenant and on the progress made on the enjoyment of those rights within one year of its entry into force for the State Party concerned and thereafter, after five years. On July 27, 1982, the Human Rights Committee issued General Comment No. 6 interpreting Article 6 of the Covenant stating that "(while) it follows from Article 6 (2) to (6) that State Parties are obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the 'most serious crimes'. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the most serious crimes.' The article strongly suggests (pars. 2(2) and (6)) that abolition is desirable... The Committee is of the opinion that the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure." Further, The Safeguards Guaranteeing Protection of

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[4] An Act Designating Death by Lethal Injection as the Method of Carrying Our Capital Punishment, Amending for that purpose Article 81 of the Revised Penal Code, as Amended by Section 24 of Republic Act No. 7659.

[5] Article III, section 19 provides for the right to life.

> Those Facing the Death Penalty adopted by the Economic and Social Council of the United Nations declare that the ambit of the term 'most serious crimes' should not go beyond intentional crimes, with lethal or other extremely grave consequences.
>
> The Optional Protocol to the International Covenant on Civil and Political Rights was adopted by the General Assembly of the United Nations on December 16, 1966, and signed and ratified by the Philippines on December 19, 1966 and August 22, 1989, respectively. The Optional Protocol provides that the Human Rights, Aiming at the Abolition of the Death Penalty was adopted by the General Assembly on December 15, 1989. *The Philippines neither signed nor ratified said document.* Evidently, petitioner's assertion of our obligation under the Second Optional Protocol is misplaced." [Emphasis supplied.]

With respect to the issue of undue delegation, the Court ruled that there was none considering that R.A. 8177 sufficiently described "the job to be done, who is to do it, and what is scope of his authority." The said law also provides the "standards which define the legislative policy, mark its limits, map out its boundaries, and specify the public agencies which will apply it."

The Court, however, declared invalid Section 17 of the Implementing Rules for being discriminatory, i.e. in treating women sentenced to death differently from men similarly sentenced. The rule suspended the execution of a woman to within three years next following the death sentence.

## OPINIONS OF THE DEPARTMENT OF JUSTICE

### Requirements for Congressional approval of loans made under the Official Development Assistance Act

***Opinion No.95, S.1996, of 4 November 1996***

The issues raised by the World Bank were in regard to the legal effects of Republic Act No. 8182 ("Official Development Assistance Act [ODA]" of 1996), brought to the DOJ through the Department of Finance (DOF). The Bank required confirmation of (1) the steps, procedures and timing through which the Government will comply with Section 4 of the law; (2) the continued authority of the Government to provide a letter of Representations and Assurances on Procurement acknowledging that Bank Guidelines on procurement and use of consultants are and will be recognized and fully applied to Bank-financed projects; and (3) that the Act was not to apply to project loans negotiated before the efficacy of the Act and to loans made to government-owned corporations guaranteed by the Government.

With respect to the first issue, the Bank was specifically concerned with a proviso in Section 4 of the law that required prior congressional approval for ODA-funded projects. The DOJ referred to the implementing rules and regulations of the Act which provided that all "proceeds of loans and grant funds must be included in the annual

national expenditure program to be submitted to Congress for approval."[6] Upon consultation with the relevant government agencies, the DOJ determined that the process involved (1) identification of the projects to be funded by foreign funding institutions in the annual programming mission of the government; (2) the submission of identified projects by the implementing agency to the Investment Coordination Committee (ICC) and the National Economic and Development Authority (NEDA) for approval; (3) the DOF then securing Presidential authority and Monetary Board approval to negotiate the funding of the approved project with the foreign funding agency; (4) the inclusion of the annual budgetary requirement of the approved project in the proposed budget of the implementing agency for submission to the Department of Budget and Management (DBM); (5) the submission, by the President, of all approved agency budget proposals in the National Expenditure program to Congress for appropriation; and (6) the submission of new foreign assisted project loans for Congressional approval as part of the Appropriations Bill. Congressional approval may take any or a combination of the following forms: (a) an appropriation of the peso proceeds of the project loan; (b) an appropriation of the counterpart funds for the project loan; and (c) the listing of proposed new foreign assisted projects which may be claimed against the Foreign Assisted Projects Support Fund (FAPSF).

To summarize, a list of foreign-funded project loans are submitted to Congress as part of the Appropriations Bill, which listing includes all foreign assisted projects expected to be negotiated and implemented during the given budget year. The DOJ opined that the above process of project identification culminating in congressional budget approval constitutes compliance with the Act's provision requiring that "expressed *(sic)* approval of Congress shall be obtained by the Executive Department prior to the negotiation and implementation of projects funded by ODA. ..."

As regards the issue of preferential treatment of Filipino consultants, suppliers and manufacturers, mandated under Section 11 of the ODA law, the DOJ opined that an exception thereto existed in Republic Act 4860, otherwise known as the Foreign Borrowings Act. Under Section 4 of R.A. 4860, the President is granted the discretion "to waive or modify the application of any law granting preferences in connection with, or imposing restrictions on, the procurement of goods or services, ..." In the DOJ's opinion, Section 4 of R.A. 4860 was not inconsistent with Section 11 of the ODA law and both provisions may be given force and effect. The DOJ likewise opined that the ODA law was enacted precisely to exclude the highly concessional ODA loans from the foreign borrowing limit of $10 billion prescribed in R.A. 4860 in order "to address the country's increasing economic needs and investments which require adequate financial funding and infrastructure support." Further, it was pointed that it was customary practice for creditor-debtor institutions to impose certain conditionalities on consultancy and supplier agreements of loan grants. To hold that the President was without power to waive restrictions and preferences prescribed in the ODA law which may be inconsistent with conditionalities issued by donor-countries/institutions would negate the purpose and intent behind the said law, "which is the optimization of the utilization of the ODA resources, considering that the absence of a presidential waiver flexibility clause will

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[6] Implementing Rules and Regulations for Republic Act 8182, Section 5.1, which provides: "All expenditures, inclusive of counterpart funds and proceeds of loans and grants funds, must be included in the annual expenditure program to be submitted to Congress for approval."

make it difficult, if not impossible, for the government to avail of ODA loans if the creditor-donor countries/institutions insist on the terms prescribed by their guidelines on consultancy and supplier agreements."

In light of such a presidential waiver clause, the DOJ opined that the Government had the authority to provide the Representations and Assurances on Procurement acknowledging that Bank guidelines on procurement and the use of consultants will be recognized and fully applied to Bank-financed projects.

With respect to the issue of the prospective application of the ODA law, the DOJ confirmed the Bank's understanding that the ODA law and its implementing rules and regulations would not apply to loans negotiated before the effectivity of the Act, specifically a loan for the Women's Health and Safe Motherhood Project negotiated in November 1994. The DOJ pointed out the ODA law clearly limited the retroactive applicability of the law to ODA loans and loan grants contracted on or after 1 January 1995. As to the applicability of the law to loans made to government-owned corporations guaranteed by the Government, the DOJ opined that the ODA law was silent on this issue, stating that the guarantee provision in Foreign Borrowings Act (R.A. 4860) applied.

## Official Development Assistance Act

### *Opinion No.8, S.1997, of 20 February 1997*

The issues raised in this Opinion are the same as those raised in Opinion No. 95, S.1996 (summarized above). In this instance, the issues were raised by the Asian Development Bank (ADB). For similar issues, the DOJ merely reiterated its holding in the prior opinion.

First, that the required express congressional approval of ODA project loans is deemed complied with through any, or a combination of the following: (a) an appropriation of peso proceeds of an ODA-project loan; (b) an appropriation of the counterpart funds for an ODA-project; and (c) a list of ODA project loans annexed to the Appropriations Act, the budget for which may be claimed against the Foreign Assisted Projects Support Fund (FAPSF). Thus, as previously opined, the observance of any, or a combination, of the above modes constitutes the required congressional approval under Section 4 of R.A. 8182.

Second, with respect to certain ADB loans negotiated or contracted after 1 January 1995, which is the cut-off date under ODA, it was contended that all such ADB-funded projects were submitted to Congress, for the 1997 Appropriations Sessions, following the procedure enumerated in the preceding Opinion No. 95, S. 1996. The ADB wished to know whether Congressional approval of the 1997 Appropriations Act constitution ratification, equivalent to an express approval of the ADB-financed projects which were not previously passed upon by Congress. The DOJ opined that congressional approval of the 1997 Appropriations Act that identifies the ADB-funded subject project loans in any, or combination, of the modes enumerated in the above paragraph, constitutes the required express congressional approval of ADB-funded ODA loans contracted after 1 January 1995, but not passed upon until the 1997 Appropriations Act.

Third, the DOJ reaffirmed its opinion that the President has the power to waive the requirements of R.A. 8182 prescribing preferences or imposing restrictions on

the procurement of goods and services for ODA-funded projects in accordance with the provisions of R.A. 4860 (The Foreign Borrowings Act).

Fourth, the DOJ similarly opined that while the President is the official authorized by law to contract foreign loans on behalf of the Republic of the Philippines, he may, by issuing Full Powers, "designate a representative to conclude, sign, execute and deliver, for and on behalf, of the Government, the loan agreement and any deed or other document of whatsoever kind and nature which may be necessary or proper for the purpose of executing or implementing the agreement ...". By investing a representative with such Full Powers, the President is deemed to have delegated to such representative the powers granted him under R.A. 8182, including the power to waive preferences on procurement of goods and services. The DOJ thus confirmed that the presidential waiver under the ODA law is deemed delegated to the President's representative at the time of the issuance of the Full Powers.

## Executive agreements

### *Opinion No.15, S.1997, of 14 March 1997*

The question was whether the Agreement on Cooperative Activities in the Field of Defense and Security between the Government of the Republic of the Philippines and the Government of the Republic of Indonesia was an executive agreement that did not need Senate concurrence.

The Agreement sought to enhance the existing bilateral relationship through defense and security cooperation between the two countries. The scope of the agreement included the joint and combined training and exercises between the Armed Forces of both countries, development of the human resources of the defense ministries and armed forces of both countries, fostering tranquillity in the border areas between the two nations, and the development of the interoperability of their Armed Forces in operations and logistics, communication, electronic measures and countermeasures, and information technology, defense technology, and logistics support system.

The DOJ opined that the said Agreement was indeed an executive agreement, not requiring Senate concurrence. The DOJ cited the Supreme Court ruling in *Commissioner of Customs* v. *Eastern Sea Trading*, 3 SCRA 356, where the Court held, to wit: "International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements." The DOJ pointed out that it had issued previous opinions to the same effect on similarly worded defense cooperation agreements.

The DOJ opined that the Cooperative Activities Agreement fell within the definition of an executive agreement. However, it expressed reservation with respect to two clauses of Article III of the said Agreement. The pertinent clauses read: "Willing to promote defense and security technical cooperation within the framework of their respective national laws and regulations; in conformity with the rules and

norms of international law and the United Nations Charter."[7] On the other hand, paragraph 1 of the same Article states: "The provisions of this Agreement shall be subject to the respective national laws and regulations of the Parties in conformity with the rules as well as norms of international law."

The DOJ opined that the harmonization of Philippine laws with the rules and norms of international law through amendments of existing laws falls within the exclusive power of Congress, and must comply with Constitutional processes. Thus, the DOJ suggested that the reference to the condition in the preambulatory clause referring to "conformity with norms and laws of international law and the United Nations Charter" be omitted. As the said clause was thought to be too broad and sweeping, the DOJ opined that any future references to such laws or norms should be accompanied by citing the specific law referred to by either party.

Inasmuch as the Agreement provided that an exchange of instruments would take place 30 days after compliance by each government with its national laws respecting such agreements, the DOJ opined that the Philippine government should wait until the Indonesian government had complied with the requirements of its laws before effecting such an exchange.

**Applicability of the nationality requirement for the advertising industry to a foreign press agency that solicits advertisements from Philippine clients for advertising abroad**

***Opinion No.37, S.1998, of 18 March 1998***

The issue is whether the 70-30 per cent Filipino-foreign equity restriction with respect to the advertising industry is applicable to a foreign press agency (corporation) which solicits advertisements, through its representatives, from prospective clients in the Philippines, such as government agencies which desire to promote or advertise the Philippines abroad. The DOJ opined that a foreign press agency/corporation is not covered by the nationality requirement under Section 11(2), Article XVI of the Constitution, provided that the advertising is done abroad with the use of foreign mass media. The said equity restriction applied when the use of mass media in the Philippines is involved. Thus, when advertising is carried on by mass media outside the Philippines, the person performing such advertising activity cannot be deemed to be engaged in the advertising industry in the Philippines.

A corollary question is whether such foreign press agency/corporation which solicits advertisements from clients in the Philippines for placement in mass media abroad is deemed to be "doing business" in the Philippines and, therefore, subject to regulation under Philippine laws. The DOJ opined that in such a case, the said foreign press agency, through its representatives in the Philippines, is considered to be "doing business" in the country. The DOJ cited the Supreme Court which held, in a number of cases, that "if a corporation performs acts for which it was created or exercises some of the functions for which it was organized, the amount or volume

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[7] Preambulatory Clause, Article III, Agreement on Cooperative Activities in the Field of Defense and Security between the Government of the Republic of the Philippines and the Government of the Republic of Indonesia.

of the business is immaterial and a single act of that character may constitute doing business. ... In this regard, it is the performance by a foreign corporation of the acts for which it was created, regardless of volume of business, that determines whether a foreign corporation needs a license or not." Thus, if the foreign press agency/ corporation solicits advertisements from Philippine clients, it is deemed to be doing business in the Philippines and as such must secure a license to do business from the appropriate government agency to enable the government to exercise jurisdiction over their activities in the country.

## Constitutionality of the Philippine-US Visiting Forces Agreement

### *Opinion No.94, S.1998, of 10 August 1998*

The issues raised were (1) the constitutionality of the Visiting Forces Agreement (VFA); and (2) the validity of the criminal jurisdiction provisions of the VFA. The VFA, between the Government of the United States and the Government of the Republic of the Philippines covered US military and civilian personnel in the Philippines for so-called war games exercises between the Armed Forces of the two countries.

With respect to the issue of constitutionality, the DOJ opined that the VFA did not contravene the Constitution, and did not constitute an abdication of Philippine sovereignty. The DOJ, citing Supreme Court doctrine, reasoned that it is well settled in international law that a state, in the exercise of its sovereignty, "may, by its consent, express or implied, submit to a restriction of its sovereign rights... That is the concept of sovereignty as auto-limitation... A State then, if it chooses to, may refrain from the exercise of what otherwise is illimitable competence."[8] The DOJ also pointed out that the Court, in several opinions, has held that "the Philippines may, by treaty or agreement, allow the United States or any foreign nation to exercise jurisdiction over certain offenses committed within certain portions of its territory."

Corollary to the issue of constitutionality was whether the VFA violated the constitutional policy of freedom from nuclear weapons in the Philippines. Again, the DOJ opined that it did not. The constitutional provision in question, Art.11, Sec. 8, provides, "The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory." The DOJ, citing the debates of the Constitutional Commission, opined that the said provision does not ban totally and absolutely nuclear arms within Philippine territory. Whether or not nuclear weapons are to be allowed is to be decided on the basis of the "national interest" to be defined by the executive and legislative departments." (Concom Records, Vol. IV, p. 814) Under the VFA, the movement of vessels and aircraft within Philippine territory is always subject to prior approval by the government and to the agreed implementing agreements. The DOJ pointed out that as the US policy is neither to deny nor confirm the presence of nuclear arms on board its ships, the Philippine government must rely on the US government conforming, in good faith, to its treaty obligations and reasonably assume that the US would not willfully disregard the sovereignty of the Philippines.

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[8] Reagan v. Commissioner of Internal Revenue, 30 SCRA 968, 1969.

Neither are the criminal jurisdiction provisions, whereby the Philippine government may waive its criminal jurisdiction upon request of the US government, constitutionally infirm. Again, it was stated that as an exercise of its sovereignty, the Philippine government may legally waive its criminal jurisdiction over certain offenses committed by visiting US personnel. The DOJ cited several Supreme Court cases that upheld the constitutionality of past Military Bases Agreements allowing the US to exercise criminal jurisdiction over certain offenses committed within the US military bases. The rationale underlying said rulings was the principle of international law which exempts foreign troops passing through or stationed in a friendly country with its permission from the civil and criminal jurisdiction of such country, and by virtue of the constitutional provisions incorporating general principles of international law as part of the law of the land, such principle is deemed part of Philippine law. The waiver of jurisdiction conforms to the theory of sovereignty as "auto-limitation" which recognizes the sovereign prerogative of states to impose limitations on the exercise of its otherwise illimitable sovereign powers.

## Constitutionality of opening the retail trade sector to foreign investors

### *Opinion No.155, S.1998, of 24 December 1998*

The issue raised was whether the opening of the Philippine retail trade sector to foreign investments was constitutional. The issue arose in connection with the various legislative proposals before the House of Representatives, which sought to liberalize the retail trade sector by allowing foreign investments in the said sector.[9]

The DOJ opined that there was no legal or constitutional impediment to the opening of the Philippine retail trade sector to foreign investments. The pertinent constitutional provisions are Art. II, Section 19, and Art. XII, Sections 1, 10, 12 and 13.[10] In the DOJ's opinion, so long as retail trade liberalization measures conform to the aforementioned constitutional provisions, then such measures are constitutional. The DOJ, however, also pointed out that Section 10, Art. XII of the Constitution

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[9] The Retail Trade Liberalization Act was passed in 1999.

[10] Section 19, Art. II provides: "The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.

Section 1, Art. XII provides: "... The State shall protect Filipino enterprises against unfair foreign competition and trade practices."

Section 10, Art. XII provides: "... The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

In the grant of rights, privileges and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

The State shall regulate and exercise authority over foreign investments within its national jurisdiction in accordance with its national goals and priorities."

Section 12, Art. XII provides: "The State shall promote the preferential use of Filipino labour, domestic materials and locally produced goods, and adopt measures that help make them competitive."

Section 13, Art. XII provides: "The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity."

granted Congress the power and discretion not only to prescribe the percentages for certain areas of investment but also the discretion to choose which areas of investment would be limited to Filipinos. This legislative discretion, however, did not apply to public utilities (Sec. 11, Art. XII), natural resources (Sec. 2, Art. XII), mass media (Sec. 11 [1], Art. XII), and educational institutions (Sec. 4 [27], Art. XIV), which the Constitution expressly reserves to Filipinos. There being no outright prohibition on foreign participation in the retail trade sector, Congress had the power to legislate its liberalization.

## Legal implications of the full implementation of the Agreement on Trade-Related Investment Measures (TRIM)

### *Opinion No.88, S.1999, of 11 October 1999*

The issues raised were in relation to the legal implications of the full implementation of the Agreement on Trade-Related Investment Measures (TRIM) under the auspices of the World Trade Organization (WTO) vis-à-vis the continued enforcement of certain laws that conflict with the provisions of the Agreement on TRIM. The specific law in question was Executive Order No.259 (An Act to Rationalize the Soap and Detergent Surfactant Industry and Thereby Promote and Expand the Utilization of Chemicals Derived from Coconut Oil and for Other Purposes).

Specifically, the following questions were raised: (1) If E.O.259 is not repealed or amended to conform to the Agreement on TRIM on or before 31 December 1999 (the said TRIM Agreement becoming effective 1 January 2000), what would be the legal implications where the country is not compliant with its commitments under the Agreement? and (2) Would the effectivity of the TRIM Agreement render E.O.259, *ipso facto*, ineffective or unenforceable?

The inconsistencies between the executive act and the TRIM Agreement relate to the commitment of member countries under TRIM to adopt the national treatment principle under Article III (4) and to eliminate quantitative restrictions under Article XI (1) of the 1994 General Agreement on Tariff and Trade (GATT), on the one hand, and the provisions of Sections 2 and 3 of E.O.259 which require local sourcing of raw materials in the manufacture of detergent products in the country and which requirement is likewise applied to imported products.[11]

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[11] The relevant GATT provisions and sections of Executive Order No.259 follow:
- 1994 GATT, Article III (4): "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. ..."
- 1994 GATT, Article XI (1), "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
- E.O. No.259 (1987): "Section 2. The soap and detergent surfactant industry shall be subject to a rationalization program requiring increasing local content in the usage of its raw materials which

The TRIM Agreement, in Article 5(2), provides that developing countries, such as the Philippines, have five (5) years from the date of entry into force of the Agreement, or until 31 December 1999, within which to comply with its commitment of eliminating trade-related investment measures which are identified to the WTO as inconsistent with the TRIM Agreement.

The DOJ opined that upon the effectivity of the TRIM Agreement, it does not automatically, or *ipso facto*, repeal or render the provisions of E.O.259 ineffective or unenforceable. The executive order in question was issued in 1987 by then President Corazon who, at the time, exercised both executive and legislative powers. Thus, E.O.259 is in the nature of legislation, requiring a legislative fiat to repeal or amend its provisions.

The TRIM Agreement, a multilateral treaty, is placed in the same category as an Act of Congress. It has the effect of automatically invalidating or superseding local law inconsistent with its articles, provided the treaty is later in date and its provisions are self-executing. Thus, when a treaty is not self-executing but requires local legislation to carry into effect its provisions, it cannot have the effect of automatically superseding or suspending the operation of a statute.

The requirement, under Article 5(2) of the TRIM Agreement, that developing countries comply with the commitment of eliminating "all TRIMs which are notified," clearly indicates that the provisions of the Agreement are not self-executing, requiring a Member country to enact appropriate law to effect the provisions of the treaty. Therefore, the TRIM Agreement does not automatically repeal or supersede E.O.259, which is a legislative measure.

However, given that the Philippines is a signatory to the TRIM Agreement, it is required to comply, in good faith, with its obligations under the said Agreement, in accordance with the principle of *pacta sunt servanda*. Thus, the Philippines is bound to eventually take measures to harmonize its laws with existing treaty obligations.

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do not endanger the environment to a minimum of 20% the first year, 40% the second year, up to a minimum of 60% the third year and thereafter."

- E.O. No.259: "Section 3. Importation of raw materials and finished products of the industries covered by the rationalization program may be restricted subject to the guidelines set by the BOI."

# PARTICIPATION IN MULTILATERAL TREATIES*

## Editorial introduction

This section records the participation of Asian states in open, multilateral law-making treaties which mostly aim at world-wide adherence. It includes data that update the treaty sections of Volumes 6 and 7 until 31 December 1999. This will be done by presenting the new data preceded by a reference to the most recent previous entry. In case no new data are available, the title of the treaty will be listed with a reference to the data in Volume 6 or 7.

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 organisations that 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 1999 (ST/LEG/SER.E/18).
- No indication is given of reservations and declarations made.
- Sig. = signature; Cons. = consent to be bound.

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* Compiled by Karin Arts, Associate Editor, Institute of Social Studies, The Hague.

*Asian Yearbook of International Law,* Volume 8 (B.S. Chimni *et al.*, eds.)

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| *State* | *Cons.* | *E.i.f.* | *State* | *Cons.* | *E.i.f.* |
|---|---|---|---|---|---|
| China | 5 Jan 99 | 5 Jan 00 | Indonesia | 6 Jul 99 | 6 Jul 00 |
| India | 15 Nov 99 | 15 Nov 00 | Sri Lanka | 22 Jan 99 | 22 Jan 00 |

**International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971**

(Continued from Vol. 6 p. 240)

(Status as included in IMO doc. J/7339, as at 31 December 1999)

| *State* | *Cons.(deposit)* | *E.i.f.* |
|---|---|---|
| China | | 1 Jul 97 |

| *State* | *Denunciation (eff.date)* | *State* | *Denunciation (eff.date)* |
|---|---|---|---|
| Indonesia | 26 Jun 99 | Korea (Rep.) | 15 May 98 |
| Japan | 15 May 98 | | |

**Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships, as amended, 1978**

(Continued from Vol. 7 p. 325)

(Status as included in IMO doc. J/7339, as at 31 December 1999)

| *State* | *Cons. (deposit)* | *Excepted annexes* |
|---|---|---|
| Singapore | 1 Nov 90 | IV |
| annexe III: | 2 Mar 94 | |
| annexe V: | 27 May 99 | |

**Convention for the Protection of the Ozone Layer, 1985**
(Continued from Vol. 6 p. 241)

| *State* | *Cons.* | *State* | *Cons.* |
|---|---|---|---|
| Kazakhstan | 26 Aug 98 | Laos | 21 Aug 98 |

**Protocol on Substances that Deplete the Ozone Layer, 1987**
(Continued from Vol. 6 p. 241)

| *State* | *Cons.* | *State* | *Cons.* |
|---|---|---|---|
| Kazakhstan | 26 Aug 98 | Tajikistan | 7 Jan 98 |
| Laos | 21 Aug 98 | | |

**Amendment to the Montreal Protocol, 1990**
(Continued from Vol. 7 p. 326)

| *State* | *Cons.* | *State* | *Cons.* |
|---|---|---|---|
| Korea (DPR) | 17 Jun 99 | Uzbekistan | 10 Jan 98 |
| Tajikistan | 7 Jan 98 | | |

**Amendment to the Montreal Protocol, 1992**
(Corrected and updated from Vol. 7 p. 326)

| *State* | *Cons.* | *State* | *Cons.* |
|---|---|---|---|
| Indonesia | 10 Dec 98 | Uzbekistan | 10 Jan 98 |
| Korea (DPR) | 17 Jun 99 | | |

**Framework Convention on Climate Change, 1992**
(Continued from Vol. 7 p. 326)

| *State* | *Sig* | *Cons* |
|---|---|---|
| Tajikistan | | 7 Jan 98 |

**Protocol to the Framework Convention on Climate Change, 1997**
Kyoto, 11 December 1997
Entry into force: not yet

| *State* | *Sig* | *Cons* | *State* | *Sig* | *Cons* |
|---|---|---|---|---|---|
| China | 29 May 98 | | Maldives | 16 Mar 98 | 30 Dec 98 |
| Indonesia | 13 Jul 98 | | Mongolia | | 15 Dec 99 |
| Japan | 28 Apr 98 | | Papua New Guinea | 2 Mar 99 | |
| Kazakhstan | 12 Mar 99 | | Philippines | 15 Apr 98 | |
| Korea (Rep.) | 25 Sep 98 | | Thailand | 2 Feb 99 | |
| Malaysia | 12 Mar 99 | | | | |

| *State* | *Sig* | *Cons* | *State* | *Sig* | *Cons* |
|---|---|---|---|---|---|
| Turkmenistan | 28 Sep 98 | 11 Jan 99 | Vietnam | 3 Dec 98 | |
| Uzbekistan | 20 Nov 98 | 12 Oct 99 | | | |

**Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995**
Geneva, 22 September 1995
Entry into force: not yet

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Sri Lanka | | 29 Jan 99 |

## FAMILY MATTERS

Convention on the Recovery Abroad of Maintenance, 1956: *see* Vol. 6 p. 243.
Convention on the Law Applicable to Maintenance Obligations Towards Children, 1956: *see* Vol. 6 p. 244.
Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions, 1961: *see* Vol. 7 p. 327.
Convention on the Law Applicable to Maintenance Obligations, 1973: *see* Vol. 6 p. 244.
Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993: *see* Vol. 6 p. 244.

**Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962**
(Continued from Vol. 7 p. 327)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Bangladesh | | 5 Oct 98 |

## FINANCE

Agreement Establishing the Asian Development Bank, 1965: *see* Vol. 7 p. 327.
Convention Establishing the Multilateral Investment Guarantee Agency, 1988: *see* Vol. 7 p. 327.

## HEALTH

Protocol Concerning the Office International d'Hygiène Publique, 1946: *see* Vol. 6 p. 245.

## HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

Convention on the Nationality of Married Women, 1957: *see* Vol. 7 p. 328.
Convention against Discrimination in Education, 1960: *see* Vol. 7 p. 328.
International Convention against Apartheid in Sports, 1985: *see* Vol. 6 p. 248.
Convention on the Rights of the Child, 1989: *see* Vol. 7 p. 329.
Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1992: *see* Vol. 6 p. 247.

### Convention on the Political Rights of Women, 1953

(Continued from Vol. 7 p. 328)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bangladesh | | 5 Oct 98 | Turkmenistan | | 11 Oct 99 |
| Tajikistan | | 7 Jun 99 | | | |

### International Covenant on Economic, Social and Cultural Rights, 1966

(Continued from Vol. 7 p. 328)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bangladesh | | 5 Oct 98 | Thailand | | 5 Sep 99 |
| Tajikistan | | 4 Jan 99 | | | |

### International Covenant on Civil and Political Rights, 1966

(Corrected and updated from Vol. 7 p. 328)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Tajikistan | | 4 Jan 99 |

### Optional Protocol to the International Covenant on Civil and Political Rights, 1966

(Continued from Vol. 7 p. 329)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Tajikistan | | 4 Jan 99 |

### International Convention on the Elimination of All Forms of Racial Discrimination, 1966

(Continued from Vol. 7 p. 329)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Indonesia | | 25 Jun 99 | Kazakhstan | | 26 Aug 98 |

**Convention on the Elimination of All Forms of Discrimination against Women, 1979**
(Continued from Vol. 7 p. 329)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kazakhstan | | 26 Aug 98 |

**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984**
(Continued from Vol. 7 p. 329)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bangladesh | | 5 Oct 98 | Kazakhstan | | 26 Aug 98 |
| Indonesia | 23 Oct 85 | 23 Oct 98 | Turkmenistan | | 25 Jun 99 |
| Japan | | 29 Jun 99 | | | |

**International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990**
(Continued from Vol. 6 p. 249)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Bangladesh | 7 Oct 98 | |

## HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV, 1949: *see* Vol. 6 p. 249.

**Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977**
(Continued from Vol. 7 p. 330)

| *State* | *Cons.* |
|---|---|
| Cambodia | 14 Jan 98 |

**Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977**
(Continued from Vol. 7 p. 329)

| *State* | *Cons.* |
|---|---|
| Cambodia | 14 Jan 98 |

## INTELLECTUAL PROPERTY

Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: *see* Vol. 6 p. 251.
International Convention for the Protection of performers, producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 6 p. 252.
Convention Establishing the World Intellectual Property Organization, 1967: *see* Vol. 6 p. 252.
Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 6 p. 252.

### Convention for the Protection of Industrial Property, 1883 as amended 1979

(Continued from Vol. 6 p. 250)
(Status as included in WIPO doc. 423(E) of 14 Jan 2000)

| *State* | *Party* | *Latest Act to which State is party* | *State* | *Party* | *Latest Act to which State is party* |
|---|---|---|---|---|---|
| Cambodia | 22 Sep 98 | Stockholm | Laos | 8 Oct 98 | id. |
| India | 7 Dec 98 | id. | Papua New Guinea | 15 Jun 99 | id. |

### Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979

(Continued from Vol. 6 p. 250)
(Status as included in WIPO doc. 423(E) of 14 Jan 2000)

| *State* | *Party* | *Latest Act to which State is party* | *State* | *Party* | *Latest Act to which State is party* |
|---|---|---|---|---|---|
| Bangladesh | 4 May 99 | Paris | Mongolia | 12 Mar 98 | id. |
| Kazakhstan | 12 Apr 99 | id. | Singapore | 21 Dec 98 | id. |
| Kyrgyzstan | 8 Jul 99 | id. | | | |

### Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971

(Continued from Vol. 6 p. 252)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Korea (Rep.) | 8 Oct 99 | | Kyrgyzstan | | 10 Sep 99 |

## INTERNATIONAL CRIMES

Slavery Convention, 1926 as amended in 1953, *see* Vol. 7 p. 331.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, *see* Vol. 7 p. 331.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: *see* Vol. 6 p. 254.
International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973: *see* Vol. 7 p. 331.

### Convention on the Prevention and Punishment of the Crime of Genocide, 1948

(Continued from Vol. 7 p. 331)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bangladesh | | 5 Oct 98 | Uzbekistan | | 9 Sep 99 |
| Kazakhstan | | 26 Aug 98 | | | |

### Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963

(Continued from Vol. 6 p. 254)
(Status as at 31 December 1999 provided by the ICAO Secretariat)

| *State* | *Cons.* | *Eff. date* |
|---|---|---|
| Turkmenistan | 30 Jun 99 | 28 Sep 99 |

### Convention for the Suppression of Unlawful Seizure of Aircraft, 1970

(Continued from Vol. 6 p. 254)
(Status as at 31 December 1999 provided by the ICAO Secretariat)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Turkmenistan | | 25 May 99 |

### Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971

(Continued from Vol. 6 p. 255)
(Status as at 31 December 1999 provided by the ICAO Secretariat)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Turkmenistan | | 25 May 99 |

**Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973**

(Continued from Vol. 7 p. 331)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Turkmenistan | | 25 Jun 99 | Uzbekistan | | 19 Jan 98 |

**International Convention Against the Taking of Hostages, 1979**

(Continued from Vol. 6 p. 255)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Turkmenistan | | 25 Jun 99 | Uzbekistan | | 19 Jan 98 |

**Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988**

(Continued from Vol. 6 p. 256)

(Status as included in IMO doc. J/7339, as at 31 December 1999)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| India | 15 Oct 99 | | Turkmenistan | 8 Jun 99 | 6 Sep 99 |
| Japan | 24 Apr 98 | 23 Jul 98 | | | |

**Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988**

(Continued from Vol. 6 p. 256)

(Status as included in IMO doc. J/7339, as at 31 December 1999)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| India | 15 Oct 99 | | Turkmenistan | 8 Jun 99 | 6 Sep 99 |
| Japan | 24 Apr 98 | 23 Jul 98 | | | |

**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**

(Continued from Vol. 6 p. 256)

(Status as at 31 December 1999 provided by the ICAO Secretariat)

| *State* | *Cons.* | *Eff. date.* | *State* | *Cons.* | *Eff. date.* |
|---|---|---|---|---|---|
| China | 5 Mar 99 | 4 Apr 99 | Mongolia | 22 Sep 99 | 22 Oct 99 |
| Japan | 24 Apr 98 | 24 May 98 | Turkmenistan | 25 May 99 | 24 Jun 99 |
| Maldives | 22 Mar 99 | 21 Apr 99 | Vietnam | 25 Aug 99 | 24 Sep 99 |

**International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989**
(Continued from Vol. 6 p. 256)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Uzbekistan | | 19 Jan 98 |

**Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991**
(Continued from Vol. 6 p. 256)
(Status as at 31 December 1999 provided by the ICAO Secretariat)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| India | | 16 Nov 99 | Mongolia | | 22 Sep 99 |
| Maldives | | 22 Mar 99 | Uzbekistan | | 9 Jun 99 |

## 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. 6 p. 257.

## INTERNATIONAL TRADE

Convention on Transit Trade of Land-locked States, 1965: *see* Vol. 6 p. 257.
Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 6 p. 257.
UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 6 p. 257.

**UN Convention on Contracts for the International Sale of Goods, 1980**
**(Continued from Vol. 6 p. 257)**
(Status as at 31 December 1999, as provided in UNCITRAL document A/CN.9/474, 6 June 2000)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kyrgyzstan | | 11 May 99 |

## JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention Relating to Civil Procedure, 1954: *see* Vol. 6 p. 258.
Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961: *see* Vol. 7 p. 332.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965: *see* Vol. 7 p. 332.
Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: *see* Vol. 7 p. 332-333.

## LABOUR

Forced Labour Convention, 1930 (ILO Conv. 29): *see* Vol. 7 p. 333.

### Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87)

(Continued from Vol. 7 p. 333)

| *State* | *Ratif. registered* | *State* | *Ratif. registered* |
|---|---|---|---|
| Cambodia | 23 Aug 99 | Indonesia | 9 Jun 98 |

### Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98)

(Continued from Vol. 7 p. 333)

| *State* | *Ratif. registered* |
|---|---|
| Cambodia | 23 Aug 99 |

### Equal Remuneration Convention, 1951 (ILO Conv. 100)

(Continued from Vol. 7 p. 333)

| *State* | *Ratif. registered* | *State* | *Ratif. registered* |
|---|---|---|---|
| Bangladesh | 28 Jan 98 | Cambodia | 23 Aug 99 |

### Abolition of Forced Labour Convention, 1957 (ILO Conv. 105)

(Continued from Vol. 7 p. 333)

| *State* | *Ratif. registered* | *State* | *Ratif. registered* |
|---|---|---|---|
| Cambodia | 23 Aug 99 | Kyrgyzstan | 18 Feb 99 |
| Indonesia | 7 Jun 99 | Tajikistan | 23 Sep 99 |

### Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111)

(Continued from Vol. 7 p. 333)

| *State* | *Ratif. registered* | *State* | *Ratif. registered* |
|---|---|---|---|
| Cambodia | 23 Aug 99 | Korea (Rep.) | 4 Dec 98 |
| Indonesia | 7 Jun 99 | Sri Lanka | 27 Nov 98 |
| Kazakhstan | 6 Dec 99 | | |

**Employment Policy Convention, 1964 (ILO Conv. 122)**
(Corrected and updated from Vol. 7 p. 334)

| *State* | *Ratif. registered* | *State* | *Ratif. registered* |
|---|---|---|---|
| India | 17 Nov 98 | Kazakhstan | 6 Dec 99 |

## NARCOTIC DRUGS

Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1925, amended 1946: *see* Vol. 6 p. 261.
Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: *see* Vol. 6 p. 261.
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. 6 p. 261.
Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the protocol of 1946: *see* Vol. 6 p. 262.
Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: *see* Vol. 6 p. 262.
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. 6 p. 262.
International Opium Convention, 1925, amended by Protocol 1946: *see* Vol. 7 p. 334.
Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: *see* Vol. 7 p. 334.
Single Convention on Narcotic Drugs, 1961: *see* Vol. 7 p. 334.

**Protocol amending the Single Convention on Narcotic Drugs, 1972**
(Continued from Vol. 7 p. 335)

| *State* | *Sig.*** | *Cons.**** | *State* | *Sig.*** | *Cons.**** |
|---|---|---|---|---|---|
| Iran | 25 Mar 72 | | Pakistan | 29 Dec 72 | 2 Jul 99 |

**Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972**
(Continued from Vol. 7 p. 335)

| *State* | *Sig.*** | *Cons.**** |
|---|---|---|
| Pakistan | | 2 Jul 99 |

** Ratification or accession in respect of Protocol 1972 or participation upon deposit of an instrument of ratification or accession to the Convention of 1961 (art. 19 Protocol).
*** Ratification or accession in respect of the Convention as amended.

**Convention on Psychotropic Substances, 1971**
(Continued from Vol. 7 p. 335)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Mongolia | | 15 Dec 99 |

**United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988**
(Continued from Vol. 7 p. 335)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Indonesia | 27 Mar 89 | 23 Feb 99 | Korea (Rep.) | | 28 Dec 98 |
| Iraq | | 22 Jul 98 | | | |

## NATIONALITY AND STATELESSNESS

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 6 p. 264.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961: *see* Vol. 6 p. 265.

**Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963**
(Continued from Vol. 6 p. 265)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Thailand | | 15 Apr 99 |

## NUCLEAR MATERIAL

Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 6 p. 265.
Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1980: *see* Vol. 6 p. 265.
Convention on Early Notification of a Nuclear Accident, 1986: *see* Vol. 7 p. 336.
Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: *see* Vol. 7 p. 336.

**Convention on the Physical Protection of Nuclear Material, 1980**
(Continued from Vol. 6 p. 265)
(Status as at 31 December 1999, provided by IAEA)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Uzbekistan | | 9 Feb 98 |

**Convention on Nuclear Safety**
Vienna, September 1994
Entry into force: 24 October 1996
(Status as at 31 December 1999, provided by IAEA)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Sri Lanka | | 11 Aug 99 |

**Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management**
Vienna, 5 September 1997
Entry into force: not yet
(Status as at 31 December 1999, provided by IAEA)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Philippines | 10 Mar 98 | |

**Protocol to amend the Convention on Civil Liability for Nuclear Damage**
Vienna, 12 September 1997
Entry into force: not yet
(Status as at 31 December 1999, provided by IAEA)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Philippines | 10 Mar 98 | |

**Convention on Supplementary Compensation for Nuclear Damage**
Vienna, 12 September 1997
Entry into force: not yet
(Status as at 31 December 1999, provided by IAEA)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Philippines | 10 Mar 98 | |

## 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. 6 p. 266.
Agreement governing the Activities of States on the Moon and other Celestial Bodies, 1979: *see* Vol. 6 p. 267.
Convention on Registration of Objects launched into Outer Space, 1974: *see* Vol. 7 p. 337.

## PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the Specialized Agencies, 1947: *see* Vol. 7 p. 338.
Vienna Convention on Diplomatic Relations, 1961: *see* Vol. 6 p. 268.
Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 1961: *see* Vol. 6 p. 269.
Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 1963: *see* Vol. 6 p. 269.
Convention on Special Missions, 1969: *see* Vol. 6 p. 269.
Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes, 1969: *see* Vol. 6 p. 269.

### Convention on the Privileges and Immunities of the United Nations, 1946

(Continued from Vol. 6 p. 267)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Kazakhstan | | 26 Aug 98 |

### Vienna Convention on Consular Relations, 1963

(Continued from Vol. 7 p. 338)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Thailand | | 15 Apr 99 |

## REFUGEES

### Convention relating to the Status of Refugees, 1951

(Continued from Vol. 6 p. 270)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Kazakhstan | | 15 Jan 99 | Turkmenistan | | 2 Mar 98 |

### Protocol relating to the Status of Refugees, 1967

(Continued from Vol. 6 p. 270)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Kazakhstan | | 15 Jan 99 | Turkmenistan | | 2 Mar 98 |

## ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968: *see* Vol. 7 p. 338.
Convention on Road Signs and Signals, 1968: *see* Vol. 7 p. 338.

## SEA

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.
Convention on the High Seas, 1958: *see* Vol. 7 p. 339.
Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 6 p. 271.
Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 6 p. 272.

**United Nations Convention on the Law of the Sea, 1982**
(Continued from Vol. 7 p. 339)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Laos | 10 Dec 82 | 5 Jun 98 | Nepal | 10 Dec 82 | 2 Nov 98 |

**Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994**
(Continued from Vol. 7 p. 339)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Laos | 27 Oct 94 | 5 Jun 98 | Nepal | | 2 Nov 98 |

**Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks**
New York, 1995
Entry into force: not yet

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bangladesh | 4 Dec 95 | | Maldives | 8 Oct 96 | 30 Dec 98 |
| China | 6 Nov 96 | | Pakistan | 15 Feb 96 | |
| Indonesia | 4 Dec 95 | | Papua New Guinea | 4 Dec 96 | 4 Jun 99 |
| Iran | | 17 Apr 98 | Philippines | 30 Aug 96 | |
| Japan | 19 Nov 96 | | Sri Lanka | 9 Oct 96 | 24 Oct 96 |
| Korea (Rep.) | 26 Nov 96 | | | | |

## SEA TRAFFIC AND TRANSPORT

Convention Regarding the Measurement and Registration of Vessels employed in Inland Navigation, 1956: *see* Vol. 6 p. 273.
International Convention for the Safety of Life at Sea, 1960: *see* Vol. 6 p. 273.
International Convention on Load Lines, 1966: *see* Vol. 6 p. 274.
International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 6 p. 274.
Special Trade Passenger Ships Agreement, 1971, *see* Vol. 6 p. 275.

Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 6 p. 275.
Convention on the International Regulations for Preventing Collisions at Sea, 1972 as amended: *see* Vol. 6 p. 275.
International Convention for Safe Containers, as amended 1972: *see* Vol. 6 p. 275.
Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 6 p. 276.
International Convention for the Safety of Life at Sea, 1974, as amended: *see* Vol. 6 p. 276.
Protocol Relating to the International Convention for the Safety of Life at Sea, 1974 (as amended): *see* Vol. 6 p. 276
UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 6 p. 276.

**Convention on Facilitation of International Maritime Traffic, 1965 (as amended)**
(Continued from Vol. 6 p. 273)
(Status as included in IMO doc. J/7339, as at 31 December 1999)

| *State* | *Cons.* | *E.i.f.* |
|---|---|---|
| Sri Lanka | 6 Mar 98 | 5 May 98 |

**Protocol Relating to the International Convention on Load Lines, 1988**
(Continued from Vol. 7 p. 340)
(Status as included in IMO doc. J/7339, as at 31 December 1999)

| *State* | *Cons.* | *E.i.f.* |
|---|---|---|
| Singapore | 18 Aug 99 | |

## SOCIAL MATTERS

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Traffic in Women and Children, 1921: *see* Vol. 6 p. 277.
Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, 1923, amended by Protocol in 1947: *see* Vol. 6 p. 277.
International Convention for the Suppression of the Traffic in Women of Full Age, 1933: *see* Vol. 6 p. 277.
Convention for the Suppression of the Traffic in Women and Children, 1921, amended by Protocol in 1947, *see* Vol. 6 p. 277.
Convention for the Suppression of the Traffic in Women of Full Age, 1933, amended by Protocol, 1947: *see* Vol. 6 p. 277.
International Agreement for the Suppression of the White Slave Traffic, 1904, amended by Protocol 1949: *see* Vol. 6 p. 278.
International Convention for the Suppression of the White Slave Traffic, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.

Agreement for the Suppression of the Circulation of Obscene Publications, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 7 p. 340.
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. 6 p. 278.

## TELECOMMUNICATIONS

### Constitution of the Asia-Pacific Telecommunity, 1976

(Continued from Vol. 7 p. 341)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Bhutan | | 23 Jun 98 |

### Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended)

(Continued from Vol. 6 p. 280)
(Status as included in IMO doc. J/7339, as at 31 December 1999)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Vietnam | 15 Apr 98 | 15 Apr 98 |

### Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977

(Continued from Vol. 6 p. 280)

| *State* | *Sig.* | *Cons* | *State* | *Sig.* | *Cons* |
|---|---|---|---|---|---|
| Afghanistan | 23 Aug 78 | 23 Dec 99 | Myanmar | | 29 Jul 99 |

### Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981

(Continued from Vol. 6 p. 279)

| *State* | *Cons.* |
|---|---|
| Bhutan | 23 Jun 98 |

### Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991

(Continued from Vol. 7 p. 341)

| *State* | *Cons.* | *State* | *Cons.* |
|---|---|---|---|
| Bhutan | 8 Dec 98 | Singapore | 6 Nov 98 |
| Mongolia | 7 Jan 99 | Sri Lanka | 9 Dec 98 |

| *State* | *Cons.* |
|---|---|
| Thailand | 14 Jan 94 |

## TREATIES

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: *see* Vol. 6 p. 280.

### Vienna Convention on the Law of Treaties, 1969

(Continued from Vol. 7 p. 341)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Kyrgyzstan | | 11 May 99 | Myanmar | | 16 Sep 98 |
| Laos | | 31 Mar 98 | | | |

## WEAPONS

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Warfare, 1925: *see* Vol. 6 p. 281.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: *see* Vol. 6 p. 281.
Treaty on the Non-Proliferation of Nuclear Weapons, 1968: *see* Vol. 6 p. 282.
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. 6 p. 282.
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972: *see* Vol. 6 p. 282.

### Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976

(Continued from Vol. 6 p. 283)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Tajikistan | | 12 Oct 99 |

### 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

(Continued from Vol. 7 p. 342)

| *State* | *Sig.* | *Cons.* |
|---|---|---|
| Tajikistan | | 12 Oct 99 |

**Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993**

(Continued from Vol. 6 p. 283)

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Indonesia | 13 Jan 93 | 13 Nov 98 | Vietnam | 13 Jan 93 | 30 Sep 98 |

**Comprehensive Nuclear Test Ban Treaty, 1996**

New York, 10 September 1996

Entry into force: not yet

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bahrein | 24 Sep 96 | | Myanmar | 25 Nov 96 | |
| Bangladesh | 24 Oct 96 | | Nepal | 8 Oct 96 | |
| Brunei | 22 Jan 97 | | Papua New Guinea | 25 Sep 96 | |
| Cambodia | 26 Sep 96 | | Philippines | 24 Sep 96 | |
| China | 24 Sep 96 | | Korea (Rep.) | 24 Sep 96 | 24 Sep 99 |
| Indonesia | 24 Sep 96 | | Singapore | 14 Jan 99 | |
| Iran | 24 Sep 96 | | Sri Lanka | 24 Oct 96 | |
| Japan | 24 Sep 96 | 8 Jul 97 | Tajikistan | 7 Oct 96 | 10 Jun 98 |
| Kazakhstan | 30 Sep 96 | | Thailand | 12 Nov 96 | |
| Kyrgyzstan | 8 Oct 96 | | Turkmenistan | 24 Sep 96 | 20 Feb 98 |
| Laos | 30 Jul 97 | | Uzbekistan | 3 Oct 96 | 29 May 97 |
| Malaysia | 23 Jul 98 | | Vietnam | 24 Sep 96 | |
| Maldives | 1 Oct 97 | | | | |
| Mongolia | 1 Oct 96 | 8 Aug 97 | | | |

**Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997**

Oslo, 18 September 1997

Entry into Force: not yet

| *State* | *Sig.* | *Cons.* | *State* | *Sig.* | *Cons.* |
|---|---|---|---|---|---|
| Bangladesh | 7 May 98 | | Maldives | 1 Oct 98 | |
| Brunei | 4 Dec 97 | | Philippines | 3 Dec 97 | |
| Cambodia | 3 Dec 97 | 28 Jul 99 | Tajikistan | | 12 Oct 99 |
| Indonesia | 4 Dec 97 | | Thailand | 3 Dec 97 | 27 Nov 98 |
| Japan | 3 Dec 97 | | Turkmenistan | 3 Dec 97 | 19 Jan 98 |
| Malaysia | 3 Dec 97 | 22 Apr 99 | | | |

# ASIA AND INTERNATIONAL ORGANIZATIONS

# ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE BI-ANNUAL SURVEY OF ACTIVITIES 1997-1999

including the work of its Thirty-seventh Session, held in New Delhi, 13-18 April 1998 and Thirty-eighth Session, held in Accra, 19-23 April 1999

M.C.W. Pinto*

*Note*: The Sessions of the Asian-African Legal Consultative Committee, which was established on 15 November 1956 to facilitate the exchange of views and information on legal matters of common concern to its Members, are convened alternately in Asia and Africa. A Session generally takes place in the first half of a calendar year, and is known by the name of the city in which it is held. Consideration of a topic commenced at one Session, may continue in the inter-sessional period through seminars or expert group meetings; these retain their association with the originating Session. Reports on inter-sessional activities may be discussed at the following Session.

The present survey refers to work taken up at the Thirty-seventh (New Delhi, 1998) and Thirty-eighth (Accra, 1999) Sessions, while containing references also to activities associated with the Thirty-fifth (Manila, 1996) and Thirty-sixth (Tehran, 1997) Sessions, which were covered in volumes 6 and 7 of this *Yearbook*. Prepared for a combined volume 8/9 of this *Yearbook*, constraints on space have required greater conciseness than usual in referring to the wealth of material generated under the auspices of the Committee.

## I MEMBERSHIP AND ORGANIZATION

1. There were forty-three Members of the Committee at the time of its Thirty-seventh and Thirty-eighth Sessions, held respectively at New Delhi, India, from 13-18 April 1998, and at Accra, Ghana, from 19-23 April 1999: Bahrain, Bangladesh, China,

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* General editor.

*Asian Yearbook of International Law*, Volume 8 (B.S. Chimni *et al.*, eds.)

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.

*Officers of the Thirty-seventh (New Delhi) Session*

2. The Thirty-seventh Session of the Committee elected Dr. P. SREENIVASA RAO, Joint Secretary and Legal Adviser to the Ministry of External Affairs of the Government of India, as its President. Dr. MARTIN A.B.K. AMIDU, Deputy Minister of Justice and Deputy Attorney-General of the Government of Ghana, was elected Vice-President of the Session.
3. The President of the Session, Dr. P.S. RAO and the Vice-President, Dr. MARTIN AMIDU, served as Chairman and Vice-Chairman respectively of the *Special Meeting on Reservations to Treaties*, held on 14 April 1998 in connection with the Committee's Thirty-seventh Session.

*Officers of the Thirty-eighth (Accra) Session*

4. The Thirty-eighth Session of the Committee elected Dr. MARTIN A.B.K. AMIDU, Deputy Minister of Justice and Deputy Attorney-General of the Government of Ghana, as its President. Mr. ABDULLA AHMED GHANIM, Minister for Legal Affairs of the Government of the Republic of Yemen, was elected Vice-President of the Session.

*Meetings associated with Committee Sessions*

5. A Commemorative Seminar in connection with the thirtieth anniversary of the adoption of the *Bangkok Principles concerning Treatment of Refugees (1966)* was held from 11-13 December 1996 in Manila, Philippines, in connection with the Thirty-fifth (Manila) Session of the Committee. The Seminar was inaugurated by the President of the Manila Session, H.E. Mr. TEOFISTO GUINGONA, Secretary of Justice of the Government of the Philippines.

6. In connection with the Committee's Thirty-sixth (Tehran) Session, a Seminar held in Tehran from 24-25 January 1998, discussed the subject "*Extra-territorial application of national legislation: sanctions imposed against third parties*". The Seminar was inaugurated by Dr. M. JAVAD ZARIF, Deputy Minister for Foreign Affairs in Iran, and President of the Thirty-sixth Session.

7. Also in connection with the Committee's Thirty-sixth (Tehran) Session, a "*Report of the Seminar to Commemorate the 30th Anniversary of the Bangkok Principles held in Manila, Philippines*" prepared by the AALCC Secretariat, was discussed at a Meeting of Experts in Tehran 11-12 March 1998, inaugurated by Dr. M. JAVAD

ZARIF, Deputy Minister for Foreign Affairs of Iran, and President of the Thirty-sixth Session.

8. The discussion of the foregoing Reports and the action taken thereon form part of the record of the proceedings of the Committee's Thirty-seventh (New Delhi) Session.

9. In connection with the Committee's Thirty-seventh (New Delhi) Session, meetings convened under the auspices of the Committee, and presided over by the President of the Session, Dr. P. SREENIVASA RAO, discussed (1) *the Establishment of an International Criminal Court*, Rome, Italy (June/July 1998; (2) *Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanism*, New Delhi, 17-18 November 1998; (3) *Human Rights in the United Nations*, New Delhi, 14 January 1999; and (4) *Themes of the First International Peace Conference (1899)*, New Delhi, 11-12 February 1999.

10. In connection with the Committee's Thirty-eighth (Accra) Session, a meeting convened under the auspices of the Committee discussed the subject *Effective means of implementation, enforcement and dispute settlement in international environmental law* on 20 April 1999. The meeting was presided over by Dr. MARTIN A.B.K. AMIDU, Deputy Minister of Justice and Deputy Attorney-General of Ghana, President of the Thirty-eighth (Accra) Session. Mr. SIRILIUS MATUPA, Senior State Attorney of the Government of Tanzania, acted as Rapporteur.

*Organization of the Sessions and Associated Meetings*

11. The organization of Sessions and associated meetings was the responsibility of the Secretary-General of the Committee, Mr. TANG CHENGYUAN, who was assisted by Mr. WAFIK ZAHER KAMIL, Mr. MOHAMMED REZA DABIRI and Mr. RYO TAKAGI, Deputy Secretaries-General, as well as by the Assistant Secretaries-General, and members of the Secretariat.

## II SUBJECTS DEALT WITH BY THE COMMITTEE

12. The Committee considered, and adopted decisions on the subjects listed below, the order of their discussion being determined at the commencement of each Session. The references next to each subject are to the pages of the Reports of each Session: ND-New Delhi, A-Accra.

**1. Questions under consideration by the International Law Commission**
(1998 (New Delhi) Report, pp. 129-288)
(1999 (Accra) Report, pp. 138-221)

2. **Matters referred to the Committee by participating States**
   - International rivers (1998 ND 197-219)
   - Legal protection of migrant workers (1998 ND 425-438; 1999 A 353-370)
   - Extra-territorial application of national legislation: sanctions imposed against third parties (1998 ND 345-399; 1999 A 11-137)
   - Status and treatment of refugees (1998 ND 289-314; 1999 A 259-300)
   - Deportation of Palestinians and other Israeli practices in violation of international law (1998 ND 315-344; 1999 A 301-21)
   - Law of the Sea (1998 ND 15-51; 1999 A 16-25)
3. **Matters of common concern having legal implications**
   - United Nations Conference on Environment and Development (1998 ND 401-24; 1999 A 322-52)
   - United Nations Decade of International Law (1998 ND 53-91; 1999 A 57-110)
   - Establishment of an International Criminal Court (1998 ND 93-127; 1999 A 222-58)
4. **Trade law matters**
   - Report on legislative activities of the United Nations and other international organizations in the field of international trade law (1998 ND 439-496; 1999 A 415-56)
   - World Trade Organization; dispute settlement and related matters (1998 ND 497-535; 1999 A 374-414)
   - Report on AALCC's Regional Arbitration Centres (1998 ND 9-13; 1999 A 11-13)

## III LEGAL MATERIALS

The Reports of the Thirty-seventh (New Delhi, 1998) and thirty-eighth (Accra, 1999) Sessions contain valuable legal materials in the form of summaries of discussions, or conclusions reached either by the Committee itself or by expert groups meeting under its auspices; as well as studies carried out by the Secretariat, which served as background material for the Committee's work.

Thus, the **Report on the New Delhi (1998) Session** contains a useful account of the progress of the work on the *Law of the Sea* at the United Nations from the signing of the 1982 UN Convention on the Law of the Sea, through the conclusion of the 1994 Agreement Relating to the Implementation of Part XI of the Convention, and the 1995 Agreement for the Implementation of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migration Fish Stocks, including lists of States Parties, and the results of the first elections to the various organs constituted pursuant to the 1982 Convention (pages 15-51); a Secretariat study on the *Establishment of the International Criminal Court* (pages 107-27); a summary of the Committee's concluding deliberation on the Law of *International Rivers* (pages 197-219); a summary of the work of the International Law Commission on *Reservations to Treaties* (pages 221-66); a Secretariat study on a draft of proposals for revision of the *Bangkok Principles concerning the Treatment of Refugees*, see

AsianYIL, Vol. 7 at pages 381-7 (pages 297-314) (reproduced below, 201-211); a background note on the *Extra-territorial application of national legislation* prepared by the Secretariat for the Seminar on the subject held at Tehran on 24-25 January 1998, and an account of the deliberations of the seminar by Professor V.S.MANI (pages 345-93) (excerpts from which are reproduced below, 211-226); a Report on the Special Session of the UN General Assembly for the purpose of an *Overall Review and Appraisal of the Implementation of Agenda 21* (pages 406-24); and a study by the Secretariat on the working of the *World Trade Organization's Dispute Settlement Mechanism* (pages 497-536) (partly reproduced below, 227-233).

Materials contained in the **Report on the Thirty-eighth (Accra, 1999) Session** include a summary of the Committee's work on *Extra-territorial application of national legislation* and a Secretariat study noting recent developments in the field (pages 111-37) (excerpts reproduced below, 233-242); a Report of a Special Meeting on *Reservations to Treaties* (pages 212-21) (excerpts reproduced below, 242-245); a Report by the Secretariat on the Committee's participation at the *Rome Conference of Plenipotentiaries on the Establishment of an International Criminal Court* 15 June – 17 July 1998, and a Secretariat Overview of the Rome Statute (pages 222-58); the Report of a Special Meeting on *effective means of implementation, enforcement and dispute settlement in international environmental law*, including a Secretariat study on the subject (pages 322-52) (conclusions reproduced below, 245-246); and the Report of a seminar on *Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanism and other Allied Matters* (New Delhi, 17-18 November 1998 (pages 365-414).

In accordance with its practice, the Committee regularly includes in its Reports materials aimed at keeping Members currently informed of developments regarding the deportation and treatment of Palestinians in violation of international law; of measures for the protection of migrant workers; of the legislative activities of the United Nations and other organizations concerned with international trade law, and of the work of the Committee's regional arbitration centres at Kuala Lumpur, Cairo, Lagos, and Tehran.

*ANNEXES**

A. Secretariat Study: STATUS AND TREATMENT OF REFUGEES[1]
(Expert Group Meeting, Tehran, 11-12 March 1998)

...

The 'draft' will be sent to the participants in the Expert Group Meeting with a view to invit[ing] their comments. Once these comments are received, the Secretariat will prepare the final record as well as an in-depth study as recommended by the Expert Group Meeting. A paper containing revised proposals for the Bangkok Declaration has also been included in this study. This has been prepared taking into account the recommendations of the Manila Seminar and the views expressed at the Expert Group Meeting in Tehran.

...

REVISED PROPOSALS FOR 'BANGKOK PRINCIPLES'[2]

## *I. The Refugee Definition*

### Article 1: Definition of the term "Refugee"

1. A refugee is a person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, [religion,] *nationality, ethnic origin,*[3] political *opinion*[4] (or) membership of a particular social group:

(a) leaves the State of which he[5] is a national, or the Country of his nationality, or, if he has

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* [*Yearbook editorial note*: Footnotes in the following texts are numbered consecutively as they appear in this reproduction of the main text of the Annexes and not separately for each Annex. For this reason and because only parts of the original main text are reproduced here, the numbering differs from that in the original Annexes.]

[1] [*Yearbook editorial note*: The following text is the reproduction of the relevant AALCC document. Despite the risks involved the Editors have decided to alter and correct suspected typing errors. These errors do not consist solely of spelling errors but also of deletions from the original Bangkok Declaration in the absence of any indication of intended change.]

[2] In this draft, the parts in regular characters are from the Bangkok Principles, their *Exceptions, Explanations, Notes*, and Addenda. The texts in italics come from other sources, including recommendations of the Manila Seminar or the Tehran Meeting of Experts, and provisions of other international instruments. All sources other than Articles of the Bangkok Principles are *specified* in footnotes.

[3] Both the Manila Seminar and [the] Tehran Meeting of Experts strongly recommended adding the ground of "nationality". The Tehran Meeting of Experts recommended "ethnic origin".

[4] The term "opinion" is used in all the other international refugee definitions, instead of "belief".

[5] It may be preferable in these times to use, whenever appropriate, the formulas: "he/she" and "his/her".

no nationality, the State or Country of which he is a habitual resident; and[6]
(b) being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection.

2. *The term "refugee" shall also apply to every person who, owing to external aggression, occupation [and?or?] foreign domination or event seriously disturbing public order in either part or the whole of his country of origin or nationality.*[7]

3. A person who was outside of the State of which he is a national or the Country of his nationality or, if he has no nationality, the State of which he is a habitual resident, at the time of the events which caused him to have a well-founded fear of the above-mentioned persecution, and is unable or unwilling to return or to avail himself of its protection shall be considered a refugee.[8]

4. The dependents of a refugee shall be deemed to be refugees.[9]

5. A person having more than one nationality shall not be a refugee if he is in a position to avail himself of the protection of any State or Country of which he is a national.[10]

6. A refugee shall lose his status as refugee if:[11]
(i) he voluntarily returns to the State of which he was a national, or the Country of which he was a habitual resident; or
(ii) he has voluntarily re-availed himself of the protection of the State or Country of his nationality; *it being understood that*[12] at the loss of status as a refugee *under*

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[6] Recommended as a substitute for 'or' in Note (iv) to Art. 1 of the Bangkok Principles: this is also consistent with all other international refugee definitions.

[7] Art.1(2) of the OAU Convention governing the Specific Aspects of Refugee Problems in Africa. This addition was recommended both at the Manila Seminar and at the Tehran Meeting of Experts. This paragraph also reflects Note (ii) to Art.1 of the Bangkok Principles which refers to "invasion" and "occupying" of the State of origin, and para. 1 of the 1970 Addendum to the Bangkok Principles, which lists "foreign domination, external aggression or occupation". In conformity with the discussions at the Tehran Meeting of Experts, it does not include the formula of the 1983 Cartagena Declaration on Refugees which refers to "generalized violence, [...] internal conflicts, massive violation of human rights [...]". One participant at the Tehran Meeting of Experts was unfavourable to expansion of the definition.

[8] Note (vi) to Art.1 of the Bangkok Principles.

[9] Explanation of Art.1 of the Bangkok Principles.

[10] Exception (1) to Art.1 of the Bangkok Principles.

[11] This paragraph is Art.2 (loss of refugee status) of the Bangkok Principles: the latter's cessation provisions, with some modifications derived from the Notes to the same Article and from the 1951 Convention.

[12] Stylistic addition.

*this sub*[13] -paragraph will take place only when the refugee has successfully re-availed himself of the protection of the State of his nationality;[14] or

(iii) he voluntarily acquires the nationality of another State or Country and is entitled to the protection of that State or Country; or

(iv) (...) he does not return to the State of which he is a national, or to the Country of his nationality, or if he has no nationality, to the State or Country of which he was a habitual resident, or if he fails to avail himself of the protection of such State or Country after the circumstances in which he became a refugee have ceased to exist.

*Provided that this paragraph shall not apply to a refugee ... who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the Country of nationality.*[15]

7. A person[16] who, prior to his admission into the Country of refuge, has committed a crime against peace, a crime against humanity *as defined in international instruments drawn up to make provisions in respect of such crimes*[17] or a serious non-political crime *outside his Country of refuge prior to his admission to that country as a refugee,*[18] or has committed acts contrary to the purposes and principles of the United Nations, shall not be a refugee.

## *II. Asylum and Treatment of Refugees*

### Article III: Asylum to a Refugee

1. *Everyone, without any distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution.*[19]

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[13] Idem.

[14] This sentence is derived from Note (ii) to Art.2 of the Bangkok Principles.

[15] Art.1(C)(5) of the 1951 Convention. This sub-paragraph usefully complements the rest of the text, the core of which is protection, as repeatedly indicated at the Tehran Meeting of Experts. It is also consistent with the recommendations of a participant at the Tehran Meeting that the chances of justifying cessation of refugee status should be of a fundamental nature.

[16] This paragraph is derived from Exception (2) of the Bangkok Principles. It is a set of Exclusion Clauses recommended at the Tehran Meeting of Experts. The text is modified to correspond to the formulations of existing universal and regional instruments on refugees, as specified below. One participant proposed a specific reference to terrorism as a ground for exclusion. It was pointed out that, if properly applied, the exclusion clauses as stated in this paragraph and indeed in all the major international refugee instruments, should exclude a terrorist. While the problem of terrorism is not to be denied, it was deemed important to avoid giving the erroneous impression that all refugees are terrorists, which would in turn undermine the institution of asylum.

[17] Art.1(5)(a) of the OAU Convention and Art.1(F)(a) of the 1951 Convention.

[18] Art.1(5)(b) of the OAU Convention and Art.1(F)(b) of the 1951 Convention.

[19] Para. 23 of the 1993 Vienna Declaration on Human Rights. An alternative formulation might be: "Everyone has the right to seek and to enjoy in other countries asylum from persecution [...]". (Art.14(1) Universal Declaration of Human Rights.

2. A State has the sovereign right to grant or to refuse asylum in its territory to a refugee *in accordance with its international obligations and national legislation.*[20]
3. *The granting of asylum to refugees is a peaceful and humanitarian act.*[21] *It*[22] shall be respected by all other States and shall not be regarded as an unfriendly act.
4. *Member States shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their Country of origin or nationality.*[23]

**Article IIIA:[24] Non-refoulement**

1. *No one seeking asylum in accordance with these principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin,*[25] *membership of a particular social group or political opinion.*[26]
2. *The provision as outlined above may not however be claimed by a person when there is reasonable ground to believe the person's presence is a danger to the security of the Country in which he is, or whom having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Country.*[27]
3. In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions it may deem appropriate, to enable the person thus endangered to seek asylum in another Country.[28]

**Article VI: Minimum standard of treatment**

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[20] This insert was recommended by the Manila Seminar and amended by the Tehran Meeting of Experts from "domestic" to "national". One participant also proposed placing the word "its" in front of "national".

[21] Art.II(2) of the OAU Convention and the preamble of the United Nations Declaration on Territorial Asylum.

[22] Stylistic substitution.

[23] Art.II(1) of the OAU Convention. This proposed paragraph would indeed reflect the positive State practice in the Afro-Asian region in the past three decades.

[24] The Manila Seminar proposed removing para.3 from Art.III of the Bangkok Principles and making it into a separate Article in two paragraphs, as per the first two paragraphs below. The third paragraph below is actually para.[4] of Art.III of the Bangkok Principles.

[25] The addition of "ethnic origin" in the *non-refoulement* provision was recommended at the Tehran Meeting of Experts. It is in any case consistent with the grounds in the refugee definition.

[26] Rephrasing of Art.III as per footnote 23 above.

[27] Idem.

[28] Para.3 of Art.III as per footnote 23 above.

1. A State shall accord to refugees treatment no less favourable than that generally accorded to aliens in similar circumstances, *with due regard to basic human rights as recognized in generally accepted international instruments.*[29]
2. The standard of treatment referred to *in paragraph 1*[30] shall include the rights relating to aliens contained in the Final Report of the Committee on the status of aliens, to the extent they are applicable to refugees.
3. A refugee shall not be denied any rights on the ground that he does not fulfil requirements which by their nature a refugee is incapable of fulfilling.
4. A refugee shall not be denied any rights on the ground that there is no reciprocity in regard to the grant of such rights between the receiving State or the Country of nationality of the refugee or, if he is stateless, the State or Country of his former habitual residence.
5. *States undertake to apply these principles to all refugees without distinction as to race, religion, nationality, ethnic origin, gender, membership of a particular social group or political opinions, in accordance with the principle of non-discrimination.*[31]
6. *States shall adopt effective measures for improving the protection of refugee women and, as appropriate, ensure that the needs and resources of refugee women are fully understood and integrated to the extent possible into their activities and programmes.*[32]
7. *States shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present principles and in other international human rights instruments to which the said States are Parties.*[33]

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[29] Insert recommended by the Manila Seminar. At the Tehran Meeting of Experts, one participant suggested substituting "as regards" for "with due regard". No explanation was given. Another proposed substituting "international human rights conventions" for "generally accepted international instruments". One participant in the Meeting of Experts complained that refugees were sometimes given a higher standard of treatment than nationals. Another doubted this, pointing out that the rules of operation were precisely not to give the refugees higher treatment than the locals. On the contrary: the services made available to refugees in a given area are often extended, as necessary, to internally displaced persons and the local population as well.

[30] As this is a restatement of para.2 of this Art.VI, it had to be rephrased accordingly.

[31] Derived from Art.IV of the OAU Convention and Art.3 (partially) of the 1951 Convention. The grounds of "ethnic origin" and "gender" are added to reflect current international standards, the latter reflecting Art.18 of the Vienna Declaration on Human Rights and foreshadowing the next paragraph. This clause reflects recommendation (d) of the Manila Seminar under "Points for Further Review".

[32] See para.(a) of UNHCR Executive Committee Conclusion No.64(XL1) on Refugee Women and International Protection. At the Tehran Meeting of Experts, during the discussion of a possible provision on women, children and elderly refugees, one participant proposed a general provision on vulnerable groups as an alternative to a separate one on each such group as in paragraphs 8, 9, and 10.

[33] Art.22(1) of the 1989 Convention on the Rights of the Child.

8 *States shall give special attention to the protection needs of elderly refugees to ensure not only their physical safety, but also the full exercise of their rights, including their right to family reunification. Special attention shall also be given to their assistance needs, including those relating to social welfare, health and housing.*

**Article VIII: Expulsion and deportation**

1. *Save in the national or public interest or in order to safeguard the population,*[34] the State shall not expel a refugee.
2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary and as applicable to aliens under such circumstances.[35]
3. A refugee shall not be deported or returned to a State or Country where his life or liberty would be threatened for reasons of race, colour, *nationality, ethnic origin,*[36] religion, political *opinion,*[37] or membership of a particular social group.
4. The expulsion of a refugee shall be 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 or a person or persons specially designated by the competent authority.[38]

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[34] This excerpt is taken from Art.3(2) of the UN Declaration on Territorial Asylum. It substitutes for "on the ground of violation of the conditions of asylum". Another alternative proposed in *Note* (1) to Art.VIII of the Bangkok Principles would be:"save on ground of national security or public order, or a violation of the vital or fundamental conditions of asylum"; "national security and public order" are the only grounds provided for by the 1951 Convention in Art.32(1).

[35] The phrase "as applicable to aliens under the same circumstances" is taken from *Note* (2) to Art.VIII.

[36] These additional grounds were recommended for the refugee definition by the Manila Seminar and the Tehran Meeting of Experts respectively. See footnote 2 above.

[37] See footnote 3 above.

[38] Art.32(2) of the 1951 Convention. This paragraph is consistent with the recommendation of a participant of the Tehran Meeting of Experts that a refugee should not be expelled without due process of law. It is also in conformity with Art.13 of the 1966 International Covenant on Civil and Political Rights. In the national context, the refugee's right to due process of law in expulsion cases was reaffirmed in the January 1996 decision of the Supreme Court of India in the case of *National Human Rights Commission v. State of Arunachal Pradesh and Another* (1996 (1) Supreme 295).

### *III. Durable Solutions*

#### Article IV: Right of return

1. A refugee shall have the right to return if he so chooses to the State of which he is a national or the Country of his nationality and in this event it shall be the duty of such a State or Country to receive him.
2.[39] This principle should apply to, *inter alia*,[40] any person who because of foreign domination, external aggression or occupation has left his habitual place of residence or who[41] being outside such place desires to return thereto.
3. It shall ... be the duty of the Government or authorities in control of such place of habitual residence to facilitate, by all means at their disposal, the return of all such persons as are referred to in the foregoing paragraph, and the restitution of their property to them.[42]
4. This natural right of return shall also be enjoyed and facilitated to the same extent as stated above in respect of the dependants of all such persons as are referred to in paragraph I[43] above.[44]

#### Article V: Right to compensation

1. A refugee shall have the right to receive compensation from the State or the Country which he left or to which he was unable to return.[45]
2. The compensation referred to in paragraph 1 shall be for such loss as bodily injury, deprivation of personal liberty in denial of human rights, death of the refugee or the person whose dependant the refugee was, and destruction of or damage to property and assets, caused by the authority of the State or Country, public officials or mob violence.
3.[46] Where such person does not desire to return, he shall be entitled to prompt and full compensation by the Government or the authorities in control of such place of habitual residence as determined, in the absence of agreement by the parties

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[39] This and the next two paragraphs are paras. (1), (2) and (3) of the 1970 Addendum to the Bangkok Principles. The incorporation of this Addendum was understood as appropriate in both Manila and Tehran.
[40] Stylistic addition.
[41] Idem.
[42] 1970 Addendum, para.2.
[43] Modified due to change in paragraph numbering.
[44] 1970 Addendum, para.3.
[45] While a Tehran Meeting of Experts participant called compensation a utopia, another called attention to its necessity when, for example, refugees' property has been confiscated. He was probably referring to historical cases of compensation and restitution from Germany and from Uganda.
[46] This paragraph and the next are paras. (4) and (5) of the 1970 Addendum. See footnote 37 above for explanation.

concerned, by an international body designated or constituted for the purpose by the Secretary-General of the United Nations at the request of either party.
4. If the status of such a person is disputed by the Government or the authorities in control of such a place of habitual residence, or if any other dispute arises, such matter shall also be determined, in the absence of agreement by the parties concerned, by an international body designated or constituted as specified in paragraph (3)[47] above.[48]

**Article V(A):[49] Voluntary repatriation[50]**

*1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.*
*2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.*
*3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.*
*4. Refugees who voluntarily return to their country shall in no way be penalized for having left it or for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the relevant universal and regional organizations[51] inviting refugees to return home without risk and to take up a normal peaceful life without fear of being disturbed and punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.*
*5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies, and international and inter-governmental organizations to facilitate their return.[52]*

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[47] Numbering modified according to the new numbering of the paragraphs.
[48] 1970 Addendum, para.5.
[49] Under "Durable Solutions" the Manila Seminar made detailed recommendations on voluntary repatriation which are reflected in this new Article taken from the OAU Convention.
[50] Art.V of the OAU Convention. Similar provisions are found in UNHCR's EXCOM Conclusion No.40 (XXXVI) Voluntary Repatriation.
[51] This phrase is substituted for "the Administrative Secretary-General of the OAU".
[52] This and the other paragraphs of this proposed Article should meet the requirements of the Tehran Meeting of Experts participants who called for "ways and means to facilitate return", for "the means of integration after return", and for "sustainable reintegration".

### Article V(B):[53] Other solutions

1.[54] Voluntary repatriation, local settlement or resettlement, that is, the traditional solutions, all remain viable and important responses to refugee situations, even while voluntary repatriation is the pre-eminent solution. To this effect, States should undertake, with the help of international governmental and non-governmental organizations,[55] development measures which would underpin and broaden the acceptance of the three traditional durable solutions.
2. States shall promote comprehensive approaches, including a mix of solutions involving all concerned States and relevant international organizations in the search for, and implementation of, durable solutions to refugee problems.[56]
3. The issue[57] of root[58] causes is crucial for solutions and international efforts should also be directed to the removal of the causes of refugee movements[59] and the creation of the political, economic, social, humanitarian and environmental conditions conducive to voluntary repatriation.[60]

## IV. Burden Sharing

### Article IX[61]

1. The refugee phenomenon continues to be a matter of global concern and needs the support of the international community as a whole for its solution and as such the principle of burden sharing should be viewed in that context.

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[53] While the Manila Seminar expressed the sense that the international climate was not ripe for a formal inclusion of local integration as a solution, it conceded that it had provided some positive experiences. As for third country resettlement, while the Seminar deemed it not a solution for the vast majority of refugees in the Afro-Asian region, it nevertheless agreed that the resettlement option needed to be left open (Report of the Seminar, p.6.) At the Tehran Meeting of Experts, both views were expressed and several participants called attention to the need to preserve these three traditional solutions in the light of positive experiences in specific refugee contexts. This proposed Article reflects these views.

[54] UNHCR's EXCOM Conclusion No. 61(XLI) Note on International Protection, paras. (iv) and (v).

[55] Stylistic insertion.

[56] Manila Seminar (see Report of the Seminar, p.6). At the Tehran Meeting of Experts, one participant recommended the consideration of "regional approaches", which in fact are not at all excluded from the concept of "comprehensive approaches".

[57] The word "issue" is substituted for "aspect" for stylistic purposes.

[58] The word "root" is added to the text in order better to reflect the recommendation made at the Tehran Meeting of Experts.

[59] UNHCR's EXCOM Conclusion No. 40 (XXXVI), para. (c).

[60] Addressing the root causes of refugee movements by ensuring "sustainable repatriation" was recommended at the Tehran Meeting of Experts.

[61] The Manila Seminar recommended that paras. I to IV of the 1987 Addendum be incorporated into the Bangkok Principles under the heading of "Burden Sharing" and become a new Art.IX.

2. The principle of international solidarity and burden sharing needs to be applied progressively to facilitate the process of durable solutions for (...) refugees, whether within or outside a particular region, keeping in perspective that durable solutions in certain situations may need to be found by allowing access to refugees in Countries outside the region, due to political, social and economic considerations.
3. The principle of international solidarity and burden sharing should be seen as applying to all aspects of the refugee situation, including the development and strengthening of the standards of treatment of refugees, support to States in protecting and assisting refugees, the provision of durable solutions and the support of international bodies with responsibilities for the protection and assistance of refugees.
4. International solidarity and cooperation in burden sharing should be manifested whenever necessary, through effective concrete measures in support of States requiring assistance, whether through financial or material aid or through resettlement opportunities.
5.[62] *In all circumstances the respect for fundamental humanitarian principles is an obligation for all members of the international community. Giving practical effect to the principle of international solidarity and burden sharing considerably facilitates States' fulfillment of their responsibilities in this regard.*

### *V. Additional Provisions*[63]

### Article X:[64] Rights granted apart from these Principles[65]

Nothing in these Articles shall be deemed to impair any higher rights and benefits granted or which may hereafter be granted by a State to refugees.

### Article XI:[66] Cooperation with international organizations

*States shall cooperate with the Office of the United Nations High Commissioner for Refugees and, in the region of its mandate, with the United Nations Relief and Works Agency for Palestine Refugees in the Near East.*[67]

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[62] This paragraph is added to ensure a more complete statement of the principle of burden sharing and arises out of the discussions at the Tehran Meeting of Experts.
[63] Title added for clarity.
[64] This is the former Art.IX. The Manila Seminar had recommended that a new Art.IX be inserted under the rubric "Burden Sharing", and that this text be renumbered Art.X.
[65] Title added for clarity.
[66] Under the heading of "Cooperation with international organizations", the Manila Seminar "expressed its appreciation to UNHCR as well as to UNRWA for their dedication to their duties on behalf of refugees". (Report of the Seminar, p.5.)
[67] On cooperation with UNHCR, see Art. VIII (1) of the OAU Convention, Art.35 of the 1951 Convention, and Art.II of the 1967 Protocol relating to the Status of Refugees.

B. Secretariat Study: BACKGROUND NOTE ON THE EXTRA-TERRITORIAL APPLICATION OF NATIONAL LEGISLATION: SANCTIONS IMPOSED AGAINST THIRD PARTIES, prepared for the Seminar held at Tehran on 24-25 January, 1998

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It is recalled that a view had been expressed at the Thirty-sixth Session of the AALCC that the extraterritorial application of national legislation and sanctions against a third party is a violation of international law and that the AALCC, as a legal body of Asian-African countries, could have its own legal opinion on this issue. For this purpose, it was suggested that a comprehensive study concerning the legality of such unilateral measures may be considered by the Committee.[68]

The view was also expressed that an examination of the item by the Committee should be purely technical, based on legal analysis, and should not, to the extent possible, step into the political arena. The United Nations, the non-aligned forum and other fora could delve into the political dimension of the matter and the AALCC should not duplicate their work. The work of the AALCC, it was emphasized, required a different type of perspective to deal with this issue and that is the reason that a seminar of a group of experts from Member and non-Member States of the AALCC had been convened.

THE IRAN AND LIBYA SANCTIONS ACT OF 1996: AN OVERVIEW

In 1996, two legislations by the United States Congress extended the jursdiction of that Sstate beyond its territory, by imposing sanctions against third States that invest in, or enter into business with, Iran, Libya, and Cuba. First, in March 1996, the Cuban Liberty and Democratic Solidarity Act of 1996 (generally known by the names of its principal co-sponsors as the Helms-Burton Act)[69] was signed by the United States President. The Act, *inter alia*, codifies the existing economic sanctions previously imposed against Cuba pursuant to executive orders. Again, on 5 August 1996, the United States President signed the Iran-Libya Sanctions Act of 1996 (generally known as the D'Amato-Kennedy Act), imposing sanctions against foreign companies that make investments which contribute to Iran's ability to develop its petroleum resources.

The Preamble to the Iran and Libya Sanctions Act of 1996 (hereinafter called "the Act") describes it as an Act to "impose sanctions on persons making investments

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[68] It was also proposed that the AALCC should keep this issue under review and could support the inclusion of the item Extraterritorial Application of National Laws, or Unilateral Acts and their Legal Effects in the future program of the work of the International Law Commission. See the statement of the Delegate of the People's Republic of China made during the Fourth Plenary Meeting in the *Verbatim Record of Discussions* of the Thirty-sixth Session of the Asian-African Legal Consultative Committee, Tehran, May 1997.

[69] For the full text of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, see 35 *International Legal Materials* (1996) p.397.

directly and significantly contributing to the enhancement of the ability of Iran or Libya to develop its petroleum resources, and on persons exporting certain items that enhance Libya's weapons or aviation capabilities, or enhance Libya's ability to develop its petroleum resources, and for other purposes".[70]

In a memorandum circulated at the Fifty-first Session of the General Assembly the United States maintained that the Act will help to deprive both the Islamic Republic of Iran and the Libyan Arab Jamahiriya from a source of income which, it claimed, could be used to finance international terrorism and procure weapons of mass destruction. The memorandum had affirmed that with the Kennedy-D'Amato Law, it aimed to put pressure on Libya to comply with Security Council resolutions.

The Act defines both Iran and Libya in identical terms as "including any agency or instrumentality" of Iran or Libya. It requires persons both natural or legal, associations of persons, [and] governmental and non-governmental agencies to refrain from investing in either Iran or Libya any amount greater than US $ 40 million during a twelve-month period. To that end the Act defines the term "investment" to mean:

(i) The entry into a contract that includes responsibility for the development of petroleum resources located in Iran or Libya or the entry into a contract providing for the general supervision and guarantee of another person's performance of such a contract.

(ii) The purchase of a share of ownership, including an equity interest, in that development.

(iii) The entry into a contract providing for the participation in royalties, earnings or profits in that development, without regard to the form of participation. The term 'investment' does not include the entry into, performance, or financing of a contract to sell or purchase goods, services, or technology.[71]

It may be stated that the investments under contracts existing prior to 5 August 1996 are beyond the pale of the Act and are exempted. The term "petroleum resources" is to have a large connotation and includes petroleum and natural gas resources.

Section 3 of the Act sets out the Declaration of Policy. Paragraph (a) of Section 3 called "Policy with Respect to Iran" reads:

> "The Congress declares that it is the policy of the United States to deny Iran the ability to support acts of international terrorism and to fund the development and acquisition of weapons of mass destruction and the means to deliver them by limiting the development of Iran's ability to explore for, extract, refine, or transport by pipeline

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[70] See text of the Iran and Libya Sanctions Act, 1996.

[71] See Section 14(9) of the Iran and Libya Sanctions Act, 1996

petroleum resources of Iran.[72] This Declaration of Policy with respect to Iran is based on the Congress findings as set out in Section 2 of the Act."

To further the objectives of the Act Section 4, *inter alia*, urges the President of the United States to "commence immediately diplomatic efforts, both in appropriate international fora such as the United Nations, and bilaterally with allies of the United States, to establish a multilateral sanctions regime against Iran, including provisions limiting the development of petroleum resources that will inhibit Iran's efforts" to carry out activities described in Section 2 of the Act.

Section 4 of the Act entitled "Multilateral Regimes", it has been suggested, "provides for the integration of coercive economic measures into multilateral systems."[73] Section 4(e) of the Act required the President to present an interim report monitoring multilateral sanctions, not later than 90 days after the enactment of the Act, to the Appropriate Congressional Committee;[74] on:

(1) whether the member States of the European Union, the Republic of Korea, Australia, Israel or Japan have legislative or administrative standards providing for the imposition of trade sanctions on persons or their affiliates doing business or having investments in Iran or Libya:

(2) the extent and duration of each instance of the applications of such sanctions; and

(3) the disposition of any decision with respect to such sanctions by the World Trade Organization or its predecessor organization.[75]

The President is thereafter to report to the "appropriate congressional committees" on the extent that diplomatic efforts, referred to above, have been successful. Each report is to include (i) the countries that have agreed to undertake measures to further the policy objectives with respect to Iran, together with a description of those measures; and (ii) the countries that have not agreed to undertake measures.

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[72] The Policy with Respect to Libya is set out in paragraph (b) of the same section in the following terms: "The Congress further declares that it is the policy of the United States to seek full compliance by Libya with its obligations under Resolutions 731, 748, and 883 of the Security Council of the United Nations, including ending all support for acts of international terrorism and efforts to develop or acquire weapons of mass destruction".

[73] See the statement of the Representative of Iraq at the Sixty-seventh Plenary Meeting of the Fifty-first Session of the General Assembly.

[74] Section 14(2) of the Act defines the term "Appropriate Congressional Committee" to mean the Committee on Finance, the Committee on Banking, Housing, and Urban Affairs, and the Committee on Foreign Relations of the Senate and the Committee on Ways and Means, the Committee on Banking and Financial Services, and the Committee on International Relations of the House of Representatives.

[75] Section 4(e) of the Act.

*A. Sanctions*

Section 6 of the Act called the Description of Sanctions stipulates that the sanctions to be imposed on a sanctioned person are:

1. Export-Import Bank assistance for exports to sanctioned persons;
2. Export sanction;
3. Loans from financial institutions;
4. Prohibitions on financial institutions;
5. Procurement sanction; and
6. Additional sanction.

1. *Export-Import Bank assistance for exports to sanctioned persons*

Under Section 6 paragraph 1 the President may direct the Export-Import Bank of the United States not to give approval to the issuance of any guarantee, insurance, extension of credit, or participation in the extension of credit in connection with export of any goods or services to any sanctioned person.

2. *Export sanction*

Section 6 paragraph 2 stipulates that the President may order the United States Government not to issue any specific licence and not to grant any other specific permission or authority to export any goods or technology to a sanctioned person under (i) the Export Administration Act of 1979; (ii) the Arms Export Control Act; (iii) the Atomic Energy Act of 1954; or (iv) any other statute that requires the prior review and approval of the United States Government as a condition for the export or re-export of goods or services.

3. *Loans from financial institutions*

Pursuant to Section 6(3) of the Act the United States Government may prohibit any United States financial institution from making loans or providing credits to any sanctioned person totalling more than US $ 10,000,000 in any 12-month period unless such person is engaged in activities to relieve human suffering and the loans or credits are provided for such activities.

4. *Prohibitions on financial institutions*

It may be stated at this juncture that under the Act the term "financial institution" includes (a) a depository institution[76] including a branch or agency of a foreign bank;[77] (b) a credit union; (c) a securities firm, including a broker or dealer; (d) an insurance company, including an agency or underwriter, and (e) any other company that provides financial services.

Paragraph 4 of Section 6 of the Act envisages two kinds of prohibitions that may be imposed against a sanctioned person that is a financial institution. These are: (a)

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[76] As defined in Section 3 (c)(1) of the Federal Deposit Insurance Act.

[77] As defined in Section 1(b)(7) of the International Banking Act, 1978.

Prohibition on Designation as Primary Dealer; and (b)Prohibition on Service as a Repository of Government Funds.

As regards the prohibition on designation as primary dealer it is stipulated that neither the Board of Governors of the Federal Reserve System nor the Federal Reserve Bank of New York may designate, or permit the continuation of any prior designation of, such financial institution as a primary dealer in United States Government debt instruments.

As to the prohibition on service as a Repository of Government Funds it is stipulated that a financial institution may not serve as an agent of the United States Government or serve as repository for United States Government funds.

The subsection goes on to clarify that the imposition of either prohibition on a sanctioned person that is a financial institution shall be treated as a single sanction and that the imposition of both shall be treated as two sanctions for the purposes of Section 5 of the Act.

5. *Procurement sanction*

The United States Government may not procure, or enter into any contract for the procurement of, any goods or services from a sanctioned person.

6. *Additional sanction*

Finally, the President may, in accordance with the International Emergency Economic Powers Act, impose sanctions to restrict imports with respect to a sanctioned person.

The European Union has identified the measures taken by the United States President to limit imports into [the] USA, prohibition of designation as primary dealer or as repository of USA Government funds, denial of access to loans from USA institutions, export restrictions by [the] USA, or refusal of assistance by the Export-Import Bank, as damaging to its interests.

Be that as it may, the impermissibility under international law of unilateral sanctions is uniformly recognized by the international community. The adoption of coercive economic measures lies only within the mandate of the United Nations in particular instances where there exists a threat to peace or breach of peace.

*B. Ratione personae*

The ratione personae of the Act is set out in Section 5(e) which identifies the Persons Against Which the Sanctions Are to be Imposed. The sanctions described in the Act are to be imposed on (i) any person [who] the President determines has carried out the activities described; (ii) [a] successor entity to the person referred [to]; (iii) a parent or subsidiary of that person, if that parent or subsidiary, with actual knowledge, engaged in the activities referred to; (iv) or an affiliate if that affiliate, with actual knowledge, engaged in those activities and if the affiliate is in fact controlled by the person.

Section 14 paragraph 14 stipulates that the term 'person' means (a) a natural person; (b) a corporation business association, partnership, society, trust, any other

non-governmental entity, organization, or group, and any other governmental entity operating as a business enterprise; and (c) any successor to any entity described above.

*C. Ratione temporis*

The Iran and Libya Sanctions Act of 1996 entered into force on the date of its enactment, viz. 5 August 1996. It will "cease to be effective five years after the date of the enactment of the Act".

The Iran-Libya Sanctions Act goes beyond previous sanctions imposed by the United States against other States and is not limited to regulating American interests in these countries. Rather, like the LIBERTAD Act it is designed to impose sanctions on companies or individuals located outside the United States that trade with Iran and Libya, and these sanctions are targeted at investments of non-US businesses in the oil industries of Iran and Libya, i.e. investments having no necessary link with the United States.

In the course of the debate at the Thirty-sixth Session of the AALCC it was pointed out that the imposition of sanctions is permissible only by the United Nations under Chapter VII of the Charter. Article 41 of the United Nations Charter provides, *inter alia,* for "complete or partial interruption of economic relations" in order to give effect to Security Council decisions with respect to maintaining or restoring international peace and security. Sanctions can only be imposed by the Security Council against a law-breaking State after the determination of the existence of [a] "threat to peace, breach of peace or act of aggression". The Security Council has followed this procedure over the past half a century. Although the sanctions policies of the United Nations remain under criticism, the power of the United Nations to enforce sanctions and the obligation of the Member States to abide by such decisions continue to remain as part and parcel of contemporary international law.

The General Assembly on its part has repeatedly denounced economic coercion as a means of achieving political goals. Among these the resolution entitled "Economic Measures as a means of Political and Economic Coercion against Developing Countries" has strongly urged the industrial nations to abstain from the use of their superior position as a means of applying economic pressure "with the purpose of inducing changes in the economic, political, commercial and social policies of other countries."

The unilateral imposition of sanctions infringes upon the right to development. The Vienna Declaration and Programme of Action of 25 June 1993 has delineated that the Right to Development has become a "universal and inalienable right and an integral part of fundamental human rights."[78] The Declaration on the Right to Development describes this principle as "an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[79]

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[78] Op.cit.note 9 [*Ed.*: referring to the numbering in the original document, not reproduced here].

[79] See Art. 1 paragraph 1 of General Assembly Resolution 41/128 of 4 December 1986.

Another inherent flaw is that the unilateral imposition of sanctions violates the principle of non-intervention. The principle of non-intervention, a customary norm of international law, is backed by established and substantial state practice and has been incorporated in various internationally binding instruments as well as the General Assembly resolutions. The resolutions of the General Assembly and the proceedings of the International Court of Justice[80] provide ample evidence that the non-intervention principle encompasses the rejection of intervention and interference in both internal and external affairs of other States. Consequently, imposition of secondary sanctions, which interrupt economic cooperation and trade relations of target States with third parties, violates the universally accepted principle of non-intervention in the international [*sic*; internal?] and external affairs of other States.

## GENERAL ASSEMBLY OF THE UNITED NATIONS

An item entitled "Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion" was inscribed on the agenda of the Fifty-first Session of the General Assembly at the request of the Libyan Arab Jamahiriya. In the course of deliberations on the item it was pointed out that the United States had enacted legislation that punishes foreign non-United States companies which invested more than US $ 40 million to develop petroleum resources in either the Islamic Republic of Iran or the Libyan Arab Jamahiriya. It was recalled that the United States had often employed sanctions to bring pressure what it termed "rogue" States.[81]

The enactment of laws which contravene the principle of territoriality [of] national laws significantly affects the sovereignty of other States and the legitimate interests of companies and persons within their jurisdiction.

The view was expressed that on the threshold of the new millennium, the emergence of unilateral coercive measures of an extraterritorial nature entails yet another serious danger in the context of an increasingly interdependent world. The risks posed by a country in unilaterally reserving the right to undermine the discipline of multilateral trade for reasons totally alien to trade issues must be confronted appropriately and resisted by the international community.

In the course of the debate on the item it was, *inter alia*, pointed out that the imposition of coercive measures and the approval of domestic legislation for the horizontal escalation of such actions with extraterritorial implications contradicts

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[80] The International Court of Justice in the *Case concerning the Military and Paramilitary Activities in Nicaragua* against the United States of America has established that: "The principle of non-intervention established the right of every sovereign State to rule its affairs without foreign interference; although examples of violation of such principle are not rare, the Tribunal states that it is part of the customary international right [*sic*]. The existence of the Non-intervention principle is backed by a very important and well-established practice. On the other hand, this principle has been introduced as corollaries [*sic*] of sovereign equality of all States".

[81] The United States of America has since 1941, either unilaterally or in concert with others, invoked sanctions more than 70 times. The overall success of sanctions has largely been limited. For details see *The Wall Street Journal* 25 November 1996.

established international trade law including the regulations of the World Trade Organization.[82]

Speaking on behalf of the European Community at the Fifty-first Session of the General Assembly, the Permanent Representative of Ireland stated: "the European Union wishes to reiterate its rejection of attempts to apply national legislation on an extra-territorial basis." He concluded: "Measures of this type violate the general principles of international law and the sovereignty of independent States."

At that session the Assembly by its Resolution 51/22 of 27 November 1996, guided by the principles of the Charter of the United Nations, particularly those which call for the development of friendly relations among nations, and the achievement of cooperation in solving problems of an economic and social character, recalled its resolutions in which it had called upon the international community to take urgent and effective steps to end coercive economic measures.[83] Concerned over the enactment of extraterritorial coercive economic laws in contravention of the norms of international law and believing that the prompt elimination of such measures is consistent with the aims and purposes of the United Nations and the relevant provisions of the World Trade Organization, the General Assembly reaffirmed the "inalienable right of every State to economic and social development and to choose the political, economic and social system which it deems most appropriate for the welfare of its people in accordance with its national plans and policies," and called for "the immediate repeal of unilateral extraterritorial laws that imposed sanctions on companies and nationals of other States". It also called upon all States not to recognize unilateral extraterritorial coercive economic measures or legislative acts imposed by any State,[84] and decided to include in the agenda of its Fifty-second session an item entitled "Elimination of Coercive Economic Measures as a Means of Political and Economic Coercion."

By its Resolution 51/22 the General Assembly had requested the Secretary-General to prepare a report on the implementation of the resolution in the light of the purposes and principles of the Charter of the United Nations and international law, and to submit the same to the Assembly at its Fifty-second Session. Pursuant to that request the Secretary-General invited Governments to furnish any information that they may wish to contribute to the preparation of that report. In response to that invitation of

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[82] The Understanding of Rules and Procedures Governing Settlement of Disputes, adopted as an Annex to the Agreement Establishing the World Trade Organization (WTO), *inter alia* incorporates restrictions on the use of individual counter measures. A similar provision can also be found in the North American Free Trade Agreement (NAFTA).

[83] See Resolutions 47/19, 48/16, and 49/9 of the General Assembly of the United Nations. A similar resolution, calling upon all States to refrain from promulgating laws and regulations the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation, was also adopted at the Fiftieth Session of the General Assembly.

[84] Earlier by its Resolutions 47/19 and 50/10, the General Assembly had called upon all States to refrain from promulgating and applying such laws and measures in conformity with their obligations under the Charter of the United Nations and international law which, *inter alia*, reaffirm the freedom of trade and navigation. These resolutions call upon States to revoke such laws.

the Secretary-General, the Government of Belgium stated that, like its partners in the European Union, it was "opposed to the extraterritorial application of national legislation, more particularly the unilateral imposition of commercial measures, especially sanctions."[85] The Government of Iraq in its reply to the Secretary-General stated, *inter alia*, that the coercive measures taken by some States constitute a real threat to international peace and security, and a flagrant violation of human rights principles. It went on to suggest that "the international community, as represented by the United Nations, must increase the resolute and effective measures it takes with a view to dissuading States from taking such action and in order to block any attempts to apply pressure on the United Nations or any multilateral body, or to use them as a means to legitimize such practices, which conflict with the Provisions and Precepts of international law."[86]

The Government of the Islamic Republic of Iran observed that the "consideration of this very issue in all recent major international conferences and summits is a manifestation of the international concern about the multidimensional character of unilateral coercive economic measures which adversely affect all countries and the world economy as a whole".

The outcome of the debate, during the recently concluded Fifty-second Session of the General Assembly, at the time of preparing this Background Note was not available to the Secretariat.

## EUROPEAN ECONOMIC COMMUNITY

The European Economic Community too asserts an extraterritorial application of its own competition laws and the application of these rules to international trade and economic relations has been equally controversial. As regards the European Community it has been stated that "(i) legislative jurisdiction may not be extended to acts outside Community territory in so far as prohibitive rules of international law stand in the way of such extension; (ii) *enforcement* jurisdiction is strictly limited to Community territory, unless the rules of international law permit an extension to the territory of third States."[87]

Be that as it may, it has been and continues to be the policy of the European Union to oppose national legislation with extra-territorial effects. The 1982 Amendments to the US Export Administration Regulations which expanded the US's control on the export and re-export of goods and technical data to [the] USSR, was objected to by the European Commission. The European Commission called these amendments "unacceptable under international law because of their extra-territorial effects."

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[85] It went on to state that the European Union had confirmed this position in its explanation of the vote when the General Assembly voted on Resolution 51/22. See *Elimination of coercive economic measures as a means of political and economic compulsion. Report of the Secretary-General*, A/52/343, 15 September 1997.

[86] Ibid.

[87] P.J.KUYPER, "European Community Law and Extra-territoriality: Some Trends and New Developments' in 33 *ICLQ* (1984) p.1013.

The European Union strongly opposed the enactment of the legislation and termed the extraterritorial application of US jurisdiction baseless in international law. The essence of the European objection to the [Kennedy-]D'Amato Act is summarized in the following extract from a letter addressed by [the] EU to Senator D'Amato on 12 February 1996:

> "We find it unacceptable that companies incorporated in and operating from [the] European Community will be threatened by unilateral US sanctions when maintaining legitimate business relations with Iran and Libya. We reiterate our opposition that the US has no basis in international law to claim the right to regulate in any way transactions taking place outside the US."

The European Union's *démarches* protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act of 15 March 1995 had, *inter alia*, pointed out that the European Union had consistently expressed its opposition as a matter of law and policy to extra-territorial application of US jurisdiction, which would restrict European Union trade in goods and services with Cuba. It emphasizes that "it cannot accept US unilateral determination and restrict EU economic and trade relations with third countries."[88] The Council of Ministers of the European Union adopted a regulation declaring the Act to be in violation of international law and decreeing that any company established in Europe that is subjected to a judgment under the Act may "claw back" against the assets of the American plaintiff in any of the Union's States.

The Council of the European Union has by its Regulation No. 2271/96 of 22 November 1996 emphasized that extraterritorial application of laws, regulations, and other legislative instruments which purport to regulate activities of natural and legal persons under the jurisdiction of its Member States violate international law and impede the attainment of the objective of free movement of capital between its Member States and third countries. It further states that such laws, regulations and other legislative instruments, which by their extra-territorial application purport to regulate activities of natural and legal persons, "affect or are likely to affect the established legal order and have adverse effects on the interests of the Community and the interests of natural and legal persons exercising rights under the Treaty establishing the European Community."

Article 1 of the Regulation adopted by the European Council provides protection against and counteracts the effects of extraterritorial application of the (i) National Defense Authorization Act for Fiscal Year 1973, Title XVII "Cuban Democracy Act 1992"; (ii) Cuban Liberty and Democratic Solidarity Act of 1996; (iii) Iran and Libya Act of 1996, and (iv) Code of Federal Regulations Chapter V (7.1.95 edition) Part

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[88] See the text of the European Union Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act in 35 *International Legal Materials* (1996) p.397.

515 – Cuban Assets Control Regulations, subparts B (Prohibitions), E (Licenses, Authorizations and Statements of Licensing Policy) and G (Penalties).[89]

GROUP OF 77

The Ministerial Declaration of the Group of 77 adopted at Midrand, South Africa, on 28 April 1996 during the Ninth Session of the UNCTAD, *inter alia* observed that although the Uruguay Round Agreements and the establishment of the World Trade Organization (WTO) had boosted confidence in the multilateral trading system, its credibility and sustainability are being threatened by emerging recourse to unilateral and extra-territorial measures. The Declaration emphasized that environmental and social conditionalities should not constitute new obstacles to market access for developing countries. That Declaration had also expressed concern at the "continuing use of coercive economic measures against developing countries through, *inter alia*, unilateral economic and trade sanctions which are in clear contradiction with international law."[90]

The Group of 77 had at Midrand objected to the new attempts aimed at extraterritorial application of domestic law, which "constitutes a flagrant violation of the United Nations Charter and of WTO rules."

NON-ALIGNED COUNTRIES

The Eleventh Conference of the Heads of State or Government of the Non-Aligned Countries held in Cartagena de Indias, Colombia, in October 1995 had, *inter alia*, "condemned the fact that certain countries, using their predominant position in the world economy, continue to intensify their coercive measures against developing countries, which are in clear contradiction with international law, such as trade restrictions, blockades, embargoes and freezing of assets with the purpose of preventing these countries from exercising their right to fully determine their political, economic and social systems and freely expand their international trade. They deemed such measures unacceptable and called for their immediate cessation."

The Eleventh Conference of the Heads of State or Government of the Non-Aligned Countries had called upon the developed countries "to put an end to all political conditionalities to international trade, development assistance and investment, as they are fully in contradiction with the universal principles of self-determination, national sovereignty and non-interference in internal affairs."

The Eleventh Conference of the Heads of State or Government of the Non-Aligned Countries had also called upon the Government of the United States of

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[89] For the full text of the European Council: Regulation (EC) No. 2271/96, Protection Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country of 22 November 1996, see 36 *International Legal Materials* (1997) p.125.

[90] See the Ministerial Declaration of the Group of 77, Midrand, South Africa, 28 April 1996, in the *Report of the United Nations Conference on Trade and Development on its Ninth Session*, Midrand, South Africa, 27 April-11 May 1996. Doc.TD/378 p.89 at 90.

America to "put an end to the economic, commercial and financial measures and actions which in addition to being unilateral and contrary to the Charter and international law, and to the principles of neighbourliness, cause huge material losses and economic damage."

More recently, the Twelfth Conference of the Foreign Ministers of the Non-Aligned Countries held in New Delhi in April 1997, *inter alia*, called upon all States to refrain from adopting or implementing extra-territorial or unilateral measures of coercion as means of exerting pressure on non-aligned and developing countries. They noted that measures such as Helms-Burton and Kennedy-D'Amato Acts constitute violations of international law and the Charter of the United Nations, and called upon the international community to take effective action in order to arrest this trend.

## ORGANIZATION OF ISLAMIC CONFERENCE

Like the Non-Aligned Movement, the Organization of [the] Islamic Conference (OIC) has rejected extra-territorial application of domestic law as illegal and unacceptable. The Preparatory Meeting for the Twenty-fourth OIC Ministerial Conference adopted a similar position. The Eighth Islamic Summit Conference held in Tehran in December 1997 declared its firm commitment to the rejection of unilateral and extra-territorial law. The Final Declaration of the Eighth OIC Summit held in Tehran, *inter alia*, rejected unequivocally the "unilateralism and extra-territorial application of domestic law" and urged all States to "consider the so-called D'Amato Act as null and void."

## THE IBER-AMERICAN SUMMIT CONFERENCE

In November 1996, leaders of Latin America, Spain and Portugal denounced the sanctions as violating international law at [the] Iber-American Summit Conference held in Chile. The resolution of the Conference was based on the opinion of the Inter-American Juridical Committee. In its opinion of 23 August 1996 [the] Inter-American Juridical Committee had, *inter alia*, observed that:

> "Except where a norm of international law permits, the State may not exercise its power in any form in the territory of another State. The basic premise under international law for establishing legislative and judicial jurisdiction is rooted in the principle of territoriality."[91]

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[91] See the Opinion of the Inter-American Juridical Committee in Response to Resolution AG/DOC.3375/96 of the General Assembly of the organization, entitled 'Freedom of Trade and Investment in the Hemisphere' in 35 *International Legal Materials* (1996) p.1329 at 1333.

B annex: **Report of the Rapporteur Dr.V.S. Mani on the Seminar on Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties**, Tehran, 24-25 January 1998

1. ...

*I. Introduction*

2. The Seminar was participated in by delegations from sixteen Member Countries of the AALCC, seven Observer delegates, and seven experts, three of whom are from non-Member Countries. One expert could not attend but sent his paper for the Seminar, while the seven experts who attended made presentations at the Seminar.

3. The present report seeks to portray an overview of the Seminar in terms of the major issues raised, broad areas of agreement, the few points of disagreement, State responses to unilateral sanctions imposed through extraterritorial application of national legislations, and the further work to be pursued in [the] study and elaboration of rules.

*II. The issues*

4. The deliberations at the Seminar focused on a range of legal and policy aspects of the subject mainly in relation to two US enactments, namely, the Helms-Burton Act, 1966 and the D'Amato Act, 1966, although references were also made to some of the earlier US laws such as the anti-trust legislation, the US Regulations Concerning Trade with [the] USSR, 1982, and the National Defence Authorization Act, 1991 (i.e. the Missile Technology Control Regime – MTCR – Law).

5. The legality of the two 1966 US enactments was examined in terms of their conformity with the peremptory norms of international law, the law relating to countermeasures, the law relating to international sanctions, principles of international trade law, the law of liability of States for injurious consequences of acts not prohibited by international law, [the] impact of unilateral sanctions on the basic human rights of the people of the target state, and issues of conflict of laws such as non-recognition, *forum non conveniens* and other aspects of extraterritorial enforcement of national laws.

6. At least two of the presentations expounded the policy implications and foundations of the Helms-Burton Act and the D'Amato Act. They also analyzed the major provisions of these statutes [and] examined their international legal validity.

*III. Broad areas of agreement*

7. There was general agreement that the validity of any unilateral imposition of economic sanctions through extra-territorial application and [*sic*;of?] national legis-

lation must be tested against the accepted norms and principles of international law. The principles discussed included those of sovereignty and territorial integrity, sovereign equality, non-intervention, self-determination, and the freedom of trade. It was generally agreed that the Helms-Burton Act and the D'Amato Act in many respects contravened these basic norms. The right to development and the permanent sovereignty over natural resources were specifically mentioned, and it was argued that the two enactments impinged on these principles as well.

8. While discussing the law relating to countermeasures, it was generally agreed that the rules of prohibited countermeasures as formulated by the International Law Commission in its draft articles on State Responsibility must apply to determine the legality of countermeasures purported to be effected by the extraterritorial application of the two impugned US statutes. These rules include the prohibition of injury to third States, the rule of proportionality, and also the other rules relating to prohibited countermeasures incorporated in Article 13 of the ILC draft articles.
9. While discussing countermeasures, it was emphasized that the presiding peremptory norm must be the peaceful settlement of disputes. All States have an obligation to seek settlement of their international disputes through peaceful means, an obligation to continue to seek such settlement, an obligation not to aggravate the dispute pending peaceful resolution, and an obligation not to resort to countermeasures until after all reasonably possible methods of peaceful settlement have failed.

10. The ensuing discussion also highlighted the interplay between countermeasures and non-intervention, and between countermeasures and unilateral imposition of economic sanctions.

11. There was also general agreement that countermeasures could not be a facade for unilateral imposition of sanctions in respect of matters that fell within the purview of Chapter VII of the Charter of the United Nations or the sanctions competence of other international organizations. A State could not take the law into its own hands where an organization had competence to decide whether or not sanctions should be issued. The differences between countermeasures and sanctions of the nature of international sanctions should be recognized, it was argued.

*IV. Points of disagreement*

12. The Seminar revealed three main points of disagreement. First, whether the subject should be confined to secondary sanctions through extraterritorial application of national laws. There was a view held by an overwhelming majority of the participants that the delegate [*sic*] should encompass all legal aspects of unilateral economic sanctions imposed through extraterritorial application of national legislation. The reasons in support of this proposition were given at two levels. First, it was pointed out that some of the Member States were themselves targets for [*sic*] such legislation. Second, it was also contended, the distinction between the target State and the third State was often not maintainable in terms of the basic legality of the sanctioning

legislation. The opposite view was that the subject should be confined in terms of the impact of unilateral sanctions on third States, since it was clearly identifiable and separable from the impact on the target State.

13. Second, there was also a disagreement on the distinction between the prescriptive jurisdiction and the enforcement jurisdiction of every State. A minority view argued that what mattered for State responsibility was violation of international law by a State under its enforcement jurisdiction. Passing a piece of domestic legislation, even if purported to be enforced but not yet enforced, in itself did not invite State responsibility. The majority view, however, was that a national legislature could also involve State responsibility, by directing action by national authorities. Also, even a threat of sanctions could cause injury to the economy of another State. At any rate, it was pointed out, the concept of reparation must wipe out all consequences of an illegal act, including its ultimate source.

14. Third, the debate revealed a further disagreement concerning the applicability of WTO disputes settlement procedure to resolve disputes relating to the Helms-Burton Act and the D'Amato Act in their extra-territorial application. One view was that the United States could, as it did, make its national security interests in defence of its unilateral action and that therefore the WTO fora would not have the jurisdiction to deal with the disputes. The contrary view was that the WTO Disputes Settlement Body and the Council had competence to interpret the provisions of the Agreements. The economic sanctions, according to this view, by definition invited the disputes settlement competence of WTO.

*V. State responses to unilateral sanctions through extra-territorial application of US national legislation*

15. The Seminar deliberations touched on a range of State responses to counter the possible impact of the US legislation in particular and the unilateral imposition of sanctions through extraterritorial application of domestic legislation in general. Detailed references were made to the response of the Inter-American System and the European Union. The measures discussed encompassed "blocking" legislation, statutes with 'drawback' provisions and laws providing for compensation claims, all at the national level. At the international level the responses noted included diplomatic protests, negotiations for exemptions, waivers in application of the projected sanctions, negotiations for settlement of disputes, use of WTO avenues, and measures to influence the drafting of legislation in order to prevent its adverse extra-territorial impact. It was also suggested, as a lego-political response, that an old agenda item calling [*sic*; called?] for a study of the distinction between acts in pursuance of the right of self-determination and terrorist acts.

*VI. Future work to be undertaken*

16. A number of proposals was made by the participants for [the] AALCC to pursue. The Rapporteur takes the liberty of reformulating some of them and adding some of his own.

17. The proposals would include formulation of principles, and sponsorship of studies.

A. *Formulation of principles/rules*

18. The Rapporteur proposes that:

(i) AALCC along with ILC undertake formulation of principles/rules relating to the *extraterritorial application of national laws, in all its implications.*
(ii) There is a need for a second look at the ILC formulation of principles concerning countermeasures *vis-à-vis* sanctions. The ILC formulation of countermeasures seems to leave this aspect open. A State may violate (a) an obligation *erga omnes* or (b) an obligation *erga omnes* but injuring another State, or (c) an obligation *vis-à-vis* another State: which of these situations would give rise to countermeasures? A clarification on this issue will help in determining the permissible countermeasures, and the relation between them and sanctions.

Similarly, the relationship between countermeasures and other peremptory norms of international law such as non-intervention and peaceful settlement of international disputes needs to be further examined.

B. *Proposals for studies*

19. It is also suggested that AALCC undertake three studies:

(i) A study on unilateral sanctions, countermeasures and disputes settlement procedures offered by the WTO group of agreements;
(ii) A study of the concept of abuse of rights in international law, preferably under the presiding norm of good faith, with[in the] context of exercised extraterritorial application of national laws in pursuit of national policy objectives; and
(iii) A study of the impact of unilateral sanctions on trade relations between States.

20. No doubt the above proposals, if approved by the Members of the AALCC, would require close cooperation of the Members with the AALCC Secretariat.

C. Secretariat Study: WORLD TRADE ORGANIZATION: DISPUTE SETTLEMENT MECHANISM

***Overview of GATT practice***

...

**The Working of the WTO Dispute Settlement System since its Establishment: A Survey**

Since the entry into force of the WTO Agreement on 1 January 1995, and until the end of August 1997, the DSB [Dispute Settlement Body] was notified of almost 100 requests for consultations pursuant to paragraph 4 of the WTO Dispute Settlement Understanding. In comparison with the GATT's dispute resolution mechanism (which dealt with some 300 disputes – an average of six disputes a year), the record of the WTO dispute settlement mechanism (averaging 40 disputes annually) has been hailed ... [as] represent[ing] a vote of confidence by WTO Members in the improved dispute settlement procedures of the new organization. This is part of the brief endeavours to provide a preliminary survey of the working with the WTO dispute settlement system since its establishment.

**Adoption of reports by the DSB**: The DSB, which is the final decision-making body on all disputes within the WTO framework, has adopted the following seven reports (covering the period between January 1995 ... [and] September 1997):

1. *United States – Standards for Reformulated and Conventional Gasoline, complaints by Venezuela and Brazil.* A single panel, established to consider both complaints, found the regulation to be inconsistent with GATT Article 111:4 and not to benefit from an Article XX Exception. Following an appeal by United States, the Appellate Body issued its report, modifying the panel report on the interpretation of GATT Article XX(g), but concluding that the exception provided by Article XX was not applicable in this case. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 20 May 1996.

2. *Japan – Taxes on Alcoholic Beverages, complaints by the European Communities (EC), Canada and the United States.* A joint panel was established by the DSB on 27 September 1995. The panel report found the Japanese tax system to be inconsistent with GATT Article 111:2. Following an appeal by Japan, the Appellate Body reaffirmed the panel's conclusion, but pointed out the areas where the panel had erred in its legal reasoning. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 1 November 1996.

3. *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, complaint by Costa Rica.* The panel found that the US restraints were not valid.

On 11 November 1996, Costa Rica notified its decision to appeal against certain aspects of the panel report. The Appellate Body allowed the appeal. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 25 February 1997. On 10 April 1997, the US informed the DSB that the measure had expired on 27 March 1997 and not renewed.

4. *Brazil – Measure Affecting Desiccated Coconut, complaint by Philippines.* The report of the panel concluded that the provisions of the agreements relied on by the claimant were inapplicable to the dispute. Following the appeal by Philippines, the Appellate Body upheld the findings of the panel. The Appellate Body Report, together with the panel report as upheld by the Appellate Body Report, was adopted by the DSB on 20 March 1997.

5. *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses, complaint by India.* The panel established on 17 April 1996 found that the US safeguard measure violated the provisions of the Agreement on Textiles and Clothing, and the GATT 1994. On 24 February 1997, India notified its intention to appeal. The Appellate Body upheld the panel's decisions on those issues of law and legal interpretations that were appealed against. The Appellate Body Report, together with the panel report as upheld by the Appellate Body Report, was adopted by the DSB on 23 May 1997.

6. *Canada – Certain Measures Concerning Periodicals, complaint by the United States.* The panel established on 19 June 1996 found ... the measure applied by Canada to be in violation of GATT rules. Following an appeal by Canada, the Appellate Body upheld the panel's findings and conclusions on the applicability of GATT 1994 to Part V.1 of Canada's Excise Tax Act, but reversed the panel's finding that Part V.1 of the Act was inconsistent with the first sentence of Article III:2 of GATT 1994. The Appellate Body further concluded that Part V. 1 of the Excise Act was inconsistent with the second sentence of Article III:2 of GATT 1994. The Appellate Body also reversed the panel's conclusion that Canada's funded postal rate scheme was justified by Article III:8(b) of GATT 1994. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 30 July 1997.

7. *European Communities – Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico, and the United States.* The panel established on 8 May 1996 found that the EC's banana import regime and the licensing procedures for the importation of bananas in this regime are inconsistent with various provisions of the GATT, the Import Licensing Agreement and the GATS. Following an appeal from the EC, the Appellate Body upheld most of the panel's findings that the EC regime was inconsistent with the WTO rules. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 25 September 1997.

**Negotiated settlements**: An interesting feature of the WTO dispute settlement practice is that about one quarter of the disputes have not progressed to the adjudication phase, but were resolved by the parties themselves at the consultation stage. This outcome amply justifies the decision of the drafters that the interpolation of a negotiation mechanism along with [a] formal adjudication process would render the dispute settlement mechanism more effective. The instances of such negotiated settlements are listed below:

| | *Complainant* | *Subject of complaint* | *Status* |
|---|---|---|---|
| 1. | Singapore | Malaysia: Prohibition of imports of polyethylene | Complaint withdrawn |
| 2. | United States | Korea: Measures concerning the shelf-life of products | Bilateral solution notified |
| 3. | Japan | US: Imposition of import duties on automobiles from Japan | Bilateral solution notified |
| 4. | Canada | EC: Trade description of scallops | Solution notified |
| 5. | Canada | EC: Duties on imports of cereals | Appears settled |
| 6. | Peru | EC: Trade description of scallops | Solution notified |
| 7. | United States | EC: Duties on imports of grains | Panel request withdrawn |
| 8. | Chile | EC: Trade description of scallops | Solution notified |
| 9. | EC | Japan: Measures affecting purchase of telecom equipment | Appears settled |
| 10. | India | Poland: Import regime for automobiles | Bilateral solution notified |
| 11. | Canada | Korea: Measures concerning bottled water | Bilateral solution notified |
| 12. | United States | Japan: Measures concerning protection of sound recordings | Bilateral solution |
| 13. | India | US: Measures affecting imports of women's wool coats | Measures removed |
| 14. | Argentina, Australia, Canada, New Zealand, Thailand, US | Hungary: Export subsidies of agricultural products | Solution notified |

| | *Complainant* | *Subject of complaint* | *Status* |
|---|---|---|---|
| 15. | United States | Pakistan: Patent protection for pharmaceutical and agricultural chemical products | Bilateral solution notified |
| 16. | United States | Portugal: Patent protection under Industrial Protection Act | Bilateral solution notified |
| 17. | EC | US: The Cuban Liberty and Democratic Solidarity Act | Panel suspended solution notified |
| 18. | EC | US: Tariff increases on products from EC | Measures terminated |
| 19. | US | Turkey: Taxation of foreign film revenues | Bilateral solution notified |
| 20. | Mexico | US: Anti-dumping investigations on fresh and chilled tomatoes | Appears settled |
| 21. | US | Australia: Textile, clothing and footwear import credit scheme | Appears settled |
| 22. | EC | Japan: Procurement of a navigational satellite | Bilateral solution notified |

Increased participation by developing countries: At much variance with the GATT practice, a new legal development in the WTO dispute settlement system is its frequent use by developing countries. As of August 1997, the developing countries have filed 31 cases and have been the subject of 37 complaints. Among the AALCC Member States, Japan, India, and Thailand have been the leading Complainants. The list of disputes wherein an AALCC Member State was involved whether as a complainant or as a subject of a Complaint is given below:[92]

**Participation of AALCC Member States in WTO Dispute Settlement Process**

| | *Complainant* | *Subject of the complaint* |
|---|---|---|
| 1. | Singapore | Malaysia: Prohibition of imports of polyethylene and polypropylene |
| 2. | United States | Korea: Measures concerning the testing and inspection of agricultural products |

[92] *WTO Focus*, August 1997.

| | *Complainant* | *Subject of the complaint* |
|---|---|---|
| 3. | United States | Korea: Measures concerning the shelf-life of products |
| 4. | Japan | US: Imposition of import duties on automobiles from Japan |
| 5. | EC | Japan: Taxes on alcoholic beverages |
| 6. | Canada | Japan: Taxes on alcoholic beverages |
| 7. | United States | Japan: Taxes on alcoholic beverages |
| 8. | Thailand | EC: Import duties on rice |
| 9. | India | Poland: Import regime for automobiles |
| 10. | Canada | Korea: Measures concerning bottled water |
| 11. | Philippines | Brazil: Measures affecting desiccated coconut |
| 12. | United States | Japan: Measures concerning protection of sound recordings |
| 13. | Hong Kong | Turkey: Restrictions on imports of textiles and clothing products |
| 14. | Sri Lanka | Brazil: Measures affecting desiccated coconut and coconut milk powder |
| 15. | India | US: Measures affecting imports of women's and girls' wool coats |
| 16. | India | US: Measures affecting imports of women's and girls' wool coats |
| 17. | India | Turkey: Restrictions on imports of textiles and clothing products |
| 18. | Thailand and others | Hungary: Export subsidies of agricultural products |
| 19. | United States | Pakistan: Patent protection for pharmaceutical and agricultural chemical products |
| 20. | EC | Korea: Laws, regulations and practices in the telecommunications sector |
| 21. | United States | Korea: Measures concerning inspection of agricultural products |
| 22. | EC | Japan: Measures concerning sound recordings |
| 23. | United States | Turkey: Taxation of foreign film revenues |
| 24. | United States | Japan: Measures affecting consumer photographic film and paper |

| | *Complainant* | *Subject of the complaint* |
|---|---|---|
| 25. | United States | Japan: Measures affecting distribution services |
| 26. | Thailand | Turkey: Restrictions on imports of textiles and clothing products |
| 27. | United States | India: Patent protection for pharmaceutical and agricultural chemical products |
| 28. | Japan | Brazil: Certain automotive investment measures |
| 29. | EC | Indonesia: Certain measures affecting the automobile industry |
| 30. | Japan | Indonesia: Certain measures affecting the automobile industry |
| 31. | Malaysia, Thailand, India, Pakistan | US: Import prohibition of certain shrimp and shrimp products |
| 32. | US | Indonesia: Certain measures affecting the automobile industry |
| 33. | Philippines | US: Import prohibition of certain shrimp and shrimp products |
| 34. | Japan | Indonesia: Certain automotive industry measures |
| 35. | EC | Japan: Measures affecting imports of pork |
| 36. | EC | Japan: Procurement of a navigational satellite |
| 37. | US | Philippines: Measures affecting pork and poultry |
| 38. | EC | Korea: Taxes on alcoholic beverages |
| 39. | United States | Japan: Measures affecting agricultural products |
| 40. | EC | India: Patent protection for pharmaceutical and agricultural chemical products |
| 41. | United States | Korea: Taxes on alcoholic beverages |
| 42. | Korea | US: Imposition of anti-dumping duties on imports of colour television receivers |
| 43. | United States | India: Quantitative restrictions on imports of agricultural, textile and industrial products |
| 44. | Australia | India: Quantitative restrictions on imports of agricultural, textile and industrial products |

| | *Complainant* | *Subject of the complaint* |
|---|---|---|
| 45. | Canada | India: Quantitative restrictions on imports of agricultural, textile and industrial products |
| 46. | New Zealand | India: Quantitative restrictions on imports of agricultural, textile and industrial products |
| 47. | Switzerland | India: Quantitative restrictions on imports of agricultural, textile and industrial products |
| 48. | EC | India: Quantitative restrictions on imports of agricultural, textile and industrial products |
| 49. | Japan | US: Measures affecting government procurement |
| 50. | EC | Korea: Definitive safeguard measure on imports of certain dairy products |
| 51. | Korea | US: Anti-dumping duty on dynamic random access memory semiconductors originating from Korea |

## D. Secretariat Study: EXTRATERRITORIAL APPLICATION OF NATIONAL LEGISLATION: SANCTIONS IMPOSED AGAINST THIRD PARTIES

...

The preliminary study prepared by the Secretariat [see 7 *AsYIL* 35 *et seq.*] and considered at the Thirty-sixth Session (Tehran, 1997) of the AALCC had pointed out that in the claims and counter-claims that had arisen with respect to the exercise of extraterritorial jurisdiction, the following principles have been invoked: (i) principles concerning jurisdiction; (ii) sovereignty, in particular economic sovereignty, and non-interference; (iii) genuine or substantial link between the State and the activity regulated; (iv) public policy and national interest; (v) lack of agreed prohibitions restricting [a State's] right to extend its jurisdiction; (vi) reciprocity or retaliation; and (vii) promotion of respect for law. Notwithstanding the national interests of the enacting State, grave concern was expressed on the promulgation and application of municipal legislation whose extraterritorial aspects affect the sovereignty of other States.

While a growing number of other States have applied their national laws and regulations on [an] extraterritorial basis, such fora as the General Assembly of the United Nations, the Group of 77, the Organization of Islamic Countries, the Inter-American Juridical Committee and the European Economic Community have in various ways expressed concern about [the] promulgation and application of law and regulations whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities and persons under their jurisdiction, as well as the freedom of trade and navigation.

The study prepared by the Secretariat drew attention to the opinions of such august bodies as the Inter-American Juridical Committee, the Juridical Body of the Organization of American States[93] and the International Chamber of Commerce[94]3.
...

It [is] recalled in this regard that the AALCC study on the "Elements of Legal Instruments on Friendly and Good-Neighbourly Relations Between the States of Asia, Africa and the Pacific" had, *inter alia*, listed 34 norms and principles of international law, conducive to the promotion of friendly and good-neighbourly relations. The 34 principles enumerated, *inter alia*, included: (i) independence and State sovereignty; (ii) territorial integrity and [the] inviolability of frontiers; (iii) legal equality of States; (iv) non-intervention, overt or covert; (v) non-use of force; (vi) peaceful settlement of disputes; (vii) peaceful coexistence; and (viii) mutual cooperation.[95]

The study also pointed out that the use of unilateral action, particularly those with extraterritorial effects, can impede the efforts of developing countries in carrying out trade and macro-economic reforms aimed at sustained economic growth.
...

In the course of deliberations on this item at the Thirty-sixth Session [see 7 *AsYIL* pp.366-7] a view was expressed that sanctions could only be imposed by the Security Council after it had determined the existence of a threat to peace, a breach of [the] peace and act of aggression, and that unilateral sanctions were violative of the Vienna Declaration and Programme of Action of 1993[96] which, *inter alia*, recognize the right to development. It was pointed out that unilateral sanctions were violative of the principle of non-intervention.

It was also stated that national laws having extraterritorial effect had no basis in international law and that such laws primarily aimed at individuals or legal persons were violative of the principle of non-intervention, political independence and territorial sovereignty enshrined in several treaties. Such acts, it was observed, were aimed at weaker developing countries.

Different views were expressed, such as: "extraterritorial application of national legislation would affect international trade" and "in a changing scenario of globalization of trade and privatization of economies, extraterritorial application of national laws would affect interdependence".

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[93] For details see 35 *International Legal Materials* (1996) p.1322.

[94] DIETER LANGE AND GARY BORNE (eds.): *The Extraterritorial Application of National Laws* (ICC Publishing S.A.1987).

[95] AALCC Secretariat Study on "Elements of a Legal Instrument on Friendly and Good Neighbourly Relations between States of Asia, Africa and the Pacific". Reprinted in *AALCC Combined Report of the Twenty Sixth to Thirtieth Sessions* (New Delhi, 1992) p.192.

[96] The World Conference on Human Rights held in Vienna in 1993 had, *inter alia*, reaffirmed the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

Also, that the extraterritorial application of national legislation infringed the sovereign right of States, violated the principles of non-intervention, and affected the economic and political relations among States. Elaborating that sanctions would disturb the North-South relations, the Member States were called upon to voice their protest.

The United Nations General Assembly "Friendly Relations Declaration" was recalled and it was stated that although no State had the right to intervene directly or indirectly in the internal or external affairs of other States and every State had an inalienable right to choose its political, economic, social, and cultural systems without interference in any form by another State, large and powerful States were using it as a weapon. It was pointed out that a particular country had within a short span of four years imposed around sixty-four unilateral sanctions against thirty-five countries. In the present era, the notion of interdependency among States had become quite obvious and the principles of non-intervention and non-aggression, the two principles of the well-known five principles of peaceful coexistence, have become all the more obvious and were universally accepted by nations large or small, rich or poor. It was categorically stated that extraterritorial application of national laws had no basis whatsoever, legal, moral, or political. It blatantly violated the rules of international law and the rules of civilised law, and amounts to the infringement of [the] internal affairs of other countries.

It was observed that the Helms-Burton Act relating to trade with Cuba [and] the Kennedy-D'Amato Act relating to Libya, Iran, and Iraq were examples of extraterritorial application of national law in the form of sanctions against third parties. Even though superficially one might think that these national laws relate to actions by individuals, their object is the imposition of sanctions against States.

...

It may be recalled that while introducing the item at the Thirty-sixth Session (Tehran, 1997), the then Assistant Secretary-General had observed that although jurisdiction in matters of public law character is territorial in nature, some States are, however, known to give extraterritorial effect to their municipal legislation, which has resulted in conflict of jurisdictions and resentment on the part of other States. Civil Law countries exercise jurisdiction over their nationals for offenses committed even while they were abroad. Among the Common Law countries, [the] United Kingdom law allows such jurisdiction in select cases. The United States of America, however, exercises jurisdiction in a wide variety of cases. The National Association of Manufacturers has stated that "resort to unilateral sanctions may be justified in some cases; it may be rationalized in many more. But it can rarely, if ever, be explained."

The United States of America has armed itself with a plethora of laws which have hitherto allowed the Administration to extend its jurisdiction and impose uni-

lateral sanctions against more than 70 States.[97] According to [a] report of the Latin American Economic System (SELA), which groups 28 Latin American and Caribbean States, 76 States put up with or are seriously threatened by one or more trade sanctions. Unilateral trade sanctions severely threaten or punish 68 per cent of the world population. The President's Export Council report on sanctions listed 73 States that, as of January 1997, had been subjected to some form of unilateral sanctions.

A report commissioned and published by the United States National Association of Manufacturers (NAM) had, in March 1997, revealed that "from 1993 through 1996, 61 US laws and executive actions were enacted authorizing unilateral sanctions for foreign policy purposes. Thirty-five countries were specifically targeted".[98] The report had concluded that all economic sanctions "should be multilateral except in the most unusual and extreme circumstances".

Senator Jesse Helms, one of the promoters of the Helms-Burton Act, has, however, questioned the validity of the report of the National Association of Manufacturers.[99] According to ... [Helms], "between 1993 and 1996, the Congress passed and the President signed a grand total of five new sanctions laws: the Nuclear Proliferation Prevention Act, 1994; the Cuban Liberty and Democratic Solidarity Act of 1996; the Antiterrorism and Effective Death Penalty Act of 1996; the Iran Libya Sanctions Act, 1996; and the Free Burma Act, 1996." He goes on to emphasize that during "the same period, the President imposed just four new sanctions: declaring Sudan a terrorist state; banning imports of munitions and ammunition from China; tightening travel-related restrictions, cash remittance levels, and the sending of gift parcels to Cuba (restrictions that have since been lifted); and imposing a ban on new contractual agreements or investments in Iran".[100] On the other hand, the former Secretary of State, Henry A. Kissinger, has observed that "these congressionally mandated sanctions are threatening to place American policy into a straitjacket".

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[97] The targeted States include Afghanistan, Algeria, Angola, Armenia, Azerbaijan, Bahrain, Bangladesh, Belarus, Belize, Burma [*sic*], Burundi, Cambodia, Canada, China, Colombia, Costa Rica, Cuba, Djibouti, Egypt, Gambia, Georgia, Guatemala, Haiti, Honduras, Islamic Republic of Iran, Iraq, Italy, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Lebanon, Liberia, Libya, Maldives, Mauritania, Mexico, Moldova, Morocco, Nigeria, North Korea, Oman, Pakistan, Panama, Paraguay, Qatar, Romania, Russia, Rwanda, Saudi Arabia, Somalia, Sri Lanka, Sudan, Syria, Taiwan, Tajikistan, Tanzania, Thailand, Turkmenistan, Uganda, Ukraine, United Arab Emirates, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Federal Republic of Yugoslavia, and Zaire. In addition to these States unilateral sanctions have also been targeted at other newly independent States of the erstwhile Soviet Russia [*sic*] and India. in addition to these States, Indonesia and Malaysia are considered to be among the possible targets.

[98] See *A Catalog of New US Unilateral Economic Sanctions for Foreign Policy Purposes 1993-96 (with Analysis and Recommendations)*, March 1997. The Catalog was prepared under the direction of PROFESSOR BARRY CARTER of Georgetown University Law School. The analysis and recommendations were prepared by Marino Marcich of the NAM Trade and Technology Policy Department. For the text of the Catalog visit http://www.usaengage.org/studies/nam.html.

[99] The list of administrative actions taken by individual government agencies was compiled by the Georgetown University Law Center.

[100] SENATOR JESSE HELMS: "What Sanctions Epidemic?: U.S. Business Curious Crusade", *Foreign Affairs*, January-February 1999.

*Reasons for the Imposition of Unilateral Sanctions*

It may be stated that the reasons for the imposition of unilateral sanctions have ranged from boycott activity[101] to the issue of [workers'] rights,[102] and have hitherto included such other issues as communism,[103] transition to democracy,[104] environmental activity, expropriation,[105] harbouring war criminals, human rights,[106] market reform, military aggression, narcotics activity, political stability, [and the] proliferation of weapons of mass destruction and terrorism.[107] The Federal legislation invoked to impose unilateral sanctions and/or impose secondary boycott have included the Andean Trade Preference Act; the Antiterrorism and Effective Death Penalty Act, 1996 (Antiterrorism, 1996); the Arms Export Control Act (AECA); the Atomic Energy Act; the Cuban Democracy Act, 1992; the Cuban Liberty and Democratic Solidarity Act, 1996 (Helms-Burton or LIBERTAD Act); the Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (Commerce Appropriations, 1990); the Department of Defense Appropriations Act, 1987 (Defense Appropriations, 1987); the Export Administration Act; the Export-Import Bank Act ("Ex-Im"); the Fisherman's Protective Act, 1967; the Foreign Assistance Act (FAA); [the] Foreign Relations Act; the Foreign Relations Authorization Act; the Foreign Operations, Export, Financing and Related Programs Appropriation Act, 1995; the General System of Preferences Renewal Act (GSP); the High Seas Drift Net Fisheries Enforcement Act (Drift Net Act); the Internal Emergency Economic Powers Act (IEEPA); the Internal Revenue Code; the Internal Security and Development Cooperation Act, 1985 (ISDCA); the International Financial Institutions Act; the Iran-Iraq Non-Proliferation Act, 1992; the Iran and Libya Sanctions Act, 1996; the Iraq Sanctions Act, 1990; the Marine Mammal Protection Act, 1972 (Marine Act); the Narcotics Control Trade Act;[108] the National Defense Authorization Act, 1996 (Defense Authorization Act, 1996); the Nuclear Non-Proliferation Act, 1994 (NNPA); the Omnibus Appropriation Act, 1997 (1997 Omnibus); the Spills of War Act; the Trade Act, 1974 (Trade Act); [the] Trading with the Enemy Act (TWEA).

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[101] See the Foreign Relations Act 1994.

[102] See the Andean Trade Preference Act.

[103] Aimed at Cuba and North Korea. See the Cuba Regulation and the North Korea Regulations.

[104] See the Cuban Democracy Act 1992.

[105] The Helms-Burton Act 1996.

[106] During 1993-96, human rights and democratization were the most frequently cited objectives [of] foreign policy and thirteen countries were specifically targeted, with 22 measures adopted.

[107] The Iran-Libya Sanctions Act 1996. The former Representative TOBY ROTH criticized the Iran-Libya Sanctions Act as "good politics ... but bad law". Its only effect, he said, "so far had been to unify the European Union, all 15 members, against the US policy toward Iran and Libya".

[108] The uncertified drug producing/transit countries are Afghanistan, Burma (*sic*), Colombia, Iran, Nigeria and Syria.

*Executive Orders/Presidential Determinations*

During 1997-8 there have been four instances of unilateral imposition of sanctions by Executive Orders and Presidential Determinations. These include Executive Order 13047 of 21 May 1997 invoking a prohibition on new investment in Burma (Myanmar); Executive Order 13067 of 3 November 1997, imposing a comprehensive trade embargo on Sudan; Presidential Determination No. 98-22 of 13 May 1997 prohibiting the sale of specific goods and technology, and United States Bank loans to the Government of India; terminating sales of defence articles and design and construction equipment and services, and shutting down the Export-Import Bank (Ex-Im), Overseas Private Investment Corporation (OPIC) and TDA; and Presidential Determination No. 98-XX of 30 May 1998, prohibiting the sale of specific goods and technology and United States Bank loans to the Government of Pakistan, terminating sales of defence articles and design and construction equipment and services, and shutting down Ex-Im, OPIC and TDA.

*State and Local Sanctions Acts*

In addition to the Federal legislation, State and Local Governments have been increasingly inclined over the last year and a half to impose sanctions against foreign countries in response to human rights practices. Some twelve US States, Countries and cities have sought to establish their own measure against other Countries and have imposed restrictions against States ranging from Myanmar to Switzerland. Thus, following the imposition of United States investments sanctions on Myanmar in May 1997[109] a dozen or so local governments restricted the granting of public contracts to companies that do business with Myanmar. These include the Commonwealth of Massachusetts, the cities of San Francisco and Oakland, California, and several other Governments that have enacted "selective purchasing ordinances" against domestic and foreign companies that do business with Myanmar. Some States have been contemplating similar procurement restrictions against companies that deal with Indonesia.

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The "Massachusetts Burma Law" of 1996[110] was characterized by the United States District Court of the State of Massachusetts as infringing "on the Federal

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[109] See Executive Order 13047 of 20 May 1997. In imposing the investment ban the President is said to have exercised authority given by an amendment to the fiscal year 1997 Foreign Operations Appropriation Act.

[110] See Massachusetts Act of 25 June 1996. The State of Massachusetts admitted before the District Court of Appeal that the Statute "was enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policy".

Government's power to regulate foreign affairs". In reaching its conclusion the Court had, *inter alia*, relied on an *amicus curiae* brief filed by the European Union.[111]

In its *amicus curiae* brief the European Union had called to the Court's attention the following points: (i) the Massachusetts Burma Law interferes with the normal conduct of EU-US relations; (ii) the Massachusetts Burma Law has created a significant issue in EU-US relations including raising questions about the ability of the United States to honour international commitments it has entered into in the framework of the World Trade Organization (WTO); and (iii) failure to invalidate the Massachusetts Burma Law risks a proliferation of similar non-federal sanctions laws, aggravating these effects. As regards the first point it was stated that the Massachusetts Burma Law "constitutes a direct interference with the ability of the EU to cooperate and carry out foreign trade with the United States ... The Massachusetts Burma Law is thus aimed at influencing the foreign policy choices of the Union and its Member States, and at sanctioning the activities of EU companies which are not only taking place in a third Country but which are also lawful under EU and Member States' laws".

As to the impugned Massachusetts Burma Law having created an issue of serious concern in EU-US relations, the *amicus curiae* brief stated that the "Massachusetts Burma Law charts a very different course. It is a secondary boycott: an extraterritorial economic sanction that is targeted not at the regime, but at nationals of third countries that may do business with Burma".

Finally, the European Union expressed its concern that the failure to enjoin the Massachusetts Burma Law will lead to the proliferation of US State and Local sanctions laws, and stated that at least six US municipalities had enacted measures purporting to regulate business activities in Nigeria, Tibet, and Cuba, and eighteen States and Local Governments had considered or "were considering similar measures restricting business ties to Switzerland, Egypt, Saudi Arabia, Pakistan, Turkey, Iran, North Korea, Iraq, Morocco, Laos, Vietnam Indonesia or China". It emphasized that "the United States and the European Union had expended considerable effort in seeking to resolve their differences over US extraterritorial economic sanctions" and that "this effort has not yielded progress on the issue of extraterritorial sanctions" imposed by State and Local Governments, a shortcoming that is of considerable concern to the US [*sic*; EU?]. It went on to recall that in recognition of this danger of proliferation of sanctions measures, the EU-US agreed at the EU-US Summit on 18 May 1998 on a set of principles covering the future use of sanctions in the context of the Transatlantic Partnership on Political Cooperation. This included agreeing that the EU and the US "*will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required*

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[111] See the judgment of the Court of 4 November 1998 in *National Foreign Trade Council vs. Charles D. Baker, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts and Philmore Anderson III in his official capacity as a State Purchasing Agent for the Commonwealth of Massachusetts.*

*of its own economic operators* and that such sanctions will be targeted directly and specifically against those responsible for the problem.[112]

The validity of punitive measures against Myanmar adopted by State and Municipal Governments and ordinance in the United States have been analysed under various provisions of the United States Constitution and it has been said that such local measures are constitutionally infirm.[113] It has been pointed out in this regard that "Article VI of the Constitution provides that the laws and treaties of the United States are 'the Supreme Law of the Land' and prevail over, or pre-empt, State and Local enactments. Thus any local law that purports to regulate or govern a matter explicitly covered by federal legislation is pre-empted, even if it is an area otherwise amenable to state regulation".[114]

*The Banana War*

The United States had last year accused the European Union of not complying with a ruling of the World Trade Organization (WTO) calling upon it to change its banana import regime, which had been ruled illegal because it favoured the produce of African, Caribbean and Pacific States (hereinafter called the ACP States), and had discriminated against imports of fruit marketed mainly by United States companies in Latin America. The European Union on its part believes that it has rectified the situation by making changes to its regime with effect from 1 January 1999, but the amendments are seen as being derisory by the United States, which has argued that it is within its rights to retaliate.

In October 1998 the United States Administration announced a series of steps that would lead to the imposition of trade sanctions under Section 301 of the Trade Act of 1974 against the European Communities by March 1999 in retaliation for what the US claims to be an incorrect implementation of the DSB[115] recommendations in the banana dispute. The United States of America had announced retaliatory 100 per cent tariffs on 520 million dollars worth of imports of EC products should it find that the EC had failed to implement the DSB recommendations. A unilateral determination by the US Administration would violate the fundamental obligations of the WTO's Dispute Settlement Understanding. A unilateral decision to restrict imports from the EC would also violate substantive obligations such as those incorpor-

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[112] See the *Amicus Curiae* Brief of 13 August 1998 filed by the European Union in support of the Plaintiff, [the] National Foreign Trade Council, in *National Foreign Trade Council vs. Charles D. Baker and Philmore Anderson III.* Emphasis added.

[113] DAVID SCHMAHMANN AND JAMES FINCH: "The Unconstitutionality of State and Local Enactments in the United States Restricting Trade Ties with Burma", *Vanderbilt Journal of International Law* Vol.30 (1997).

[114] Ibid.

[115] The Complainants in the dispute before the Dispute Settlement Body of the WTO had included Ecuador, Guatemala, Honduras, Mexico, and the United States of America.

ated in Articles I, II, and XI of GATT 1994. An overwhelming majority of the WTO members[116] are opposed to US embarking on unilateral action on this issue.

The threat to retaliate against the EU results from a unilateral judgment that the EU has not complied with a WTO ruling "condemning" [the] EU banana import regime, and the conflict has raised serious issues of interpretation of WTO laws and brought to light ambiguities in the WTO rule book.

*Fifty-third Session of the General Assembly*

The General Assembly at its recently concluded Fifty-third Session had expressed its concern at the continued promulgation and application of laws and regulations the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction, and the freedom of trade and navigation. It took note of the declarations and resolutions of different intergovernmental forums, bodies and Governments that expressed the rejection by the international community and by public opinion of the promulgation and application of such regulations, and [...] reiterated its call to all States to refrain from promulgating and applying laws and measures the extraterritorial effects of which affect the sovereignty of other States [and] the legitimate interests of entities or persons, "in conformity with their obligations under the Charter of the United Nations and international law which, *inter alia*, reaffirmed the freedom of trade and navigation".[117]

*Comments and observations*

As the Catalog of New US Unilateral Economic Sanctions for Foreign Policy Purposes 1993-6 revealed, the United States is resorting increasingly to unilateral economic sanctions against a broad range of countries for a wide variety of reasons. Apart from the increase in the instances of unilateral imposition of sanctions has been [*sic*] the additional development of "secondary boycott measures, which extended the reach of the United States law to overseas companies doing business in the targeted countries". The unilateral imposition of sanctions is at the core of the problem of extraterritorial application of national legislation.

Owing to its extraterritorial reach the imposition of unilateral sanctions for foreign policy purposes has often caused a new set of commercial problems with allies, as it did in the instances of both the Helms-Burton Act and the D'Amato-Kenenedy Act. The abrogation, annulment, or revocation of extraterritorial provisions and Acts would require a new Act.

Just as the validity or constitutionality of municipal, local and state laws must be tested with[in] the framework and parameters of the Constitution of that State,

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[116] At present 133 States are Members of the World Trade Organization.

[117] See General Assembly Resolution 53/4 of 22 October 1998 on the "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba".

the *vires* of the national legislation which imposes unilateral sanctions and has extraterritorial reach must be examined in the context of the provisions of the Charter of the United Nations and other international instruments which that State has negotiated and ratified. The preliminary study prepared by the Secretariat had emphasized this point and had sought to demonstrate that national legislation with extraterritorial reach contravenes not one or two, but several norms and principles of contemporary international law.

Many of these international instruments had been negotiated, concluded, and brought into force to establish a rule-based system and to promote the rule of law in international relations. This is particularly true to [*sic*] international economic and trade relations where such legislation poses a challenge to the avowed objective of the international community to establish a rule-based system to ensure stability and predictability in international trade relations. National legislation with extraterritorial reach, explicit implicit [*sic*], undermines the further redevelopment and growth of the rule-based system that the members of the international community are endeavouring to evolve. Such legislation, apart from sapping the principle of rule of law in inter-state relations, poses a challenge nay [*sic*] a threat, to the avowed objective of the international community to make international law the language of international relations in the next millennia.

## E. REPORT OF THE RAPPORTEUR OF THE SPECIAL MEETING ON THE RESERVATION TO TREATIES held on 14 April 1998

...

The view was expressed that while the Vienna regime of reservations to treaties was based on the assumption that a multilateral treaty is in effect a combination of several bilateral treaty relationships, there were a certain category of treaties which, by the very nature of the subject matter addressed by them, did not admit of any reservations. Treaties relating to the protection and preservation of the environment [treaties], disarmament treaties, and human rights treaties were identified as the category of treaties which are applicable and binding upon not only the States Parties, but on all members of the international society. The United Nations Convention on the Law of the Sea 1982 was yet another example of a treaty which by the nature of being a "package deal" did not admit of reservations.

The Special Meeting considered the functions and role as well as the competence of the monitoring bodies to appreciate or determine the admissibility of a reservation. The view of the Commission that the legal force of the findings made by such bodies in the exercise of their functions could not exceed those resulting from the powers given to them, met with approval. However, the suggestion of providing specific clauses in normative multilateral treaties or elaborating protocols to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation met with resistance.

Many of the participants addressed themselves to the provisions of the international instruments on human rights. The right to religion, the right to work, [the]

right to health, and the right to compulsory education were among those that were cited and debated. Several views were expressed on the specific provisions of human rights treaties and the reservations thereto. While some identified the lack of resources, unrealistically high international human rights standards, among others, some participants listed the different socio-economic, cultural, and political backgrounds of the people and States as the reasons for the formulation of reservations to human rights treaties. It was pointed out that the provisions of some of the human rights treaties could be sub-classified as those (i) requiring intervention of States and (ii) those not requiring any action or intervention by States Parties.

*Points of convergence*

The deliberations in the Seminar revealed a convergence of views on a wide range of issues. These included:

(i) The law of reservation ushered in by the Vienna Convention has, by and large, served well the needs of the international community of States. It may be unwise to derail the Vienna regime on reservations. The provisions of the Vienna Convention on Treaties had been [*sic*] and continue to enjoy wider acceptance. Inasmuch as these provisions had stood the test of time they should not be tampered with. There was no need to amend or alter them. The majority of participants were of the view that the right to formulate and express reservations to one or more provisions of a convention is an attribute of State sovereignty, and power to make or express reservations can only be restricted by a treaty.

(ii) The existing regime of reservations as incorporated in Articles 19 to 23 of the Vienna Convention on [the] Law of Treaties, 1969, were sufficiently flexible and, whilst recognizing the inherent right of a State to make a reservation, merely restricted that right by stipulating that the reservation or declaration made by a State be "compatible with the object and purpose of the treaty concerned". In this regard it was pointed out that the Commission itself had, in paragraph 1 of the Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, [...] recognized that "Articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations". It (the Commission) "considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty".

The view was expressed that a monitoring body lacked the competence to adjudge the admissibility or legality of a reservation unless it had been expressed that a strict regime of reservations with a monitoring body at its apex would impair the objective of universality of participation in the treaty. The treaty regime including the regime

of reservations should aim at promoting the objective of universality of participation rather than hinder the process of ratification.

(iii) Although one expert had categorized treaties as (a) treaties valid *erga omnes*; (b) constitutive treaties; (c) humanitarian conventions/treaties, and (d) codification treaties, the majority view was that, while such a classification was useful, no distinction needed to be drawn between human rights treaties and other treaties with respect to the regime of reservations. One expert raised the question whether reservations to human rights treaties were any different from reservations to other normative treaties. Almost all treaties stipulate normative and contractual obligations. The question was also posed whether human rights treaties deserve to be classified in the category of treaties which admit of no reservations. It was pointed out in this regard that the Human Rights Covenants had been adopted a good [*sic*] two years before the Conference on the Law of Treaties was convened in 1968 and that the Vienna Conference on the Law of Treaties had not deemed it necessary to differentiate human rights treaties from any other set of normative treaties. It was stated in this regard that what the conference of plenipotentiaries had not done the International Law Commission could not do because what cannot be done directly can not be done indirectly.

(iv) Insofar as paragraph 3 of the Preliminary Conclusions adopted by the Commission sought to differentiate between normative treaties and treaties in the field of human rights, the participants in the Special Meeting could not agree with the formulation or text of paragraph 3.

(v) Most participants could not accept paragraph 5 of the Preliminary Conclusions adopted by the International Law Commission relating to the role of the monitoring bodies of human rights treaties. One expert took exception to the use of the term "monitoring body" since the term "monitor" implied an element of surveillance. He therefore proposed the use of the term "supervisory body" in lieu of the present term "monitoring body" employed by the Commission. Yet another expert was of the view that the proposed role of the monitoring bodies was a dangerous proposition. It was stated in this regard that the passing of value judgments on the admissibility of reservations and the practice of States by a monitoring body would be unacceptable to States. A third expert characterized the proposed role and function of monitoring bodies, as regards the admissibility of reservations to human rights treaties, as the opening of Pandora's box. A participant from one member state expressed the view that formulation of a reservation constitutes [the] sovereign right of States and [that] the provision embodied in paragraph 5 of the Preliminary Conclusions is in contradiction with this cardinal principle of the Law of Treaties.

(vi) The view was also expressed that, while the monitoring bodies ought [*sic*; ought not?] to make value judgments on the validity or otherwise of a reservation to a treaty, they could, however, make recommendations as to the effect of a reservation.

(vii) Paragraph 10 of the Preliminary Conclusions was considered by some to be a "creeping" clause and one that may be amenable to misuse. It was stated in this regard that the Commission should avoid handing out political handles (*sic*) that could result in the defeat of the very object of universality of participation in a treaty.

*Recommendations*

A number of recommendations was made in the course of the Special Meeting. The proposals advanced included:

(i) One view suggested that the International Law Commission undertake an empirical study of state behaviour and study the reservations to treaties and, if feasible, the motives thereof. It could thereafter seek to develop the reservation regime by way of "interpretative codification".

(ii) Another view emphasized the universal acceptability of the existing reservation regime and proposed that the gaps and lacunae could be filled by commentaries on the existing provisions of the Vienna Convention. He favoured the preparation of a guide to state practice rather than the formulation of model clauses or a protocol.

(iii) It was recommended that the ILC consider concluding its work on this topic not on the basis of "intuitive feeling" but on the basis of an empirical study of the behaviour of States.

(iv) The Commission should approach its future work on the subject with due caution and [should] not be guided by the European precedents, which may not always be relevant or appropriate to the universal context. One view was that a realistic stance would require taking note of the different political, social, economic, and cultural milieux of the States and accepting some reservations to treaties as the price to be paid for the promotion and achievement of universality.

(v) The Secretariat should report the debate of the Special Meeting to the International Law Commission. It also requested the Representative of the International Law Commission to report his findings to the Commission at its forthcoming 50th Session.

## F. Secretariat Study: SPECIAL MEETING ON EFFECTIVE MEANS OF IMPLEMENTATION, ENFORCEMENT AND DISPUTE SETTLEMENT IN INTERNATIONAL ENVIRONMENTAL LAW

...

### VII. *Conclusions*

The existing normative framework of international environmental law is presently characterized by an abundance of multilateral conventions and other international

instruments. As rightly articulated by Ambassador Chusei Yamada, Member of the ILC, "the sector by sector approach which has been adopted so far in the conclusion of various multilateral conventions, often dictated by the need to respond to urgent and specific requirements, runs the risk of not addressing the need for an integrated approach to the prevention of pollution and continuing deterioration of the global environment".[118] The uncertainty over the normative framework is equally relevant in the study of effective means of implementation, enforcement, and dispute settlement in international environmental law. Certain aspects of this incongruity between the traditional approaches premised on sovereign equality of territorial States and the broader concern to preserve the global environment, in the sphere of implementation and enforcement has been briefly outlined in this background note. Besides such conceptual difficulty in issues concerning implementation in developing Countries is the lack of resources and technology, and the absence of trained personnel.

While the task of evolving fair and workable legal principles towards conserving the global environment is equally important, yet if the existing patch-work of environmental regimes are to be consolidated, the AALCC needs to consider the specific infrastructural and legal impediments facing implementation and enforcement in the Afro-Asian region. It is hoped that this Background Note would provide the backdrop for the AALCC Member States to deliberate on country-specific issues encountered in the process of implementation, enforcement and dispute settlement.

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[118] See ILC document ILC (L) INFORMAL/22 entitled *"Long-term Programme of Work: Feasibility study of the law of environment"*.

# CHRONICLE

# CHRONICLE OF EVENTS AND INCIDENTS RELATING TO ASIA WITH RELEVANCE TO INTERNATIONAL LAW
July 1997 – June 1999

Ko Swan Sik*

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* General Editor.For the considerations underlying the Chronicle, see the "Editorial Introduction" in 1 *AsianYIL* (1991) 265.

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## AIR TRAFFIC AND TRANSPORT

### Opening of North Korean airspace

North and South Korea concluded an air traffic agreement in Bangkok on 8 October 1997, allowing foreign commercial flights to cross North Korean airspace. This had not occurred since 1945, except for Russian and Chinese airlines.(IHT 09-10-97;JP 09-10-97)

### Japan-US civil aviation agreement

An interim agreement on current disputes (see 6 AsYIL 332; 7 AsYIL 392) was reached and signed on 30 January 1998. The number of US flights with access to Japan would be considerably increased, in exchange for All Nippon Airways being added to Japan Airlines as entitled to unlimited access to the US. The remaining dispute was said to be about Japanese resistance to code-sharing by US carriers for flights from Japan on to third destinations.(IHT 16-12-97;21-01, 31-01/01-02-98)

### Iranian scheduled flights to Saudi Arabia resumed

Iran resumed scheduled flights to Saudi Arabia in September 1997 after an 18-year interruption, since the 1979 Islamic Revolution in Iran. An agreement between the two countries stipulated that Saudi Arabia would also start weekly flights to Tehran.(JP 22-09-97)

### Open-sky agreements with US

Among the Asian countries only Brunei, Malaysia, and Singapore had so-called open-sky agreements with the US in late 1997, including the "seventh freedom", which allows a carrier to handle traffic between two countries neither of which is its home country. South Korea and the Philippines were expected to follow soon.(JP 13-11-97)

### Thai-Australian aviation agreement to be scrapped

Thailand was likely to scrap an air transport agreement with Australia after a two-year deadlock in negotiations. Australia wanted more so-called fifth freedom rights. Thailand blocked these efforts since reciprocal rights with Australia would bring an extension only of Thai flights to New Zealand, while Australian carriers would enjoy a far broader network.(JP 18-11-97)

## ARMS SALES AND SUPPLIES

### Arms sales to Indonesia

Indonesia announced it would buy military aircraft from Russia, while canceling an order for US planes because of Congressional attacks on its human rights record. The Indonesian and Russian governments were still finalizing details of the payment conditions, but at least part of it would be by way of a counter-trade arrangement.(IHT 06-08-97;JP 25-08, 27-08-97)

The UK government in late September 1997 announced its refusal of export licences for a shipment of armoured personnel carriers and sniper rifles to Indonesia, resulting from new criteria for arms sales.(JP 07-10-97)

The US Congress included a clause in a foreign aid spending bill on 13 November 1997 urging the government not to supply to Indonesia arms that could be used in East Timor.(JP 16-11-97)

### Weapons trade

It was reported by the US Congressional Research Service in 1998 that the US had in the past seven years been the world's biggest arms supplier, with sales of $15.2 billion worth of weapons in 1997, a 44 per cent share of the arms market. Developing countries were the largest buyers of US weapons. A presidential order of 1995 laying down US policy on weapons sales said that the sales were "a legitimate instrument of US foreign policy". Asia is the second-largest regional market after the Middle East.(IHT 05-08-98)

### Russian MiG-29s for Bangladesh

The two countries signed a contract on 28 June 1999 concerning the purchase of eight MiG-29 combat aircraft by Bangladesh.(IHT 30-06-99)

## ASIA-PACIFIC ECONOMIC CO-OPERATION FORUM (APEC)

### Annual meetings and membership

The APEC annual meetings were held in Vancouver and Kuala Lumpur in November 1997 and November 1998. Russia, Vietnam and Peru were admitted as Members at the 1998 conference.(IHT 13-11-98)

### Annual summit 1998

The meeting was dominated by the different approaches in confronting the financial crisis in Asia.

Malaysia raised the issue of short-term capital flows and hedge funds, which it blamed for the Asian financial crisis, and sought to obtain APEC backing for their regulation. On the other hand, there were those who remained firmly committed to market-oriented policies. The result as contained in the Joint Declaration appeared to be an uneasy compromise: a task force was to be set up to examine the questions.(IHT 09-11-98)

The major food exporting countries (US, Australia, Canada, and New Zealand) pressed for implementation of a "fast-track" trade liberalization plan, including tariff cuts in nine sectors valued at more than $1.5 trillion a year. The plan was agreed at the 1997 summit conference in an Early Voluntary Sectoral Liberalization accord. In view of the Asian economic crisis Japan and other Asian countries such as China, Indonesia, Thailand and Malaysia were not in favour and stressed the voluntary nature of the plan. On the other hand, the US had recently posted record trade deficits because of the significant depreciation of Asian currencies against the dollar, which could trigger a protectionist backlash.(IHT 13-11-98) The issue was finally submitted to the WTO.

The issue of a blueprint for global financial change was amended into an expanded version of the Group of 22 which links finance ministers and central bankers from developed and emerging states.(IHT 20-11-98)

### Speed of trade liberalization

In 1999 there was a growing rift among the APEC members on the issue of how fast their economies should be liberalized. The group in support of faster liberalization, including Australia, New Zealand and Singapore, was opposed by Japan and other East Asian countries reluctant both to open their economies too fast and to open sensitive sectors in view of their recent recovery from economic crisis. Also, the US showed an increasingly protectionist attitude.

The trade ministers of the group gathered for talks on this and other issues in Auckland in late June in preparation for the 1999 annual summit meeting in New Zealand and to forge a unified position for the WTO ministerial meeting in Seattle in November 1999.(IHT 28-06-99)

## ASSOCIATION OF SOUTH EAST ASIAN NATIONS

### The admission of Cambodia

*(See also:* Civil War: Cambodia)

In a move to increase international pressure for a negotiated end to the political conflict in Cambodia and because of "the unfortunate circumstances that have resulted from the use of force", the ASEAN foreign ministers announced at a special meeting

in Kuala Lumpur on 10 July 1997 that they would indefinitely delay Cambodia's admission to the organization, which had been scheduled for that month.

The position of the organization was regarded to have weakened when both the US and Australia on 14 July dropped demands that the ousted co-prime minister of Cambodia be reinstated, characterizing such demands as unrealistic.(IHT 11-07, 16-07-97)

ASEAN set up a team of three foreign ministers to mediate in the struggle in Phnom Penh. They obtained the approval from the king, while the Chinese foreign minister said China opposed any excessive outside interference. As to ASEAN's decision to postpone Cambodia's admission the Indonesian foreign minister said, *inter alia*: "We did not pass judgment on who was wrong or right, but there were armed clashes, high tensions and instability and under these circumstances we thought it was a wise thing to postpone Cambodia's admission as a full member."(IHT 18-07-97) The mediation attempts were for all practical purposes rejected by the ruling prime minister, who urged ASEAN not to interfere with the internal affairs of Cambodia.

The resulting diplomatic isolation of Cambodia was favourable for US efforts to increase international pressure on the Cambodian government for it to make political concessions, such as calling on donors to use aid to Cambodia as leverage. Besides, it was reported that Vietnam, which, together with Malaysia, was seeking a reversal of the ASEAN decision to delay Cambodia's entry as a member, was told by the US of the importance of its continued support of the regional consensus for the bilateral Vietnam-US relationships, among which are the early approval of a trade agreement and easier access to US markets.(IHT 21-07-97) As to the similarities and differences between the respective US and ASEAN positions on Cambodia, the Indonesian foreign minister said that although there was a convergence "in general terms" between those positions there were also differences, including the US decision to suspend part of its aid by considering a complete halt to all but humanitarian assistance: "We don't believe in sanctions easily."(IHT 25-07097)

At the Kuala Lumpur meeting of foreign ministers in July 1997 it appeared that ASEAN would continue not to recognize formally the removal of the first prime minister while not insisting on his return to office as long as Cambodia maintained the coalition government set up after the UN-supervised elections in 1993.(IHT 24-07-97)

On the other hand a "new [Cambodian] position" appeared to emerge as was expressed by a Cambodian welcoming of a mediating role for ASEAN(IHT 26/27-07-97), although it was not clear what that role would in fact entail. It was also unclear either whether ASEAN still considered the ousted co-prime minister as legally still holding that position. As to the question whether ASEAN recognized the person who had in fact taken over the position as the first prime minister, a joint statement of the ASEAN foreign ministers said that the question did not arise "because ASEAN member states recognize states, not governments".

A difficult discussion developed within ASEAN on the question to what extent the admission of Cambodia should be postponed. On the one hand there were those who wanted to let Cambodia join by December so that ASEAN could achieve its

aim of including all ten countries of the region. Other members emphasized another vital principle to be at stake, *viz.* the use of force in disrupting the coalition government and constitutional rule.(IHT 11-08-97)

The ASEAN summit of December 1998 "decided to admit" Cambodia as a member. The actual admission took place on 30 April 1999 by a joint ministerial declaration.(IHT 15-12-98 and 30-04/02-05-99;ASEAN Doc.Ser. 1998-1999)

**1997 and 1998 Summit Meetings**

The Second Informal ASEAN Summit was held in Kuala Lumpur on 14-16 December 1997 and the Sixth ASEAN Summit 1998 in Hanoi on 15-16 December 1998.

**Admission of Myanmar and Laos**

The two countries were officially admitted to membership on 23 July 1997 at a meeting of foreign ministers in Kuala Lumpur.(IHT 24-07-97)

**Myanmar participation in ASEAN-EU meeting**

The Thai foreign ministry said on 30 October 1997 that the EU had agreed to Myanmar participation in an ASEAN-EU joint cooperation meeting in November 1997. However, Myanmar as well as another new ASEAN member, Laos, would attend only as observers.(JP 31-10-97) [The meeting was finally cancelled.]

**ASEAN plus Three**

*(See also:* Monetary and financial matters)

During his Southeast Asia tour in January 1997 the Japanese prime minister had called for regular meetings between Japan and ASEAN countries.(*See* 7 AsYIL 441) The latter extended the idea by inviting Japan, China, and South Korea to a "commemorative summit" meeting to be held in Malaysia in December 1997 to celebrate ASEAN's thirtieth anniversary.

The Informal Summit Meeting in December was followed by bilateral and collective meetings of the ASEAN heads of state with their counterparts from China, Japan and South Korea. After having developed close links with mostly Western and Western-inclined countries in the past, ASEAN would now have moved to meet with exclusively Asian non-member countries.(IHT 2/3-08 and 04-09-97) The meeting did not, however, reach agreement on regular pan-Asian meetings.(IHT 16-12 and 17-12-97)

**The issue of non-interference in each other's internal affairs, and a peer surveillance mechanism**

The Association decided in early December 1997 to monitor the domestic economies of its members and evaluate their potential economic and financial risks, in order to prevent future financial crises. The system of peer surveillance implies a modification of ASEAN's policy of strict non-intervention in domestic affairs.(IHT 02-12-97) The system would join a wider system of East Asian surveillance by a monitoring body linked to the Tokyo office of the IMF. There would be some

coordination of macro-economic policies and there could be "peer pressure" exerted on governments judged to be failing to meet certain standards.(IHT 09-02-98) The matter was again on the agenda on a meeting of the finance ministers in Washington in early October 1998 where agreement was reached on the early warning procedures.(IHT 08-10-98)

Another new phenomenon emerged in the form of the raising of human rights issues in other member states. The Philippine president openly criticized the prison sentence given to the former Malaysian deputy prime minister in April 1999, contrary to the tradition of non-interference.(See: (Non-)Intervention)

On a different aspect the ASEAN Secretary General divulged that the member states had begun to inform one another on their respective internal policies and reforms, and to exchange views on these.(IHT 22-04-99)

**"Flexible engagement"**

The Thai foreign minister said on 13 July 1998 that ASEAN must drop its long-standing policy of non-interference or "constructive engagement" and replace it with "flexible engagement" where members talk openly and frankly about national economic and political issues adversely affecting the region.(IHT 14-07-98)

**Accelerated implementation of the ASEAN Free Trade Area (AFTA)**

At its summit conference in December 1998 at Hanoi ASEAN agreed to speed up the implementation of AFTA. Under the new terms Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand would target, admittedly "with some flexibility", full implementation of the tariff-free zone by 2002, i.e. a year earlier than in the original scheme. The more recent entrants, Vietnam, Laos, and Myanmar, also agreed to act more expeditiously, but with a more extended timetable.(IHT 17-12-98)

**ASEAN Inter-Parliamentary Organization (AIPO) Eighteenth session**

The AIPO held its Eighteenth Session from 1-5 September 1997 in Den Pasar, Bali. It issued a joint declaration and 42 resolutions, generally endorsing the agreements reached between the ASEAN members on cooperation. As a rule AIPO deals with the same items currently being discussed at the inter-governmental level in ASEAN. Although human rights was not the subject of a separate resolution, reference was made to the topic in the resolution on the WTO. AIPO rejected the efforts made to link agreement on international trade and investment to social issues such as labour standards, human rights, and democratization.

At the Eighteenth session Laos was accepted as the seventh member of AIPO, while Myanmar was made "special observer". The organization thus comprised the following members: Indonesia, Malaysia, the Philippines, Singapore, Thailand, Vietnam, and Laos. (Kompas 06-09-97;JP 01-09-97)

## BORDERS, BORDER DISPUTES, AND BORDER INCIDENTS

*See also:* Inter-state relations: Cambodia-Thailand; Oil and Gas: Division and sharing of Caspian oil

### Malaysian-Thai border wall

Malaysia had built a 21-kilometre border wall along the Malaysia-Thai border, in its effort to prevent illegal immigrants from entering the country. The wall would also serve to reduce the smuggling of firearms, illegal drugs, and livestock. There was, however, still more than 250 miles of unwalled border.(IHT 22-09-97)

### Sino-Russian border pact

China and Russia signed a declaration on 10 November 1997 on the final demarcation of their 4,300-kilometre border, during a visit by the Russian president to China. The border agreement laid out the eastern frontier, from Mongolia to the Tumen River near the Sea of Japan, and includes territory that was disputed as recently as 1969. The agreement covers the joint use of islands and surrounding waters on the border, but it was not clear whether two disputed islands on the Amur River were included. The western border, only 50 kilometres long, was still under negotiation.(IHT 28-10, 09-11 and 11-11-97;JP 11-11-97)

### India-Pakistan maritime boundary dispute

For the past 30 years there had been a maritime boundary dispute between India and Pakistan, blocking the exploration of oil and gas. The border in question is between the western Indian state of Gujarat and Sind Province of Pakistan. The line follows a shifting tidal channel known as Sir Creek, and the dispute led to armed clashes in 1965. Failure to determine this border at the mouth of Sir Creek had blocked agreement on the maritime boundary in the Arabian Sea, preventing the exploration of offshore deposits of oil and gas. Fishermen were also routinely mutually arrested in the disputed zone.

On 9 November 1998 Pakistan proposed international arbitration to resolve the dispute, a proposal rejected by India.(IHT 10-11-98)

## BOYCOTT

### International conference in Myanmar boycotted by Western countries

The Fourth International Heroin Conference was held in February 1999 in Yangon under the auspices of Interpol. The conference was boycotted by Western states such as the US, Britain, France, Germany, Denmark, The Netherlands, and Belgium, which saw their attendance as endorsement of the current Myanmar government and wished to avoid this.(IHT 24-02-99)

CIVIL WAR

**Papua New Guinea**

Talks aimed at ending the secessionist war in Bougainville Island started in early July 1997 in New Zealand.(IHT 02-07-97)

**Cambodia**

(*See also:* Association of South East Asian Nations)

The Second Prime Minister (HUN SEN) seized power and declared victory in his confrontation against the First Prime Minister (NORODOM RANARIDDH), claiming full power. At the same time he announced he would remain second prime minister, apparently hoping to retain the structure of government fostered by the UN in 1993, and vowed to hold elections in May 1998 as scheduled.(IHT 07-07-97) He accused the first prime minister of being a "traitor" who should be put on trial, and of having recruited Khmer Rouge members to enter Phnom Penh. Meanwhile, the first prime minister, who was abroad at the time of the seizure of power, called on the international community not to recognize the government controlled by the second prime minister.(IHT 09-07-97)

The US condemned the use of force and after some hesitation announced the suspension of aid programs,(IHT 10-07-97 and 12/13-07-97) but after a few days there were signs of emerging international acceptance. Japan continued its aid although others, such as Australia, followed the example of the US. The titular leader and king of Cambodia also seemed to have granted support to the controlling prime minister, calling him "victorious" and saying that he himself "cannot become 'a judge' as to what is a 'coup' or a 'non-coup'".(IHT 14-07,15-07 and 28-07-97)

Faced with military defeat and limited international support the deposed first prime minister conceded on 18 July that he would not be restored to power.(IHT 19/20-07-97) Early in August the king finally officially endorsed the replacement.(IHT 08-08-97)

In view of the prevailing situation of uncertainty, the UN decided to leave the Cambodian seat vacant at the 1997 General Assembly session. The leading prime minister of Cambodia thereupon threatened to suspend cooperation with the UN.(IHT 25-09-97)

On 27 February 1998 a cease-fire was declared by the two main competing forces in response to a peace process quietly mediated by Japan in the previous weeks.

Under the plan, there would be a military trial of the deposed co-prime minister *in absentia*, after which he would be pardoned by the King and return to Cambodia under a safety guarantee of the government. He would promise to cut ties with the Khmer Rouge and be allowed to campaign for the elections [due to be held on 26 July 1998].(IHT 28-02/01-03-98)

On 18 March 1998 the deposed co-prime minister was found guilty of conspiring with Khmer Rouge guerrillas to overthrow the government and was sentenced to 30 years in prison.(IHT 19-03-98) A royal amnesty was granted on 21 March.(IHT 23-03-98)

**Sri Lanka**

In early October 1997 the government unveiled details of a power-sharing formula aimed at ending the country's ethnic war. The plans included the grant of greater autonomy in a regional council to the minority Muslim and Tamil communities in exchange for ethnic peace. It did not accept a Tamil demand for a union between the Tamil-dominated northern provinces and the multi-ethnic eastern provinces, but the government was prepared to hold a referendum on the question.(IHT 03-10-97)

On 22 February 1998 the Tamil rebels attacked a military ship convoy and sank two vessels.(IHT 24-02-98)

**Afghanistan**

(*See also:* Inter-state relations: general aspects: Iran-US)

In mid-August 1998 it was reported that the Taleban movement appeared to be on the brink of reunifying the country. They had overwhelmed the forces of the so-called Northern Alliance which had held on to much of the territory in the northern part of the country for two years, but were finally pushed back in two remaining redoubts, ending the civil war for all practical purposes.

Most states, and also the UN, maintained their recognition of the deposed president, BURHANUDDIN RABBANI, as the legitimate leader. The Taleban government was recognized by Pakistan, Saudi Arabia, and the United Arab Emirates.(IHT 13-08, 08-09-98)

[In 1973 the King as the last representative of the 250-year old DURRANI dynasty was ousted by a coup mounted by MOHAMMED DAUD, a cousin of the King. In April 1978 he was overthrown in turn and killed, in a military coup that brought the Communist Party to power. A civil war broke out, drawing in Soviet forces in February 1979.]

DIPLOMATIC AND CONSULAR IMMUNITY AND INVIOLABILITY

*See*: Inter-state relations: Afghanistan–Iran; (Non-)Intervention

DIPLOMATIC AND CONSULAR RELATIONS

*See also:* Inter-state relations: China-Liberia; Chin-Singapore; Iran-Europe; Iran-Pakistan

**China–North Korea: consulate in Hong Kong**

China approved a request by North Korea to open a consulate in Hong Kong. North Korea had been lobbying for a consulate ever since the former British colony returned to Chinese rule in 1997. South Korea had not opposed the granting of the request.(IHT 15/16-05-99)

**India–Pakistan**

In September 1998 India expelled a Pakistani diplomat for suspected espionage, and Pakistan retaliated with the expulsion of a member of the Indian High Commission in Pakistan for activities deemed incompatible with his diplomatic status.(IHT 05-10-98) Another case of mutual expulsion of diplomats took place in December 1998.(IHT 21-12-98)

**Iran–Argentina**

In 1992 there was a bombing of the Israeli embassy at Buenos Aires, and in 1994 another bombing took place directed against the Argentine Israeli Mutual Association, the city's main Jewish community centre. The Islamic Jihad, one of the armed groups linked to the Hezbollah organization in Lebanon, had claimed responsibility for the latter attack The Argentine government appeared to have accepted the long-held US and Israeli allegations that Iran had played a role in these incidents and, *inter alia*, ordered the expulsion of seven of Iran's eight embassy employees. It had also recalled all its diplomats from Iran with the exception of its *chargé d'affaires*. Both states had already withdrawn their ambassadors after the 1994 bombing.[*See*, however, the contrary news report in 5 AsYIL 402](IHT 18-05-98)

**Iran–United Kingdom**

The two countries which had severed their diplomatic relations ten years earlier after the religious death edict against the author SALMAN RUSHDIE announced the restoration of these relations at the level of ambassador. They had reached agreement on the matter in September 1998. With this restoration Iran regained diplomatic ties with all member states of the European Union.(IHT 19-05-99)

**Singapore–Andorra**

Singapore and Andorra established diplomatic relations on 18 September 1997. Many of Singapore's ambassadors do not live in the country to which they are assigned, but carry the title while remaining at home.(JP 20-09-97)

**South Korea–Russia**

In early July 1998 Russia expelled a South Korean diplomat accused of having bribed Russian officials for political and economic information.(IHT 06-07, 08-07-98) After a few days South Korea expelled a Russian diplomat. Both sides alleged that the expelled persons were working for the intelligence service of their respective countries.(IHT 09-07-98)

The dispute endangered the diplomatic relations established in 1990 between the two countries.

## DISARMAMENT AND ARMS CONTROL

### India

The Indian prime minister in mid-December 1998 rejected three voluntary restraints on strategic weapons systems proposed by the US (on nuclear weapon deployment, on missile development and on production of bomb-grade material). Instead, his government would maintain the deployment of nuclear weapons, continue development of ballistic missiles and reserve the right to produce more bomb-grade material. The purpose of deployment of nuclear weapons was the "deployment of a deterrent which is both minimum and credible" and "ensures survivability and the capacity of an adequate response" in the event of a nuclear attack.

On the other hand, India would adhere to a comprehensive test ban before September 1999. It had already announced a voluntary moratorium on further tests. The prime minister also announced that India had tightened controls to prevent the export of technologies that could be used to make weapons of mass destruction.

Finally, the prime minister repeated that India was prepared to join negotiations on a Fissile Material Cutoff Treaty, but would not agree to cease producing bomb-grade material until a non-discriminatory treaty had been finalized.(IHT 16-12-98)

## DIVIDED STATES: KOREA

### US soldiers missing in action

It was reported that an agreement was reached in May 1997 on exhumations of the remains of US soldiers missing in action at North Korean territory during the Korean War. Three rounds of exhumations would take place, starting in July.(IHT 01-07-97)

### North Korean defections

According to South Korean officials, between 40 and 50 North Koreans had defected annually since 1994.(IHT 01-07-97)

It was reported that the North Korean ambassador to Egypt had defected in late August 1997, together with his wife, a famous actress. He was to return to North Korea in September 1997 after concluding his three-year term in Cairo. Earlier in the month his 19-year-old son had already disappeared.(JP 26-08-97) A South Korean foreign ministry official said that the ambassador's brother, then stationed in Paris, and his family, had joined the ambassador in an unidentified country.(JP 27-08-97) On 26 August the US announced that it had granted asylum to the ambassador and his brother.(JP 29-08-97)

### Four-party peace talks

North Korea on 30 June 1997 agreed to the talks (see 7 AsYIL 417) by dropping its insistence on simultaneous food aid, clearing the way for preparatory talks to begin in New York on 5 August 1997. The talks would be the first between the South and the North to address directly matters like mutual recognition, normalization of

relations, and eventual reunification.(IHT 02-07-97) When the preparatory talks had started, North Korea insisted on the unconditional withdrawal of foreign forces from the country be put on the agenda; it further demanded a cancellation of the scheduled US-South Korean military exercises.(IHT 08-08-97) It also accused the US of using economic sanctions as a means to turn the talks to its advantage. The talks thereupon broke off, but the parties agreed to resume them on 15 September.(IHT 9/10-08-97) Despite its displeasure at the asylum granted by the US to two North Korean diplomats (*see infra* at 282) North Korea agreed to stick to the agreed resumption.(IHT 12-09-97) The talks broke down again, however, because North Korea repeated its demand that any talks must include the issues of the withdrawal of the US troops and of food aid, accusing the US of using the food aid as a weapon in the talks.(IHT 22-09-97) After this demand as well as that on a separate peace accord between North Korea and the US were dropped (but this was denied by North Korea), the parties started the main negotiations on 9 December 1997 in Geneva. After a two-day session the next round of talks was fixed as being on 16 March 1998.(IHT 19-11, 22/23-09-12, 10-12, 11-12-97) In the ensuing negotiations North Korea kept insisting on having the issue of withdrawal of the US troops put on the agenda (IHT 21/22-03-98) which was rejected by the US.(IHT 23-03-98) The talks were resumed on 21 October 1998 for four days. Two working parties were to be created to explore a peace treaty and to examine confidence-building measures. A fourth round of talks was held in January 1999. Agreement was reached on procedures for the above working groups.(IHT 19-10, 26-10-98; 20-01 and 23/24-01-99) A following meeting was held in late April 1999, when the following issues were on the agenda: a communications channel between North and South Korean forces, the exchange of visits by officers, mutual advance notification of military exercises, setting up of a humanitarian corridor across the demilitarized zone.(IHT 26-04-99)

**Clash in demilitarized zone**

On 16 July 1997 a clash occurred in the demilitarized zone, leaving several North Korean soldiers wounded. A UN Command protest accusing the North of violating the armistice was delivered but rejected by North Korea. [North Korea had since June 1995 declined to recognize the armistice agreement, as its being a relic of the Cold War.](IHT 18-07-97)

**New attitudes on bilateral inter-Korean relations**

The new president-elect of South Korea proposed a broad dialogue with North Korea as the first step toward reconciliation, and said he might seek a summit meeting.(IHT 20/21-12-97)

On 19 February 1998 North Korea responded, by letters sent through Red Cross officials, with conciliatory gestures, also suggesting dialogue, including between political parties and civic groups.(IHT 20-02-98) A proposal by North Korea in early April to hold talks in Beijing on food and agricultural problems, the first bilateral talks in nearly four years (see 5 AsYIL 406), was accepted by South Korea; the talks started on 11 April. They covered a wide range of topics, but ended without results as the two sides focused on different matters: North Korea emphasized the food issue

and South Korea stressed other issues, such as family reunions, exchange of envoys and the reactivation of a liaison office at the border village of Panmunjon.(IHT 06-04, 08-04, 13-04, 14-04-98) In an open letter dated 18 April the North Korean leader again called for a dialogue in a drive toward reunification. The two parties finally agreed to meet again on 21 June 1999, more than a year after the previous round. This was initially overshadowed by the naval incident that had just occurred (*see infra*) but the talks were later actually resumed.(IHT 30-04-98; 04-06, 21-06 and 25-06-99)

**Inter-Korean food aid**

Red Cross officials from the two Koreas began talks in Beijing on 22 December 1997 on food aid to the North. The South Korean Red Cross had given North Korea 100,000 tons of food aid in 1997. There would be a twomillion-ton shortage for the 25 million population in the coming year.

The most difficult aspect of the negotiations was guaranteeing the transparency of the delivery.(IHT 23-12, 24/25-12-97)

**Lifting of sanctions against North Korea**

The president of South Korea on 1 June 1998 called for the US to drop the existing economic sanctions against North Korea and replace them with a policy of increasing political "engagement". This would be part of a broad transformation of policy of the world toward North Korea which should lead to changes in North Korea and to its opening up.(IHT 02-06-98) [The above approach was part of the newly elected South Korean president's "Sunshine policy".]

**North Korean submarine in South Korean waters**

A North Korean midget submarine was snared in the nets of a fishing boat on 22 June 1998 at 18 kilometres off the east coast port of Sokcho, about 33 kilometres south of the North Korean border. This was just within South Korean waters and South Korean officials said it might have strayed off course.(*compare* 7 AsianYIL 415). The bodies of nine North Koreans were discovered inside the vessel.

There were indications that the vessel had been on a spy mission.(IHT 23-06 and 27/28-06-98)

**North Korean speedboat sunk**

A North Korean semi-submersible speedboat was sunk by South Korean warplanes and patrol boats on 18 December 1998 after being chased from the southern coast of South Korea into international waters.(IHT 19/20-12-98)

**Naval incident**

North and South Korean vessels confronted each other in a tense standoff on 9 June 1999, for the second day in a row, with each side accusing the other of intruding into its own waters. No shots were fired, but a South Korean boat collided with a North Korean one that it was trying to prevent from going farther south. Later in the week South Korean patrol boats rammed at least three North Korean vessels.

According to the South Korean version of events, the episode began when North Korean military vessels headed in single file south of the "northern limit line". This is a line extending into the sea from the western end of the demarcation line between the two Koreas and established unilaterally by the "United Nations Command" after the Korea War to divide the waters to the west of the two Koreas. The line is not recognized by North Korea. The North Korean ships thus entered a South Korean "buffer zone" of two to 14 kilometres wide and escorted fishing boats which apparently were catching crabs that are bountiful on the southern side of the line. This crossing of the line in fact did occur periodically, but usually the North Korean ships left when ordered back by the South Koreans. According to the North Korean version of events the South Korean ships had intruded deep into North Korean waters but had fled when approached by North Korean ships.

On the following days North Korea continued sending groups of patrol boats south of the "northern limit line" into the crabbing zone while pulling out of the area before dusk.(IHT 10-06; 12/13-06 and 14-06-99) On 15 June 1999 military representatives of the US-led United Nations Command and North Korea met at Panmunjom for talks over the confrontation.(IHT 15-06-99)

On 15 June 1999 South Korean naval ships sank a North Korean gunboat during a furious barrage in the "buffer zone". The incident occurred when South Korean ships were ramming the North Korean vessels, trying to force them back to North Korean waters, when the North Koreans began firing.(IHT 16-06-99)

## EMBARGO

### Supercomputers

The US added thirteen foreign organizations, among which from Russia, China, India, Israel, and Pakistan, to a list of entities it contended of being involved in producing nuclear weapons and which require special federal approval to buy certain "supercomputers". This constituted a change in policy after relaxed export controls were introduced in 1995.(IHT 02-07-97)

### Lift of US embargo on China in exchange for support of embargo on Iran

The US and China had concluded a nuclear cooperation agreement in 1985, but the US Congress, worried about Chinese sales of nuclear-weapons technology to Pakistan and Iran, passed a law that required the president first to certify that China had stopped such proliferation.

The US government told the US Congress in September 1997 that it was ready to certify that China had stopped exporting nuclear weapons technology to certain countries, which would allow the US nuclear energy industry to sell US nuclear power technology to China for the first time. It was reported that China had agreed to cancel or postpone indefinitely several projects at nuclear facilities in Pakistan and a "uranium conversion facility" in Iran, but had not agreed to a request to cease all nuclear cooperation with Iran.

The planned policy decision might be related to a planned meeting between the US and Chinese presidents in October 1997.(IHT 19-09-97) The certification, with classified appendix, which was issued on 12 January 1998, read that China "is not assisting and will not assist any non-nuclear weapon state, either directly or indirectly, in acquiring nuclear explosive devices or the material and components for such devices".

In March 1998 it was reported China and the US once again reached agreement on the cancellation of another planned Sino-Iranian transaction on uranium-enriching chemical material, although according to the Chinese side the material concerned (anhydrous hydrogen fluoride) was not included in the lists of controlled chemical substances maintained by international arms control bodies.(IHT 14/15-03-98) However, Iran denied the cessation of its nuclear cooperation with China, alleging that its cooperation with other countries was of a peaceful character and in accordance with international regulations and under the supervision of the IAEA.(IHT 16-03-98)

**US purchase of goods in order to deny them to Iran**

The US bought advanced fighter planes from the former Soviet Republic of Moldova in order that they would not be bought by Iran.(IHT 06-11-97)

**US embargo on missile technology to Iran and Pakistan: Chinese position**

On the occasion of a visit by the US Defense Secretary in January 1998 China stated that it had ceased selling certain types of anti-ship cruise missiles to Iran. The US had objected to these sales because of its fears that the missiles could endanger free navigation in the Gulf shipping lanes. However, in November US officials raised concerns that China was continuing to transfer missile technology to other Asian countries such as Pakistan and Iran.(IHT 20-01 and 13-11-98)
[The technology concerned was listed in an annex of the Missile Technology Control Regime of which China is not a member. See 1 AsYIL 270; 2 AsYIL 349; 4 AsYIL 485; 5 AsYIL 468 and 6 AsYIL 431.]

**US embargo on weapon technology to Iran: Russia**

In late January 1998 the Russian government, pending formal legislation, introduced export-licensing restrictions to providing materials or technical services to foreign programs aimed at building missiles or nuclear, chemical or biological warheads.

For about a year alleged Iranian weapons programs had preoccupied the US, and under pressure from, *inter alia*, Israel, it had made intensive efforts to halt the flow of sensitive technologies from Russia.](IHT 26-01-98) It was reported in March 1998 that the US offered Russia the opportunity to expand the lucrative business of launching foreign satellites on condition that Russia took measures against the sale of missile technology to Iran.(IHT 10-03-98)

In July 1998 the US government stated it would impose trade sanctions on nine Russian companies and institutions that had helped Iran with missile development programmes. [The US president had just vetoed a bill for an Iran Missile Proliferation Sanctions Act that would impose sanctions on any company believed – "credible

evidence" – to be aiding the missile, nuclear, or chemical weapons programmes of Iran. It was reported that the bill was strongly supported by the America Israel Public Affairs Committee.](IHT 17-07-98)

**US embargo on nuclear turbines from the Ukraine to Iran**

The US government blocked the provision of American nuclear technology and fuel to the Ukraine by Westinghouse Electric Corp. until the latter canceled plans to sell turbines to Russia (for the first Iranian nuclear power plant at Bushehr). It did so by offering the Ukraine, by way of compensation, a package of loans, credits and joint ventures, along with military and space cooperation and the prospect of future access to US nuclear fuel. If, however, the turbine deal went forward, the US would refrain from signing an accord on peaceful nuclear cooperation. (*See*: 5 AsYIL 477; 6 AsYIL 436; 7 AsYIL 467).[The cooperation agreement was concluded on 6 March 1998 and the delivery of the turbine was canceled] (IHT 09-02-98)

**Iranian acceptance of international safeguards and US position**

It was reported that Iran had promised to accept international safeguards against nuclear proliferation at its Bushehr plant, but that the US government contended that the plant was related to a secret Iranian plant to develop nuclear weapons.(IHT 09-02-98)

**US embargo on satellite sales to China**

The US decided to reject the sale of a satellite to a Singapore-based consortium that was considered as having close ties with the Chinese government, thus reversing both an approval of two and a half years earlier and a policy that had been in effect for several years. It was said that the sales could threaten US security and increase the military capability of China. The satellite in question was designed to set up a mobile telephone network over a large part of Asia.(IHT 24-02-99)

## ENVIRONMENTAL POLLUTION AND PROTECTION

**Waste imports from Europe**

It was reported that at least 200 cases of plastic waste had been illegally imported into Indonesia from Germany since the middle of August 1997, giving rise to demonstrations by environmentalists in front of the German embassy at Jakarta.

The transport of hazardous waste from industrialized countries to developing countries is prohibited by the Basel Convention unless unless, firstly, permitted by the receiving state and secondly, there is the availability of proper storage capacity. Indonesia had already prohibited the import of (noxious) so-called "B3" waste, particularly plastic waste.

The import into Indonesia of B3 waste had been noticed since 1990. In 1995 the Netherlands, as one of the countries of origin, took back 75 cases.(Kompas 17-09-97)

**Transboundary effects of Indonesian forest fires**

Forest fires on the islands of Sumatra and Kalimantan as a result of "slash and burn" methods employed by private enterprises to clear the land for other purposes affected not only areas in Indonesia but also in Singapore, Malaysia, and Brunei. The meeting of ASEAN environment ministers in mid-September 1997 was overshadowed by the "haze" problem. The Indonesian president apologized for the problem to the neighbouring countries.(Kompas 17-09-97)

On 20 September 1997 Malaysia pledged to send firefighters to help Indonesia in fighting the fire. It also pledged to help Indonesia to seed clouds over Kalimantan in a bid to cut the choking smoke with artificial rain.(JP 21-09-97) More than a dozen countries contributed to efforts to fight the brush and forest fires, among which were Germany, Australia, Japan, South Korea, Canada, the UK, the US, Norway, Finland, France, Sweden, Switzerland, Thailand, and Singapore, as did UN agencies such as the WHO and the UNDP. Assistance was also pledged by the UN Disaster Assessment and Coordination Team.(JP 03 and 08-10-97)

The ASEAN ministers revealed a regional plan on 23 December 1997 to try to prevent a recurrence of the smog generated by the Indonesian forest fires.(IHT 24/25-12-97)

**Singapore's accession to 1992 Protocol to the 1969 Civil Liability Convention**

Singapore signed the 1992 Protocol to the 1969 Convention on Civil Liability for Oil Pollution Damage. This would result in oil spill compensation cost four times the existing rate. By so doing Singapore was taking responsibility for ensuring that Singapore-registered oil tankers would be covered by insurance for a higher limit of compensation. This was a consequence of positioning itself as Asia's maritime hub and taking a lead role in the region. The previous limit had been inadequate for some time, bearing in mind the devastating exposure Singapore was facing to oil pollution.(JP 22-09-97)

Not being a party to the 1971 International Oil Pollution Compensation Agreement ("Fund Convention") Singapore, in contrast to Malaysia and Indonesia, would not be compensated for the oil spill as a result of the collision on 15 October 1997 between the Cyprus-registered tanker Evoikos and a Thai-flagged, empty, very large crude carrier (VLCC), the Orapin Global. The wind direction would have been a crucial factor in the environmental damage resulting from the spilling of 25,000 tons of fuel oil..

There had been intensive discussions within the framework of the IMO on preventing oil spills in the Southeast Asian region, among which was a proposal to divert shipping further south and away from the shallow and narrow Singapore Strait, adding two days' journey for a tanker bound for Japan, moving the problem elsewhere rather than solving it.(IHT 17-10-97, JP 20-10-97)

**UN Climate Change Convention: Asian attitudes**

The 1992 Rio Convention had called for states parties to reduce emissions of greenhouse gases by the year 2000, reverting to the levels of 1990. A conference in Berlin in 1995 said stronger measures should be taken. It mandated a working

group to come up with an amendment or treaty for further commitments. The US, Europe, and Japan differed over what these should be.

The EU had proposed mandating a reduction of 15 per cent of the 1990 levels by 2010. It was backed by the Group of 77 and China, all of whom refused to be forced to match the industrialized countries in anti-pollution measures that could hinder development. Japan proposed a five per cent reduction from the year 2008 to 2012, with the possibility of further modifications. The US wanted to delay the reductions in emissions below their 1990 levels until after 2012. This would give the US two decades, i.e. until 2017 to bring emissions to levels below those set in 1990. The US president made US engagement in cutting greenhouse gases conditional on pollution limits in the developing world.(JP 01-11-97)

Countries would, however, be able to reduce that target if their 1990 emissions per gross domestic product were lower than the average, or if their population growth rate were lower than the average.

At a conference held on 1-10 December 1997 in Kyoto, Japan, the signatories to the 1992 UN Climate Change Convention decided on targets for industrialized countries to cut emissions of greenhouse gases in the twenty-first century. The particularly heated argument between China and the US resulted in the Chinese success in exempting itself and the rest of the developing world from commitments to cut emissions, and the Americans succeeding in establishing the right of so-called "emissions trading", although disagreement remained on whether this right should be limited (the issue of a so-called "cap").(JP 07-10 and 12-12-97)

According to IEA data the US produced 23.7 per cent of total CO2 emissions or 20 tons *per capita* annually; China, 13.6 per cent or 2.51 tons on a *per capita* basis; Russia, seven per cent; Japan, 5.2 per cent and Germany, four per cent.(JP 15-11-97)

## GROUP OF 15 DEVELOPING NATIONS (G-15)

### Its genesis, purposes and activities

The Group was set up as a result of a meeting to discuss common problems, convened by Malaysia in 1990 in Kuala Lumpur, of fifteen developing countries. The Group consists of Algeria, Argentina, Brazil, Chile, Egypt, India, Indonesia, Jamaica, Malaysia, Mexico, Nigeria, Peru, Senegal, Venezuela, and Zimbabwe. At the Group's seventh annual summit meeting in early November 1997 Kenya was admitted as its sixteenth member.(IHT 04-11-97;JP 01-11-97) Although Latin America was meant to be the original engine for the G-15 as it was the region that had stable leadership and had earlier liberalized, the Group's cohesiveness was, in fact, undermined by the interest of Latin America in its own regional integration.(JP 07-11-97)

At the meeting of foreign ministers preceding the seventh summit at Kuala Lumpur in 1997, the low attendance at the summit meetings was a point of discussion. The 1994 summit had even had to be cancelled due to its being inquorate. The G-15 countries were divided over whether to hold summits every two years instead of

annually. Many G-15 projects were progressing rather slowly, mainly due to problems of funding, information and coordination.

In a bid to increase economic cooperation, the group held its first meeting of trade and economic ministers on 31 October 1997.(JP 02-11-97) The Group also asked the WTO to study the impact of currency fluctuations on trade but stopped short of endorsing a call by Malaysia for rules on foreign-exchange trading.

The three-day summit ended with an agreement to meet more often to improve the coordination of positions. The next meeting would [and did] take place in Cairo in May 1998. (IHT 01/02-11-97;JP 06-11-97)

## HIGH SEAS

### Freedom of navigation

*See:* Regional security

## HONG KONG

### Resumption of Chinese sovereignty

China resumed sovereignty over Hong Kong on 1 July 1997. Sovereignty was wrested from China 156 years ago by Britain, intent on selling opium to the Chinese.(IHT 01-07-97)

## HUMAN RIGHTS

### Review of the UN Declaration on Human Rights

On the occasion of the ASEAN foreign ministers' conference in July 1997 the Malaysian prime minister raised the idea of a review and possibl change of the 1948 Declaration in order to take account of the views of developing countries. He was quoted as saying that the West's insistence that developing countries conform to its high ideals on human rights as a form of oppression. The Declaration was issued at a time when most of the current UN members had not yet gained statehood and independence from colonial rule.

At the meeting to which non-ASEAN ministers were invited, the idea obtained support from the non-Western participants present. On the other hand, the representatives of the European Union and the US were strongly against. A EU representative said the EU would be "extremely reluctant" to embark on a review, as it regarded the declaration as "one of the cornerstones of the international legal and political system". The US Secretary of State said that the US would be "relentless" in its opposition to any attempts to change the Declaration.(IHT 29-07,30-07-97)

**UN access to political prisoners in China**

For the first time UN experts, members of the UN working group on arbitrary detention, had private interviews with political prisoners in China.(IHT 22-10-97)

**UN resolution on human rights in China**

The US dropped its sponsorship of a (since 1990 practically annual) draft UN resolution condemning China's record on human rights. This was seen as a response to what were considered Chinese efforts to improve its record, including the recent decision to join the UN Covenant on Civil and Political Rights.(IHT 16-03-98)

IMMIGRATION
*See:* Refugees

INSURGENTS

**Cease-fire in Philippine insurgency**

The Philippine government and the Moro Islamic Liberation Front signed a cease-fire agreement on 18 July 1997, paving the way for formal peace talks.(IHT 19/20-07-97)

**Accord between Philippine government and Communist insurgents**
*(See also:* 7 AsYIL 430)

Agreement was reached in early February 1998 in the Netherlands, where the talks had been proceeding sporadically since 1992,on an accord, the "Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law", together with two related agreements. The accord was signed in March 1998, the first of four agreements forming a political settlement ending a nearly-three-decade insurgency.(IHT 03-02 and 17-03-98)
However, in early 1999 several abductions were carried out by the New People's Army, the military arm of the Communist Party, resulting in the Philippine president suspending the peace talks.(IHT 24-02 and 25-02-99)

**Shanti Bahini in Bangladesh**
*(See also:* 4 AsianYIL 452, 7 AsianYIL 431)

A twenty-two-year separatist war was ended on 2 December 1997 with the signing of an accord between the government and the Shanti Bahini rebels. The Shanti Bahini had been fighting a war since 1973 over demands for autonomy for the Hill Tracts in the northeastern Indian state of Tripura, bordering Bangladesh. The region in question has an area of 13,000 square kilometres southeast of Dhaka and a population of 800,000 people, and the rebels were mainly from the predominantly Buddhist Chakma tribe. Under the agreement there would be three elected district councils which would control the land management and local police of the area. The first batch

of insurgents in the southeastern Chittagong Hill Tracts were to give up their weapons in February 1998.(IHT 03-12-97 and 16-01-98)

The agreement gave rise to protests from the political opposition; they held that the accord gave the Buddhist rebels too much power at the expense of Muslim Bengali-speaking settlers from the north who would have to return their land to the tribes, and that it in effect handed over the Chittagong Hill Tracts to India.(JP 17-10-97;IHT 11-06-98)

**Bougainville peace efforts**

The Papua New-Guinea (PNG) prime minister in late August 1997 gave full government support for the Burnham (New Zealand airbase) Peace Declaration to end the nine-year secessionist war. The declaration was agreed by the rebel representatives and the PNG government-backed Bougainville Transitional Government. The declaration called for a cease-fire, demilitarization, an end of the military blockade and the installation of a UN peace-keeping force.(JP 25-08-97) An interim truce agreement was signed on 10 October 1997.

The conflict began when in 1988 landowners revolted over damage caused by the huge Panguna copper mine and the level of royalties they received from it. The mine, since closed, was owned by a unit of the Anglo-Australian Rio Tinto Ltd.(JP 11-10-97)

New Zealand was to lead an unarmed Truce Monitoring Group, including representatives from Australia, Fiji, Tonga, and Vanuatu. It would be neither a military peace-keeping nor a peace-enforcing body.(JP 18 and 19-11-97)

**Insurgents' attack on foreign vessel in Sri Lanka**

Tamil Tiger guerrillas set ablaze a Chinese cargo carrier on 9 September 1997 while it was loading cargo at a government-owned mineral sands facility. The attack was the second against a foreign ship at the same port: in August 1996 a Philippine-registered ship was the target.

In July 1997 the LTTE hijacked a North Korean cargo vessel, later freed. The guerrillas then vowed to attack merchant vessels taking supplies for the government to the Tigers' former stronghold in the north of the island.(JP 10-09-97)

A shipment of mortar bombs from Zimbabwe for the Sri Lankan government went missing in July 1997 and according to the Zimbabwean side the weapons were captured by the insurgents. The latter denied the charges, charging that the allegation was aimed at tarnishing their image and associating them with acts of piracy.(JP 06-10-97)

## INTER-STATE RELATIONS: GENERAL ASPECTS

**Afghanistan–Iran**

As forces of the Taleban advanced in northern Afghanistan, Iran had asked them, through the Pakistan embassy, whether the safety of the Iranian consulate in the city of Mazar-i-Sharif could be guaranteed as and when the Taleban captured the town.

The answer was in the affirmative, but in reality a great number of Iranians were in August 1998 caught up in the fighting. Eleven Iranian diplomats disappeared in the event. Iran reacted angrily and raised the prospect of military action. The leader of the Taleban, which had taken over authority of virtually the whole country, said that the diplomats were "probably dead"; this was confirmed on 9 September in respect of nine of them.

The Taleban put the blame on renegade fighters acting without orders, yet Iran put responsibility for the "abhorrent killing" squarely on the shoulders of the Taleban along with Pakistan, which had "assured us of their safety". Taleban officials promised to punish the soldiers who had carried out the executions, but rebuffed both an Iranian demand that those responsible be handed over to the Iranian authorities or to an international tribunal, and to issue a formal apology. The case was brought before the UN Security Council.

On the other hand there were ample suspicions that Iran had been active in assisting Shiite anti-Taleban alliances.(IHT 07-09;11-09;12/13-09 and 17-09-98)

A first border clash took place on 8 October 1998.(IHT 09-10-98)

**Asia-Europe Meeting (ASEM)**

*(See also:* 6 AsYIL 401)

The UK had accused Myanmar of profiting from the drug trade and announced that it would not be admitted to the 1998 Asia-Europe Meeting. The UK could bar Myanmar from the gathering because it constituted a voluntary dialogue between individual states rather than a bloc-to-bloc meeting. By way of response a senior Myanmar official recalled that 150 years ago Britain had forcefully introduced opium into Asia.(IHT 02-09-97)

The second Asia-Europe meeting was held in London in early April 1998. It was attended by twenty-five heads of state or government. The next meeting would be held in Seoul in 2003.(IHT 03-04 and 06-04-98)

**Asian attitudes toward the Iraq issue**

The conflict over Iraqi behaviour toward the activities of the UN Special Commission had led the US to carry out heavy missile attacks and air strikes on Iraqi targets in mid-December 1998. Japan issued a forthright defence of the American action, while the Chinese response consisted of a sharply worded attack on the US. Singapore showed increasing support for the US position, and the Malaysian prime minister denounced the US action. South Korea uttered modest rhetorical backing.(IHT 21-12-98)

**Cambodia–Japan**

*(See:* Civil war: Cambodia)

**Cambodia–Vietnam**

The leader of the Vietnamese Communist Party paid a state visit to Cambodia, aiming at easing historically tense relations.(IHT 10-06-99)

**Cambodia–Thailand**

As a result of the battle between Cambodian factions near the Thai border, artillery shells hit Thai territory, killing a Thai soldier. The Thai army retaliated and the Cambodian government apologized for the accident. The Thai premier acknowledged that it was an accident, stressing that Thailand would remain neutral and would not intervene in the internal conflict.(JP 29-08-97)

**China–ASEAN**

During a visit to Malaysia in August 1997, the Chinese prime minister put forward a five-point proposal on developing relations between the two sides: respecting each other and treating each other as equals; strengthening dialogue and intensifying consultation; seeking common development based on mutual benefit; supporting each other and expanding cooperation; bearing in mind the general situation, seeking common ground while setting aside differences.(JP 01-10-97)

**China–India**

*(See also:* Weapons: Indian nuclear weapon test)

During a television interview on 3 May 1998 the Indian defence minister declared that China, not Pakistan, is India's "potential threat No.1", referring to Chinese "encirclement" and assistance to Pakistan. Later he softened his pronouncements by saying that he had been misunderstood and that he was committed to dialogue.(IHT 04-05;06-05 and 07-05-98)

**China–Japan**

In talks between the Chinese and Japanese foreign ministers the Japanese side promised to be more open about its security pact with the US [*see infra* at 290].(IHT 01-07-97)

The president of China paid a five-day state visit to Japan in late November 1998. (IHT 26-11-98). He was the first Chinese head of state ever to visit Japan.

The visit was somewhat overshadowed by certain disagreements. The joint declaration was released without signatures. China wanted two concessions: a clear-cut written apology for the behaviour of Japan during World War II, similar to that given to South Korea (*see infra* at 281), and a pledge about relations with Taiwan similar to the three "no's" by the US president (*see infra* at 276). Japan rejected both wishes and offered a verbal apology only. The Japanese government explained this apparent anomaly by saying that the historical circumstances were different, such as in the fact that Japan had formally annexed the Korean peninsula while in the case of China, Japan had fought a war there; this was an act for which Japan had to apologize yet not in writing although the essence was the same. Further, the Japanese emperor had already been to China and had expressed deep regret for the war.

The written joint declaration contained the following statement: "Japan feels acute responsibility for the grave misfortune and harm to the Chinese people during a certain period of aggression toward China, and we express deep remorse about this." As to the fact that the written joint declaration did not contain signatures, it was said that the document was never intended to be signed.

As to the issue of Taiwan: the Japanese prime minister stated that he did not support Taiwan independence and did regard it as Chinese territory.(IHT 27-11 and 30-11-98)

**China–Liberia**

China severed its diplomatic relations with Liberia on 9 September 1997 because Liberia had established official relations with Taiwan.(IHT 10-09-97) In this context the Liberian consulate in Hong Kong was also closed.(IHT 10-10-97)

**China–Russia**

The Russian president paid a state visit to China in November 1997. The summit meeting resulted in agreements on various topics, such as border demarcation (see: Borders), cooperation between border regions, technical and scientific cooperation, cooperation on regulating trade in financial services, the diamond trade, oil and gas, and protecting the Manchurian tiger.

China and Russia, *inter alia*, signed a framework agreement to construct a $12 billion, 3,000-km-long pipeline from Siberia to North China. It was hoped that Japan and South Korea would join in the financing, in return for some of the 20 billion cubic metres of gas that would flow down the line.

The Russian president characterized the Sino-Russian ties as "a strategic partnership based on personal trust between the presidents of China and Russia".(IHT 11-11-97;JP 11-11-97)

**China–Singapore**

For the first time since the establishment of diplomatic relations in 1990 (as to the timing of establishing these relations Singapore had ceded precedence to its larger neighbour, Indonesia), the Chinese premier visited Singapore in August 1997.(JP 27-08-97)

**China–Southeast Asia**

The Chinese response to the seizure of power in Cambodia by Mr.HUN SEN (see: Civil War) was considered to mark a major change in Chinese policy toward the region. Whereas it launched a reprisal attack into Vietnam when Vietnam invaded Cambodia in 1978 to oust the Khmer Rouge, its recent stance was very restrained. Southeast Asian officials said China was willing to let countries in the region take the lead on matters affecting regional stability. Its backing for the ASEAN efforts to broker an end to the political crisis in Cambodia would also help to ensure that those efforts were not pushed aside by the more powerful efforts of the US.(IHT 25-07-97)

**China–US**

*(See also:* Law of armed conflict)

China urged the US on 15 July 1997 to reject a transit visa request from the president of Taiwan, warning that issuing the visa could seriously damage Sino–US

ties.(IHT 16-07-97) A visa was nevertheless issued for two transits at Honolulu.(IHT 01-08-97)

The Chinese president paid an official to the US in late October 1997, the first Sino–US summit in twelve years.(IHT 27-10-97) The two sides afterwards issued a joint statement.(IHT 04-11-97) On his part the US president paid a visit to China in late June 1998.(IHT 25-06-98)

During his visit the US president declared that the US does not support an independent Taiwan, will oppose Taiwan's entry into organizations of nation-states and does not support a policy of "one China, one Taiwan". The statement became known as the "three noes" policy. The president said that the US supported the peaceful reunification of China and Taiwan. He did not make direct mention of China's demand that the US begin winding down arms supplies to Taiwan, but did say, at another meeting, that "our policy is that weapons sales to Taiwan are for defensive purposes only".(IHT 01-07-98)

As well as US plans to develop a national system of missile defence, it was reported in January 1999 that the US was preparing plans for a missile system to defend Japan, South Korea, and Taiwan, including the US troops stationed in the region. The idea of constructing such a system became more acute with the North Korean firing of a missile or rocket into the Pacific Ocean in August 1998. (*see infra* at xxx) [Russia was worried that the US project for a limited missile shield would imply revising the 1972 Treaty on anti-ballistic missiles, but the US had sought to assure Russia that the US would not withdraw from the ABM commitments.(IHT 12-03-99)]

When US-Japanese discussions about the plans were publicized China accused the US of trying to start "a revival of Japan's military ambitions". As regards Taiwan, any system aimed at protecting the island would imply its being aimed at neutralizing the existing Chinese missiles facing Taiwan. China said that the system "would only undermine security and stimulate the proliferation of missiles", and that it struck at US ties with China as enshrined in the well-known three joint communiques, under which the US agreed to sell only defensive weapons to Taipei.(IHT 23/24-01;25-01;11-02 and 12-02-99) The Chinese foreign minister also warned that a theatre missile defence system would amount to an encroachment on China's sovereignty and territorial integrity and would block hopes of a peaceful reunion of the mainland with Taiwan.(IHT 08-03-99)

In its first concrete response to increasing deployment of missiles by China in coastal areas the US allowed Taiwan to buy an early-warning system from the US. A US official acknowledged that one purpose of the approval was to try to dissuade China from continuing its build-up of missiles and manned bombers across the Taiwan Strait.(IHT 02-05-99)

Reportedly in a gesture of goodwill toward China the US military commander in Asia and the Pacific in late May 1999 urged stronger multilateral security arrangements in the region, a measure long demanded by China to reduce the dominant role of US bilateral alliances with Japan, South Korea, Thailand, the Philippines and Australia. In the Chinese view these alliances are aimed at containing China and should be abandoned in favour of broader cooperative security arrangements. The

commander linked the effectiveness of such arrangements with the settlement of disputes such as those over the Spratly Islands.(IHT 24-05-99)

**India–Pakistan**

*(See also:* Specific territories within a state: Kashmir)

In his speech to the UN General Assembly the Pakistan prime minister on 23 September 1997 made a proposal to open talks on a non-aggression pact with India and for the two countries to show "mutual and equal restraint in the nuclear and ballistic fields". However, the two sides had already agreed in 1972 to settle their differences peacefully, and in 1988 signed an agreement not to attack each other's nuclear plants. After the third Indo-Pakistan war the two sides met in 1972 at Simla and agreed to "refrain from the threat or use of force against the territorial integrity or political independence of each other". On the other hand, there have been Indian proposals since 1994 to extend the nuclear agreement to population centres and economic targets, and to reach a no-first nuclear strike agreement.(JP 24-09-97)

The two states held three days of peace talks in September 1997, agreeing to meet again, but without signs of progress. It was the third round of negotiations since March 1997. (IHT 19-09-97;JP 17-09 and 18-09-97) On 29 July 1998 the two prime ministers met on the sidelines of the annual SAARC summit conference, for the first time since the nuclear tests conducted by both countries in May of that year (*see*: Nuclear energy matters). It was agreed that the above talks would be resumed, but the preparatory talks over procedures of the talks ended in failure.(IHT 30-07 and 1/2 -08-98) When the two prime ministers met in September 1998 during the meeting of the UN General Assembly session they agreed to resume the talks. The most extensive Indo-Pakistan discussion ever on nuclear weapons issues was then held in three days of talks in mid-October 1998, *inter alia,* on confidence-building measures. The parties agreed to meet again in February 1999.(IHT 17/18-10 and 19-10-98)

This meeting of 20-21 February 1999 was described as the "most historic engagement" between the two countries since their Simla Peace Agreement of 1972. It took place in Lahore, Pakistan, where the Indian prime minister arrived by bus on the inaugural run of a cross-border bus service, as the first Indian prime minister in ten years to visit Pakistan.(IHT 19-02-99)

The meeting resulted in several agreements, as embodied in a joint statement, the "Lahore Declaration". The parties would reduce the risk of nuclear war on the subcontinent by exchanging strategic information about their arsenals and giving each other advance notice of ballistic missile tests. Similarly, notice would be given of "any accidental, unauthorized or unexplained incident" that could create the risk of nuclear fallout or an outbreak of nuclear war. They pledged to "engage in consultations on security concepts and nuclear doctrines, with a view to developing measures for confidence building in the nuclear and conventional fields", aimed at the avoidance of conflict. They also pledged to intensify their efforts to resolve their differences, such as the Kashmir dispute, and to have periodic foreign ministerial meetings.(IHT 22-02-99)

**Iran–Arab countries**

As an effort to improve ties between the two states an envoy from Saudi Arabia paid a rare visit to Iran in early July 1997.(IHT 02-07-97)

Against the backdrop of an often disharmonious relationship between Iran and other Arab countries, mending these relations had been going on for a while and the process accelerated in 1997 with the election of the new Iranian president. There was, inter alia, a flurry of diplomatic traffic between Iran and the Gulf states. In May 1999 the Iranian president went on a tour of Arab countries. He began his trip in Syria then started his visit to Saudi Arabia on 14 May 1999, the first Iranian leader to visit Saudi Arabia in twenty years. The trip was continued with a visit to Qatar.(IHT 15/16-05-99)

**Iran–Europe**

The ambassadors of all but one of the European Union countries had been recalled in connection with the Mykonos case (*see* 6 AsYIL 422; 7 AsYIL 408;453). It was reported that the fifteen EU states had agreed in principle on 5 September 1997 to send their ambassadors back to Iran, but no progress was achieved on resolving the Iranian demand that the German ambassador be the last EU envoy to return.(JP 04-10-97)

Iran considered the crisis with Germany to be of a "bilateral nature" which ought be settled through bilateral talks. On the other hand, the German foreign ministry said that Germany would hold talks only once the EU ambassadors were back in Tehran.(JP 06-10-97)

**Iran–Pakistan**

Unidentified gunmen had shot dead four Iranian air force personnel and their Pakistani driver in Rawalpindi. The Iranians were receiving technical training in Pakistan. The incident came after several attacks on Iranian interests in Punjab Province where clashes between Sunni and Shia Muslim factions were not unknown. The Iranian foreign ministry summoned the Pakistani ambassador for an explanation. The ambassador expressed regret over the incident.

Apart from the incident referred to above, a Sunni militant group had earlier claimed responsibility for the killing of an Iranian diplomat in February 1997, and in January 1997 a Sunni Muslim mob had burnt down an Iranian cultural centre in Lahore.(JP 18-09-97)

**Iran–Thailand**

The Iranian foreign minister warned that relations with Thailand could suffer if Thailand did not release an Iranian sentenced to death in Thailand for plotting to bomb the Israeli embassy. Iran was of the opinion that the man was not guilty and had been arrested by mistake.

A Thai appeals court upheld the death sentence in June 1997.(JP 17-09-97)

**Iran–US**

There were essentially three points of contention between the US and Iran: (i) the Palestinian issue, (ii) the allegation that Iran was a supporter of terrorist activities, and (iii) the US accusation that Iran was pursuing programmes to develop nuclear, chemical and biological weapons and the disapproval of the US of the pursuits of Iran in the field of ballistic missiles.

It was reported that the US was quietly seeking to improve its relations with Iran. This occurred against the backdrop of what was considered a political shift in Iran, symbolized by the outcome of the presidential election in May 1997.(IHT 10-07-97) At the Organization of the Islamic Conference *(see infra* at 302) on 15 December 1997 the newly elected Iranian president called for renewed "thoughtful dialogue" with "the great people and nation of America". The suggestion was repeated later in an interview with CNN. The US responded positively, although it was divulged later that just after the new president's inauguration in August 1997 the US had already conveyed a proposal through diplomatic channels for open direct talks.(IHT 16-12-97;08-01;09-01 and 10/11-01-98) It was also reported that since the new Iranian president had taken office there had been low-key US-Iran deliberations in a small group of UN member states, among whom were Russia, Turkmenistan, Uzbekistan, Tajikistan, Pakistan, and China, to explore ways to end the civil war in Afghanistan.(IHT 16-12-97)

In the first significant easing of the US economic isolation of Iran [among the Iranian grievances was that concerning the Iranian assets frozen in the US immediately after the Islamic revolution of 1979] the US government decided in July 1997 not to oppose a 3,200-kilometre pipeline that would carry Central Asian natural gas across Iran to Turkey. The project was considered not to be in violation of the US 1996 Iran–Lybia Sanctions Act which prohibited investments of more than $40 million in the development of Iran's energy sector.(IHT 28-07-97) (*see also*: Oil and gas) However, later in the year the US sought to persuade Caspian Sea states to scrap plans for oil and gas pipelines through Iran in favour of a more costly "Eurasian transportation corridor" to the West. Although the real choice depended on a decision from the oil companies, leaders of the region (Azerbaijan, Georgia, Turkey, Kazakhstan, and Uzbekistan) on 29 October 1998 "strongly confirmed their determination" to realize the American-backed pipeline route, increasing political pressure on the companies.(IHT 21-11-97 and 30-10-98)

In June 1998 the US government declared it was seeking "a genuine reconciliation" with Iran but repeatedly linked Iran with the support of terrorism and distribution of dangerous weapons as well as with opposition to the peace process in the Middle East. On the other hand the Iranian side urged the US to end its "hostile policies" toward Iran before any normalization could occur, and called for the US to end support for opponents of Iran based in Iraq, to free Iranian assets frozen two decades ago and to "apologize to the Iranian nation for its wrong policies in the past fifty years".

The evolving relationship since January 1998 showed the promotion of cultural exchanges, the relaxation of travel restrictions on Iranian diplomats and eased entry barriers to visiting Iranians.(IHT 19-06-98)

Responding to a US call to join in drawing up a roadmap to normal relations, the Iranian foreign minister in a speech to the Asia Society in New York acknowledged a "new tone" toward Iran on the part of the US but said that "sole reliance on variation of verbiage can simply not provide the necessary basis for an invitation to political dialogue". He made the following criticisms: (i) the US lacks "a commitment to international law" because of its imposition of sanctions against Iran and dozens of other countries; (ii) the US is "retarding economic prosperity of Iran and the region" by its policy of obstructing the building of a pipeline through Iran from Central Asia and the Caucasus; (iii) the US is trying to "sabotage" Iran's efforts to play a role in promoting regional stability, and (iv) the covert programme approved by the US Congress to destabilize Iran and the recent creation of a Persian-language radio station to wage a propaganda war against Iran are evidence of American interference in internal affairs of Iran.(IHT 30-09-98) On 3 November 1998 the Iranian supreme leader ruled out any possibility of a normalization of relations with the US.(IHT 04-11-98)

It was reported that the US had been pressing Russia for most of 1997 to stop its scientists and military institutes from helping Iran develop a new ballistic missile with a range of between 683 and 1,243 miles, one that could reach Israel, Saudi Arabia and US troops in the Gulf area, but Russian officials had denied any government policy or program to that effect. It was reported that the missile issue had become a major one as Israel had stepped up its charges on the matter.

US officials estimated that deployment of the missiles concerned could be between two and five or more years away, depending on how much help Iran would receive from countries like Russia, China and North Korea.(IHT 23/24-08, 22-09-97)

The annual report of the US State Department had referred to Iran as remaining "the most active state sponsor of terrorism". Iran rejected the accusation and through the state-run radio said, *inter alia*: "Itself a major victim of terrorism, Iran is fully aware of the dangers of this phenomenon and has worked with other countries at international bodies to rid the world of this threat."(IHT 02/03-05-98)

**Japan–North Korea**

*(See also*: Nuclear capability; Missile technology; Territorial sovereignty)

North Korea announced in July 1997 it would lift a ban preventing Japanese women who were married to North Koreans from leaving the country to visit their homeland. There were an estimated 1,800 of them who had married their Korean husbands in Japan and followed them to North Korea between 1959 and 1982.(IHT 18-07-97) On the other hand, Japan refused to send food aid until it obtained information about the alleged abductions of up to 19 Japanese citizens by North Korean agents in the course of the past decades.(IHT 04-08-97) North Korea and Japanese Red Cross officials signed an agreement on 9 September 1997 allowing the visit to Japan of Japanese wives of North Koreans (*see* above)(IHT 10-09-97) A month later it was reported that Japan had resumed its food aid.(IHT 10-10-97)

However, in June 1998 North Korea announced that it had conducted an exhaustive search for the Japanese persons who had allegedly been abducted but had found no sign of them. When Japan refused to accept this information North Korea

cancelled the planned visit by Japanese-born wives of Koreans to Japan.(IHT 10-06-98)

In August 1997 Japanese negotiators held talks with North Korean counterparts at Beijing aimed at restarting efforts to normalize diplomatic ties. These normalization talks had been stalled for nearly five years.(IHT 21-08-97) In November 1992 eight rounds of similar talks ended abruptly when North Korea broke off negotiations after the Japanese side raised allegations that North Korean agents had kidnapped Japanese nationals. This referred to the abduction on seven occasions involving ten Japanese in the 1970s and 1980s.(IHT 22-08-97)

At the invitation of the ruling party in North Korea the Japanese governing parties were to send a mission to Pyongyang to prepare a resumption of talks on normalizing diplomatic relations.(IHT 04-11-97)

**Japan–Russia**

The Japanese prime minister and the Russian president held a summit meeting at Krasnoyarsk, Siberia, on 2 November 1997. They pledged to make maximum efforts to conclude a peace treaty by the year 2000. Despite a normalization of relations in 1956 a peace treaty had not yet been concluded, particularly because of the ongoing dispute over the Kuril Islands ("Northern Territories" to Japan) seized from Japan near the end of World War II.(IHT 03-11-97)

**Japan–South Korea**

During a state visit by the South Korean president to Japan in early October 1998 the emperor and the Japanese prime minister offered frank and unambiguous apologies for the suffering that Japan had caused during its 1910-1945 occupation of the Korean Peninsula. The apology was contained in a joint declaration, the first written apology issued to an individual country by Japan for its actions before and during World War II.

On his part the Korean president in a speech to the Japanese Parliament forgave Japan for its behaviour and emphasized a future of partnership. He said, inter alia: "It is truly infantile to regard 1,500 years of exchanges and cooperation as insignificant because of unfortunate periods that totaled fewer than fifty years", and "Isn't it something we should be ashamed of and something we should be reproached for by our ancestors, who forged such a history ...?" He stressed reconciliation and future cooperation.(IHT 08-10 and 09-10-98)

The Japanese prime minister paid a visit to South Korea in March 1999 for the first time since 1996. He and the Korean president were to try to resolve their differences over North Korea.(IHT 19-03-99) Although agreeing on the importance of "engagement" with North Korea, Japan insisted that North Korea had to be the first to "respond constructively" to "concerns and anxieties" aroused by the missile firing of 31 August 1998 (*See infra* at 292) before Japan could contribute "humanitarian assistance".(IHT 22-03-99)

**Malaysia–Singapore**

Malaysia rejected a request from Singapore to move its immigration and customs checkpoint from the Tanjong Pagar railway station in central Singapore to Woodlands, on the border (see: Lease of territory). Other disputes between the two countries concern, inter alia, the water supply agreements which would expire in 2011 and 2061, the high interest rates for (Malaysian) ringgit deposits offered by Singapore banks, and the mandatory savings plan in Singapore which was freezing the deposits of the many Malaysians working in Singapore.(IHT 05-08-98)

In September 1998 Malaysia introduced new rules with regard to entry to its air space by Singapore military and rescue planes, prescribing case-by-case permission. The previous arrangement of blanket approval of the military aircraft of one state flying at low altitude over another without warning was highly unusual.(IHT 18-09-98)

**Malaysia–US**

In a speech on the eve of the annual summit meeting of the APEC forum the US vice-president strongly endorsed efforts of political reformation and strongly assailed the use of authoritarian rule in a time of economic crisis, implicitly though clearly referring to the prevailing political situation in the host state Malaysia. The latter reacted by accusing the US on 17 November of inciting lawlessness in order to overthrow a constitutionally elected government.(IHT 17-11 and 18-11-98)

**Myanmar–US**

The US permanent representative to the UN abandoned his plan to visit Myanmar, as the Myanmar government let it be known that he would not be eligible for a visa unless the US ban on Myanmarese government members entering the US were either waived or lifted. A 1996 US executive order barred members of the military government of Myanmar and their families from visiting the US.(IHT 08-04-98)

**North Korea–US**

While preparing for four-party talks *(see supra* at 262) bilateral talks continued and expanded to areas of missile proliferation, food aid and missing US servicemen (*see infra* at 287)(IHT 02-07-97) It was reported later that the US was approximately doubling its previous donation to North Korea through, *inter alia*, the UNWFP.(IHT 16-07-97) However, on 27 August 1997 North Korea suspended the talks in view of the defection of their ambassador to Egypt and his brother to the US (*see supra* at 263).(IHT 28-08-97)

After more than a year, the parties met again in New York in early October 1998 and discussed North Korea's development of long-range missiles and its export of missile technology to countries in sensitive regions.(IHT 02-10-98) The meeting was resumed in March 1999. During these talks agreement was reached on repeated US inspections of a suspected site (*see*: Nuclear energy matters: New North Korean building activities).(IHT 17-03-99)

In May 1999 the US sent an envoy to North Korea with, reportedly, a proposal gradually to lift the 46-year-old economic embargo in exchange for several major

concessions, including an agreement that North Korea would end its long-range missile programme. Details of the proposal were not divulged. It would be the biggest change in the US approach to North Korea since the Korean War.(IHT 22/23-05 and 27-05-99)

**Pakistan–US**

The US secretary of state visited Pakistan in November 1997, the first to visit Pakistan since 1983. According to US embassy officials in Islamabad cooperation on anti-terrorism would take an important place in the discussions. Besides this, the US would encourage peace efforts in Afghanistan where the Taleban was recognized only by Pakistan, the United Arab Emirates and Saudi Arabia.(JP 17-11-97)

**South Korea–Vietnam**

Over a period of about eight years during the Vietnam War South Korea had sent 300,000 troops to fight alongside the US forces.

At a meeting between the president of South Korea and the prime minister of Vietnam on the sidelines of the ASEAN summit of December 1998 at Hanoi the South Korean president for the first time expressed regret over the role of South Korea in the Vietnam War. However, the Vietnamese prime minister said that his country did not expect apologies nor reparations: "If they feel regret for what they did in the past, that's their decision. We want to close the past, look to the future and build better relations with other nations."(IHT 17-12-98)

**South Korea–Russia**

The president of South Korea went to Russia in late May 1999, firstly to conduct his summit diplomacy with the powers surrounding his country and secondly, to discuss the problem of the Russian debt.

As to the former, he tried to get support for his "sunshine policy", while Russia on its part put forward its wish to participate in the four-party talks among North and South Korea, China and the US, or, alternatively, to start a new "multiple regional dialogue" including all powers in the area and covering a broader agenda.

With regard to the latter item, Russia reportedly offered to South Korea Russian submarines as payment for the $1.7 billion in loans, plus interest, extended from 1990 to 1992.(IHT 24-05-99)

## INTERNATIONAL CRIMINAL LAW

**Opposition to the establishment of an International Criminal Court**

China declared on 16 June 1998 its opposition to an international criminal court at the UN conference on establishing such a court because of the Court's jurisdiction to deal with the internal affairs of a country without the latter's consent.(IHT 17-06-98)

## INTERNATIONAL ECONOMIC RELATIONS AND TRADE

### US sanctions in trade dispute against Japan: retaliatory port fines

*(See also:* 7 AsYIL 449-450)

Under the Japanese port system, foreign shipping companies are not themselves allowed to choose who will unload their ships or even to negotiate the price of the job;or are they allowed to establish their own companies to provide port services. Prior approval is required for even minor cargo-handling changes. The ruling body is the Japan Harbour Transportation Association. In September 1997 the US imposed retaliatory fines on US port calls by Japanese ships, on the grounds that Japan had refused to ease costly restrictions on foreign ships operating in Japanese ports. As three Japanese shipping firms had failed to pay the fines, the US imposed a ban on the use of US ports and detained those already in port. Japan was of the opinion that the fines violated the US-Japan Treaty of Friendship, Commerce and Navigation.

In October 1997 Japan agreed to streamline the licencing procedures at its ports and to create an independent agency to monitor the harbour system. Following this agreement the US Federal Maritime Commission decided to postpone enforcement of the access ban, but it later transpired that no agreement had yet been reached on the issue of sanctions.(IHT 17-10 and 18/19-10-97;JP 20-10 and 27-10-97)

### US renewal of most-favoured-nation treatment for China

Citing the Indian and Pakistani nuclear tests as demonstrations of an urgent need to maintain constructive relations with China as part of a strategic relationship, the US decided to grant the annual renewal of the most-favoured-nation status for China.(IHT 24-07-98)

### Most-favoured-nation status for Vietnam

Six countries in the world did not enjoy most-favoured-nation treatment vis-à-vis the US for various reasons: Afghanistan, Cuba, Laos, North Korea, Serbia and Vietnam.

Vietnam was on that list under a 1974 law that denies that treatment to countries with restrictive emigration policies. In March 1998 the US president issued a waiver exempting Vietnam from that law and on 3 June the waiver was renewed for another year.(IHT 24-06-98)

## (NON-)INTERVENTION

### US bombing of sites in Afghanistan

On 7 August 1998 the US embassies in Kenya and Tanzania were bombed, causing a great number of casualties. The bombings were classified as acts of terrorism. It was argued, inter alia, that an attack on a diplomatic mission counts as an attack on the state itself under international law; US officials put high on their list of suspects the name of the Saudi Arabian national OSAMA BIN LADEN who was expelled from Sudan in 1996 under US pressure and had fled to Afghanistan.

On 20 August 1998 the US delivered surprise missile strikes against sites in Afghanistan (and Sudan) in an effort to destroy key bases used by Muslim groups allegedly involved in the explosions in Nairobi and Dar-es-Salaam. The US president described the attack as a response to terrorism and said, *inter alia*: "The US launched an attack ... on one of the most active terrorist bases in the world. It is located in Afghanistan and operated by groups affiliated with OSAMA BIN LADEN, a network not sponsored by any state but as dangerous as any we face." He mentioned the following reasons for the action: "convincing evidence [that] these groups played the key role in the embassy bombings", "these groups have executed terrorist attacks against Americans in the past", "compelling information that they were planning additional terrorist attacks against our citizens ..." and that "they are seeking to acquire chemical weapons and other dangerous weapons". The US Defense Secretary described the action as "not just retaliation for a specific act but also an act of self-defense" by the US to protect American lives around the world. He said that both countries had harbored the planning and training of terrorists and had helped them to launch attacks, thereby making them legitimate targets for US military attacks. The chairman of the joint chiefs of staff said that the operations were directed against "a clear and imminent threat" to the US.(IHT 08/09-08;14-08 and 21-08-98)

Pakistan condemned the attack and filed a protest, *inter alia*, over the fact that the missiles launched into Afghanistan flew through Pakistan air space without permission.(IHT 22/23-08-98)

**Reactions in Southeast Asia on the treatment of former Malaysian deputy prime minister**

Breaking a long-standing tradition in Southeast Asia of non-interference in the internal affairs of other countries, there were criticisms of the detention and alleged bad treatment of the former deputy prime minister of Malaysia.

In view of the coming APEC meeting in November 1998 in Malaysia, the Philippine president said he was considering not to attend "because they put my good friend behind bars". Criticism was also expressed by Thai officials, and from the Indonesian side (IHT 02-10-98), to the extent that the Indonesian president canceled a planned visit although care was taken not to link this with the events in Malaysia.(IHT 07-10-98)

**Asian reactions to NATO attack on Serbia**

Among the Chinese reactions to the attack which began on 24 March 1999 were those contained in the official newspaper People's Daily which called the operation a "dangerous precedent of naked aggression". Noting that ethnic conflict in Yugoslavia had ancient roots, it blamed the recent violence in Kosovo on "illegal Albanian armed forces. ... There are many countries with problems involving ethnic minorities. ... If we encourage division, won't the world fall into chaos? ... NATO's use of military force ... is without reason or legal basis ...". It considered the action as part of a dark new "strategy for global intervention". China held the view that the operation required approval by the UN Security Council. A month or more later some

change was said to be visible in the Chinese attitude when certain of its top leaders said that China opposed massacres and the expulsion of people from their homes.

Indonesia, Vietnam, Thailand, and Iran also spoke out against the NATO action; the Philippines indicated it would not take sides, while Japan and Singapore supported the action.

The Japanese foreign minister said that "Japan understands NATO's use of force as measures that had to be taken to prevent a humanitarian catastrophe or a further increase in victims" and the Japanese prime minister called the air strikes "an unavoidable step to prevent a humanitarian atrocity".(IHT 26-03, 8/9-05-99) There was a contrast between the reactions of Indonesia and Malaysia: Malaysia was seen to give some support to the attacks as their being necessary to prevent the "genocide" of the Kosovar Albanians. After criticizing US strikes in Iraq, Sudan, and Afghanistan, its backing of the attacks in Kosovo was described by the Malaysian representative to the UN as a "reluctant exception" to the idea that all international security issues must be channeled through the UN Security Council.(IHT 14-04-99)

JAPAN'S MILITARY ROLE

*See:* Territorial sovereignty

JOINT DEVELOPMENT AND JOINT VENTURES

*See also*: Oil and Gas: Division and sharing of Caspian oil; Territorial claims and disputes: Spratly Islands

**Russian plans for disputed islands**

In talks between the Russian and Japanese foreign ministers the Russian side was reported by a Japanese spokesman to have offered to his Japanese colleague plans for the joint development of the islands off the Japanese island of Hokkaido which are under dispute between Russia and Japan.

There was, besides, a proposal to set up a Japanese representative office in Yuzhno-Sakhalinsk, the main city on the Russian island of Sakhalin.

The two sides also agreed to prevent recurrences of incidents like a week before when Russian vessels fired warning shots at Japanese fishing boats in Russian waters near the disputed islands.

Referring to the rapprochement achieved on the G-8 meeting in Denver, USA, two weeks earlier, the Russian minister mentioned the wish of huge Japanese investments in Sakhalin and on the Kuril Islands.(IHT 01-07-97)

JUDICIAL ASSISTANCE

**Detention of criminal suspect by Pakistan**

A suspect in the bombing of the US embassies in Kenya and Tanzania was arrested in Pakistan and handed over to the authorities in Kenya. The person was arrested soon after his arrival at Karachi on 7 August 1998, the day of the bombings. There were conflicting reports as to whether or not officials of the US CIA who had come to Pakistan had had access to the man and had accompanied him to Nairobi.(IHT 17-08-98)

JURISDICTION

**Extraterritorial scope of municipal legislation**

*(See:* Sanctions)

Iran sentenced in foreign court for acts outside Iran and outside the state of the forum

A US court granted punitive damages to the US victim of a bombing in Gaza in 1995. The Court held that the bombing was carried out by the "Islamic Jihad" and that this grouping was financed by the Iranian government, making Iran liable for the bombing.

The ruling was the first case of a US court holding a foreign state liable for sponsoring "terrorism". It was based on a new US law allowing US citizens to file suit in US courts against foreign states for tort if these states are classified by the State Department as sponsors of terrorism.(IHT 12-03-98)

In late August 1998 there were reports of another federal court decision ordering the government of Iran to pay civil damages for its role in the kidnapping of three Americans who were held hostage in Lebanon by Islamic groupings during the late 1980s. The Iranian government did not take part in the court proceedings.(IHT 29/30-08-98)

KOREAN WAR

**Exhumation of remains of US soldiers**

Under an agreement reached in May 1997 North Korea announced that these exhumations would start by way of joint effort with the US in July. There were 8,100 US troops still listed as missing in the Korean War.(IHT 01-07-97)

LAW OF ARMED CONFLICT

**US bombing of Chinese embassy at Belgrade**

NATO warplanes had bombed and destroyed the Chinese embassy building in Belgrade on 7 May 1999, allegedly in the mistaken belief it was a military target, causing at least three deaths and twenty wounded. The US Central Intelligence

Agency and the US Defense Department issued a joint statement, blaming faulty intelligence for the error: "... The bombing was an error. Those involved in targeting mistakenly believed that the [Yugoslav] Federal Directorate of Supply and Procurement was at the location that was hit. ... Clearly, faulty information led to a mistake in the initial targeting of this facility. ..." Later, the US Defense Secretary attributed the bombing to "institutional error" [in contradistinction to human error] and reliance on old, insufficiently updated maps and educated guesses rather than on first-hand information. The US and NATO leaders expressed regret and apologized for the bombing.

The Chinese government protested furiously and called an emergency session of the UN Security Council. Officials expressed scepticism that the US air force, with the most modern technology at its disposal, could have hit a large, well-identified embassy building in error. In China tens of thousands of protesters surrounded the US embassy in Beijing and diplomatic facilities in other cities.(IHT 10-05 and 12-05-99)

The first concrete Chinese response consisted of the announcement that China was suspending its cooperation with the US on stopping the proliferation of weapons of mass destruction. China also suspended its dialogue on human rights and high-level contacts with the US, exacerbating the already extant downward trend in relations with the US. The foreign minister presented the Chinese demands, consisting of an "open and full apology", an investigation, publication of its results, and US action "severely (to) punish those responsible". The US president expressed his "sincere condolences" in a telephone conversation with his Chinese colleague on 14 May 1999. In mid-June a high-level US delegation presented a detailed reconstruction of the events that led to the bombing, but China rejected the excuses offered.(IHT 11-05;15/16-05;17-06 and 18-06-99) China later declined to resume negotiations with the US on its entry into the WTO until it received a "full and satisfactory explanation" of the bombing.(IHT 30-06-99)

In late June press reports said that according to "American officials and a Western diplomat" there was in fact an intelligence-gathering nerve centre in the embassy building and two of the three Chinese persons killed were not journalists but intelligence officers.(IHT 26/27-06-99)

## LEASE OF TERRITORY

### Lease of Singapore territory for Malaysian railways

*(See also:* Inter-state relations: Malaysia-Singapore)

Tanjong Pagar railway station in central Singapore, property of the Malaysian railways, is located on land that is part of a parcel of 200 hectares leased by Malaysia under a 999-year lease and that includes a 40-kilometre corridor of Singapore territory to the border with Malaysia. The lease was established during the period of British rule.

Malaysia rejected a Singaporean request to move its immigration and customs checkpoint from the railway station to the border. The issue centred on the issue that

Malaysia might have to surrender the land if there were no longer a checkpoint.(IHT 05-08;06-10-98)

## MERCENARIES

### Gurkha soldiers in British service

Retired Gurkha soldiers demanded pensions equal to those of their British counterparts. They rejected an offer from the British government of an increase from twenty-three to fifty-one per cent for the 26,375 individuals in question.

At the time of report 3,000 Gurkhas were still on active British duty.(IHT 17-07-98)

## MIDDLE EAST ISSUES

*See:* Inter-state relations: Asian attitudes, etc.

## MIGRANT WORKERS

### Malaysia

Malaysia said it expected to deport a million foreign workers in 1998 following the reduction of the work force in some sectors of industry due to the economic slowdown.

Malaysia had about two million legal foreign workers, or one-fifth of the work force, many of whom hailed from Indonesia. Besides, workers from Bangladesh, Thailand and India come to Malaysia in search of work.

Next to the legal workers there were about 800,000 illegal foreign workers.(IHT 03/04-01-98). Malaysia said in June it expected to deport 200,000 illegal Indonesian immigrants by mid-August 1998.(IHT 25-06-98)

### Thailand

The government announced on 19 January 1998 that it planned to deport 300,000 foreign workers over the next six months by not renewing their work permits. Besides this, it was the government's intention to repatriate a further one million illegal immigrants (most of them from Myanmar). All this was part of a programme to ease the impact of the economic crisis.(IHT 20-01-98)

### Indonesian workers abroad

It was reported that up to October 1997 more than 900,000 Indonesians had gone abroad as migrant workers, mostly in Malaysia, Saudi Arabia, Singapore and Hongkong.(Kompas 16-11-97) Half a million were in Saudi Arabia, forming 25 per cent of expatriates working there.(JP 09-10-97)

The Saudi authorities had detained 1,000 Indonesians for either overstaying their visas or lacking the documents to stay there. The government aimed at deporting

more than 100,000 illegal workers. In October 1997 the Indonesian government decided to repatriate about 5,000 (reference was later made to 9,000) illegal Indonesian workers stranded in Saudi Arabia, but in November 1997 Indonesia had airlifted almost 22,000 of its illegal workers from Saudi Arabia.(JP 10-11-97)

## MILITARY ALLIANCES

### Japan–US

The two countries reached a military agreement, spelling out the Japanese support for the US in the event of war in Asia. The agreement was contained in the so-called Defence Guidelines, which constituted an update of the former arrangements designed for the Cold War period. The agreement was silent on a possible conflict relating to Taiwan. It did not specify the territorial scope of the agreement. An interim report on the defence pact was made public on 8 June 1997.(IHT 31-07-97)

The Guidelines were announced on 23 September 1997. Under the agreement Japan would, for the first time since the Second World War, engage in military activities outside its borders in military conflicts involving the US. Japan would provide minesweepers and conduct search and rescue missions in international waters; use its navy to conduct inspections of ships at sea to enforce UN-sanctioned embargoes, and assist with communications and surveillance in international waters and airspace. It would allow its civilian airports, ports and hospitals to be used by US troops; it would accept refugees from war zones and receive non-combatants evacuated from areas of conflict. The Guidelines call for Japanese support for US forces in conflicts in "areas surrounding Japan" without further specification. However, as required by the Japanese constitution, no Japanese forces would be required to fight or even enter areas of combat. Japan's logistical support for US troops (there are 47,000 US troops stationed in Japan) specifically excludes providing them with weapons or ammunition.(IHT 24-09-97)

The Japanese Lower and Upper Houses of Parliament on 27 April 1999 and 24 May 1999 passed the legislation necessary for the implementation of the above agreement.(IHT 28-04 and 25-05-99)

### US bases on Okinawa

*(See also*: 7 AsYIL 457)

The governor of Okinawa on 6 February 1998 announced that Okinawa had decided not to accept the plans for a new US military heliport, thus effectively denying the intended closure of the Futenma air station.(IHT 07/08-02-98)

## MILITARY COOPERATION

### India–Russia

The two countries agreed to extend until 2010 a 1994 agreement on military and technical cooperation that was originally due to expire in 2000.(IHT 13-10-97)

### China–US

China and the US on 12 December 1997 initialled an agreement aimed at preventing naval clashes and accidents at sea, the "Maritime Military Consultative Agreement".(JP 14-12-97)

### Philippines–US

The Philippines and the US signed an agreement on military cooperation on 10 February 1998. It dealt, inter alia, with the "status of visiting forces". The "Visiting Forces Agreement" enabled the two parties to resume major military exercises, and is similar to those concluded by the US with Japan, South Korea and other countries.(IHT 15-01 and 11-02-98) The Philippine president said that a continuing conflict with China over ownership of part of the Spratly Islands closest to the Philippines underlined the need for such an agreement. The agreement proved controversial because of sensitivity about issues of national sovereignty and jurisdiction. The Supreme Court in June 1999 ordered the government to answer questions regarding its constitutionality raised by opponents of the pact.(IHT 04-08-98 and 10-06-99)

### Singapore–South Africa

Singapore reached an agreement with South Africa allowing its troops to hold exercises in South Africa. Singapore has overseas training arrangements with various Asian countries as well as with Australia and the US.(JP 12-11-97)

### Five-Power Defence Arrangement

Malaysia had withdrawn from the annual military exercise for 1998 of the FPDA, officially for economic reasons. The FPDA is a cooperation agreement between Malaysia, Singapore, Britain, Australia and New Zealand for regular exercises between the naval and air forces of the member states such that they can operate effectively together in a crisis situation. The agreement includes an integrated air defence for Malaysia and Singapore.(IHT 22-09-98)

### Cooperation agreements of Southeast Asian countries with the US

Instead of seeking bases under US military control such as those in Japan and South Korea it was said that the US aimed at new agreements with Southeast Asian countries increasing US access to local bases and support services, in return for the training and supply of local forces. These were so-called Acquisition and Cross-Servicing Agreements.(IHT 03-12-98)

## MISSILE TECHNOLOGY

### North Korean missile development, deployment, exports

In September 1997 it was reported that a US military satellite had detected North Korean deployment of a ballistic missile, allegedly of the "Rodong 1" type capable of reaching Tokyo. Earlier experiments with Rodong 1 missiles had been conducted

in 1991 and 1993.(IHT 23-09-97) In August 1998 it was reported that a longer-range missile, named "Taepo-Dong-1" by US intelligence analysts, was test-fired into waters off northern Japan. The second stage of the missile, containing the cone, flew over Japan and landed in the Pacific Ocean. These reports about the firing were at odds with a North Korean explanation that it in fact launched not a missile but a broadcast satellite. The US retreated from their initial assessment and admitted being unsure of the true nature of the launch. Russian sources said that Russian space tracking devices had confirmed the North Korean statement. Finally, the US maintained that North Korea tried but failed to launch a small satellite and that the rocket in question was much stronger than originally reported.(IHT 01-09;04-09;5/6-09;07-09 and 16-09-98)

On 16 June 1998 North Korea declared that it would continue to develop, test and export ballistic missiles. Addressing itself to the US it said: "If the US really wants to prevent our missile export, it should lift the economic embargo as early as possible and make a compensation for the losses to be caused by discontinued missile export. ... Our missile export is aimed at obtaining foreign money, which we need at present."(IHT 17-06-98)

There were reports according to which North Korea proposed a compensation of $1 billion per year for three years. In late March 1999 the US again warned North Korea of "very serious negative consequences" for the evolution of mutual relations if it were to test-fire or export its long-range missiles. On the other hand it was said on behalf of the North Korean foreign ministry that it was North Korea's "legitimate right to self-defence to develop, test and produce missiles by its own efforts to defend the security of the country because the US [was] posing constant threats" coming from "enormous nuclear missiles and weapons of mass-destruction."(IHT 01-04-99)

**Iran**

*(See also:* Embargo)

According to US reports of 15 December 1997 satellite reconnaissance had discovered tests for Iranian ballistic missiles (the "Shahab 3") capable of carrying a one-metric-ton warhead further than 800 miles (intermediate range). [A US law banned any foreign company from supplying Iran with certain prohibited missile components from aerospace contracts in the US.](IHT 16-12-9 and 10-03-98) The actual testing of the missile was confirmed by Iran in late July 1998. It was suspected that North Korean assistance was involved.(IHT 24-07 and 28-07-98) Iran denied any current foreign contribution to its missile technology as it had reached technological self-sufficiency. On the other hand US sources said that Iran was recruiting Russian scientists to work in Iran.(IHT 11-12 and 12/13-12-98)

**Pakistan**

Pakistan successfully tested a medium-range missile ("Ghauri") with a range of approximately 900 miles (1,500 kilometres), believed to be capable of carrying a nuclear warhead.(IHT 07-04-98) The realization of the missile was considered by the US to be based on purchases from North Korea in a 1997 deal.(IHT 15-05-98)

The US tried to prevent the testing by offering "to help resolving" an eight-year old dispute over $650 million that Pakistan had paid for an order of fighter planes which had never been delivered by the US (see 1 AsYIL 271; 2 AsYIL 286; 4 AsYIL 508; 5 AsYIL 486 and 6 AsYIL 449).(IHT 13-04-98)

Three days after India launched a nuclear-capable missile (*infra*) Pakistan responded by first firing off a new and improved version of its own ballistic missile, the Ghauri-2, which flew about 1,120 kilometres, and subsequently another, the "Shaheen-1", with a range of 725 kilometres. However, India emphasized there was no violation of the Lahore Declaration (*supra* at 277).(IHT 15-04 and 16-04-99)

### India

India successfully completed a series of test firings on 16 November 1998 of the naval version of its "Trishul" missile.(IHT 17-11-98)

US sources reported that India was developing a sea-launched ballistic missile with Russian help. The missile was said to be named "Sagarika" and to have a range of 325 kilometres. The Indian Defence Ministry denied the existence of the project.(IHT 28-04-98)

It was announced on 11 April 1999 that India had test-fired a missile, the "Agni-2", with a range of 2,400 kilometres that was capable of delivering a nuclear warhead.(IHT 13-04-99)

### China

According to US intelligence reports China was close to deploying an intercontinental ballistic missile with a nuclear warhead, the "Dong Feng-31", designed on the basis of US technology acquired through espionage; however, this was contrary to the position taken by the US government, according to which there was no evidence that Chinese nuclear weapons relied on US secrets.(IHT 15/16-05-99)

## MONETARY AND FINANCIAL MATTERS

### Asian central bank co-operation

A joint statement of 25 July 1997 by central bankers from eleven Asia-Pacific countries at a regular meeting of the Executives' Meeting of East Asian and Pacific Central Banks at Shanghai pledged to expand cooperation but fell short of commitments to intervene directly to prop up neighbouring currencies. The statement was aimed at curbing speculation in Asian currencies by making it more expensive for investors to bet against them, but the group failed to introduce any specific measures.(IHT 26/27-07-97)

### Swap agreement among Southeast Asian central banks

The central banks of Thailand, Malaysia, Indonesia, Singapore, and the Philippines agreed to renew for one year a swap agreement to help to prop up their currencies. The accord allows member states to exchange their respective local currencies for dollars when needed.(IHT 26/27-07-97)

**Abortive "ASIAN Fund"**

ASEAN member states took the occasion of the annual IMF/World Bank meeting in late September 1997 to push for a regional economic stability fund intended to bail out economies in emergency situations.

The participation of Japan and China in such project was considered essential. So far regional cooperation during the financial crisis consisted only of bilateral repurchase agreements between central banks.(IHT 20/21-09-97)

Despite Western reservations, the idea of an "Asian Facility" initially won the backing of Japan and Hong Kong.(IHT 23-09-97) Among other advantages, the "fund" would be able to draw on standby credits from regional members of up to $100 billion. US objections were reportedly based firstly, on fears that such a fund might undercut the tough conditions attached by the IMF to bail-outs, or, in other words, would remove incentives for the Asian countries concerned to modernize their economies in order to fulfil the stringent lending conditions of the IMF; and secondly, on concerns that a Japanese-led regional organization might exclude the US.(IHT 03-10-97) In November 1997 Japan modified its position following the concerns voiced by the US, the IMF and others.(IHT 14-11-97) The hope that specifics of the fund would be completed at an Asia-Pacific finance ministers' meeting (ASEAN countries and Australia, China, Hong Kong, Japan, South Korea, and the US) in Kuala Lumpur in early December was not fulfilled and the matter was postponed.(IHT 05-11; 01-12-97;JP 03-12-97)

Instead, agreement was reached at a meeting at Manila on 19 November 1997 to work towards setting up a financial facility. The facility would be strongly tied to IMF assistance and any current situation would dictate which countries became contributors. The group of countries should meet regularly to monitor the region's economies to "help identify potential risks to growth and financial stability and advise on appropriate policy responses to reduce those risks". On its part the US announced that it would participate on a "case-by-case basis". Thus the agreement avoided any reference to earlier proposals about a special regional fund. The new assistance facility was to be designed at a meeting in Japan in 1998.(IHT 20-11 and 24-11-97)

At the ASEAN-plus-Three summit meeting at Kuala Lumpur in mid-December 1997 it became clear that Japan and China were not willing or able to lead the way out of the prevailing regional financial crisis, stressing that their assistance to the region would come within the IMF framework, and ASEAN consequently called for "greater ... international efforts, including by the major economies such as the European Union, Japan and the US and international institutions, to overcome this situation ...".(IHT 16-12-97;JP 17-12-97)

**World Financial Organization**

The UN Economic and Social Commission for Asia and the Pacific (ESCAP) laid out a blueprint for a new global body to regulate short-term capital flows. The organization would have a "specific mandate dealing with the monitoring of all short-term cross-border flows". The idea was launched in the UN Economic Survey of Asia and the Pacific 1999.(IHT 09-04-99)

**Japanese guarantee of Asian government bonds**

In addition to a $30 billion loan package for Asia announced in 1998, Japan announced a new commitment to guarantee government bonds in an amount of $17 billion. The commitment was made on 15 May 1999 during a meeting of finance ministers of the APEC countries in Malaysia.(IHT 17-05-99)

NUCLEAR ENERGY MATTERS
*(See also:* Embargo)

**Implementation of KEDO agreement**

August 1997 marked the formal beginning, after lengthy delays, of the construction in North Korea of the nuclear plants stipulated in the 1994 Agreed Framework between North Korea and the US.(IHT 19-08, 20-08-97) *(see* 5 AsYIL 471;545; 6 AsYIL 435; 7 AsYIL 465) The first of the two nuclear plants was to be built near Sinpo. The reactors were to be delivered by the US nuclear equipment producer Combustion Engineering (see the DPRK – KEDO agreement of 15 December 1995, Art.1 para.1, where the reactor model is defined as being "the advanced version of US-origin design and technology currently under production") thought to be "of the Korean standard nuclear plant model" *(see* the Agreement establishing KEDO, Art.II(a)(1), allegedly to meet South Korean sensitivities because of its assigned obligation to pay) .

Under the Agreed Framework the frozen nuclear facilities would be dismantled when the light water project is completed. This completion would, however, need the necessary infrastructure to handle the electrical output, and the existing North Korean transmission and distribution system appeared unable to do this. There seemed to be disagreement regarding where responsibility lay for providing the necessary upgrade. If the North Korean potential nuclear weapons programme were to remain frozen, the US would have to take responsibility for assured funding of the KEDO activities. On the other hand, until North Korea brought itself into full compliance with IAEA safeguards, it was to be expected that critical components necessary for the light water reactor to start operating would not be delivered.(IHT 19-08-97)

In early February 1998 it was reported that South Korea had told the US that the Asian financial crisis had disabled it from paying its promised share towards the construction of the power plants. The possibility of the US's taking over the cost for the early stages of the project was negligible since the US Congress had refused to participate in the direct funding of the reactor construction. It was reported that under an informal agreement South Korea would pay 70 per cent ($3.5 billion) and Japan 20 per cent ($1 billion). In early June Japan confirmed that it would contribute around $1 billion (but parliamentary approval was not granted until early May 1999). Instead, the US was supposed to finance the fuel oil deliveries to North Korea to supplement its energy supplies pending the completion of the promised light-water reactors ($35 million a year).(IHT 06-02;14-05;09-06-98 and 05-05-99) There were, however, also problems with US Congress approval of funding for the oil deliveries,

necessitating financing by borrowing and thus causing delays.(IHT 02/03-05-98)[According to later US press comments the US had struck the 1994 deal as it assumed that the beleaguered North Korean government would not continue long enough to benefit from the most ambitious features of the accord, and that US policymakers nursed private hopes that the US would never have to deliver on the expensive and controversial reactor scheme.(IHT 01-04-99)]

In late April 1998 the then US Secretary of State held talks with her South Korean colleague on the implementation of the 1994 agreement. This implementation was said to be at great risk because no agreement could yet be reached on the financial consequences of providing North Korea with the promised replacement energy in the form of oil. It was reported that on the one hand the US sought to build a sense of urgency on the subject, but on the other hand made clear that it would find a way to honour its commitments. The Secretary of State was quoted as saying: "There should be no doubt we will fulfil an agreement as important as this one."(IHT 02/03-05-98) Early July 1998 the lack of funds still existed, causing the US Secretary of State remark that it would be a "disaster if we let this fall apart".(IHT 08-07-98) Generally speaking it could be said that the US had not lifted sanctions on North Korea despite the 1994 agreement. Also, Japan became even more reluctant to sign a formal funding agreement as a result of its dismay of the alleged launching of a new North Korean missile in August 1998 (*see supra* at 292)

North Korea had started complaining that the US was not living up to the terms of the agreement.(IHT 07/08-03-98) On 8 May 1998 such complaints were accompanied by the announcement that it might restart the North Korean nuclear programme by unsealing a nuclear reactor in Yong Byon that under the agreement was to have been closed permanently, to "conduct maintenance". It was also divulged that technicians were barred from packing the last of the reactor's fuel rods for shipment out of the country. It was reported, however, that such a reopening of the Yong Byon plant was primarily a symbolic act without immediate effect, since the approximately 200 spare fuel rods (out of the original 8,000) contained too little plutonium to pose a nuclear threat. American and Asian experts also said that it would be too expensive and technologically complex for North Korea to reopen the plant.(IHT 14/ 15-05-98)

The reports of a new underground complex near Yong Byon (*see infra*) made the US Congress, never enthusiastic about the 1994 agreement, even less likely to agree on financing the promised fuel oil deliveries which could, in turn, give North Korea an excuse to abandon the 1994 nuclear agreement.(IHT 17-08-98) In early October the US president even diverted an amount from the US foreign aid budget to be able to comply with the US obligation to deliver oil to North Korea for the year 1998. However, even then there would be a shortfall of 134,000 tons for which no additional funds were available. (IHT 05-10-98) Later the Congress approved the budget for the oil purchase though linked to the condition that the president certify that the recently discovered underground facility (*see infra*) was not used to build nuclear warheads and that progress was being made in dissuading North Korea from building missiles for nuclear warheads, referring to the recent firing on 31 August (*see supra* at 292).(IHT 21-10-98) Meanwhile, the firing of a long-range missile in

late August 1998 caused Japan to suspend financial assistance for the building of the reactors, break off talks aimed at restoring diplomatic relations, end food aid and ban flights between Japan and North Korea.(IHT 04-09-98)

**New North Korean building activities**

In August 1998 US intelligence agencies said spy satellites had detected a secret underground complex in Kumchangri, 25 miles from Yong Byon in North Korea that they, according to newspaper reports, "believe is the centerpiece of an effort to revive" the frozen nuclear weapons programme. However, there was no evidence yet of a start of building a new reactor or a reprocessing plant. Intelligence estimates of how long it would take to complete the project ranged from two to six years, depending in part on how much outside help would be received.(IHT 17-08-98)

Upon US insistence that it be given access to the complex for inspection, North Korea attached the condition of payment of $300 million for such access by way of "compensation for the insult" of the US's suggestion that North Korea was violating the 1994 agreement.(IHT 20-11-98) However, in late December 1998 it was reported that the demand for payment had been dropped and replaced by a demand for more food aid.(IHT 16-12 and 28-12-98) Later US news reports referred to several, or even a dozen, underground complexes "around the country" and the need to have regular inspections instead of a single access.(IHT 04-01-99) In March 1999 agreement was reached on repeated, at least two annual, inspections of the suspected site. Though North Korea initially insisted on a specific US commitment on food aid in return, this demand was later dropped.(IHT 17/18-03-99) It was later agreed that US experts visit the site on 20 May 1999.(IHT 12-05-99) The investigation of the site took place until 24 May. The 14-member team was allowed unhindered access, but the only find was an unfinished site with vast, empty, tunnels. The US State Department said that the inspection yielded no evidence that North Korea was in violation of the 1994 agreement, and that the tunnel complex "was at a stage of construction prior to the time when any relevant equipment other than construction equipment would be expected to be present".(IHT 28/29-05 and 30-05-99)

**Chinese restrictions of exports of nuclear weapons and technology, and the US sale of nuclear technology to China**

New Chinese rules were issued on 11 September 1997, enabling the government to bar the transfer of the relevant materials and technology with dual civilian and military uses to countries opposing international safeguards. The regulations were intended to meet US demands in order to end a ban on the building of nuclear power plants in China by US companies.(IHT 12-09-97) This was accompanied by some assurance of non-proliferation of nuclear weapon technology.

The new restrictive Chinese rules were also necessary for a US ban on sales of nuclear technology to China to be lifted, in the sense that US presidential certification that China was no longer helping other states in developing nuclear weapons was required in order that a 1985 bilateral agreement on peaceful nuclear cooperation, allowing US companies to sell nuclear reactors to China could come into effect.(IHT 20-10-97) That certification was finally announced during the visit by the Chinese

president to the US in late October 1997 and issued in a statement to the US Congress in December 1997. The documents for the re-activation of the 1985 agreement were signed by the US president on 12 January 1998.(IHT 30-10;12-12-97 and 17/18-01-98) This was followed by the issuance of implementation measures to the above Chinese regulations on 17 June 1998.(IHT 18-06-98)[The embargo on transfer of nuclear technology was based on the US 1978 Nuclear Non-proliferation Act, which also applied to other states such as India.]

**Russian and South African sale of atom plants to China**

South Africa sold the last of its sensitive nuclear-fuels equipment to China, just weeks ahead of the planned transfer of diplomatic recognition from Taipei to Beijing.(JP 15-12-97)

Russia and China in late December 1997 signed an agreement for the building of a nuclear power plant consisting of two light water reactors at Lianyungang in eastern China. The contract was the result of a 1992 nuclear cooperation agreement.(IHT 30-12-97)

**Indian and Pakistani nuclear weapon tests**

India conducted three underground nuclear tests (with a fission device, a low-yield device and a thermonuclear (hydrogen) device respectively; however, the number of tests was later considered exaggerated by outside experts) on 11 May 1998, the first since 1974, and a month after Pakistan tested a new ballistic missile (see: Missile technology, *supra* at 292). Two days later, on 13 May, two more underground tests were conducted.

Previously, India had maintained that its nuclear programme was for peaceful purposes and that it only kept open the nuclear weapons option to ensure national security.

[Neither India nor Pakistan had signed the Comprehensive Test Ban Treaty, nor had the US not ratified it.]

The Indian president wrote a letter to the US president in which he explained the rationale for the tests. In it he said, *inter alia*: "... We have an overt nuclear weapon state on our borders, a state which committed armed aggression against India in 1962. Although our relations with that country have improved in the last decade or so, an atmosphere of distrust persists mainly due to the unresolved border problem. To add to the distrust that country has materially helped another neighbour of ours to become a covert nuclear weapons state. At the hands of this bitter neighbour we have suffered three aggressions in the last 50 years. And for the last ten years we have been the victim of unremitting terrorism and militancy sponsored by it in several parts of our country, specially Punjab and Jammu and Kashmir..." The contents of the letter were later strongly criticized by others and apparently also regretted by the Indian side.

The tests raised protests from various countries. Among the Asian states there were Japan, Pakistan, and China. Some countries announced the imposition of sanctions. Japan suspended some financial aid and contemplated expanded cuts. The US would cut off some financial aid, prohibit US bank loans to the Indian government

and restrict exports of "dual-use" equipment. It would also vote against India in the World Bank and the IMF. In late June, however, the World Bank resumed its lending program with the endorsement of the US, as being chiefly of humanitarian character, and thus falling under an exception in the US 1994 Nuclear Non-proliferation Act.(IHT 12-05;13/14-05;01-06;27/28-06 and 17-09-98)

[The Nuclear Non-proliferation Act requires the US government to cut off virtually all direct aid to states that conduct nuclear tests; it also bans American banks from making loans to the governments of those states and mandates that the US vote against aid to those states by the World Bank and the IMF. The law exempts aid for "basic human needs". In September 1998 the US Congress gave flexibility to the President by allowing a one-year waiver of sanctions on India and Pakistan.]

On 21 May 1998 India announced a moratorium on nuclear tests and restated a willingness to negotiate a comprehensive test ban.(IHT 22-05-98)

In a later newspaper interview the Indian prime minister said that India did not intend to build a large nuclear arsenal or create the elaborate command and control systems that other nuclear powers use to manage their weapons. He emphasized that the Indian approach was to have a credible deterrent which should prevent the use of nuclear weapons, and that India carried out the tests in part to prod the five established nuclear weapon states into agreeing to plans to disarm.(IHT 18-06-98)

Despite intense diplomatic pressure not to follow the Indian example, particularly despite a letter from the president of China obviously written at the request of the US president, Pakistan conducted five underground nuclear tests on 28 May 1998 (here too doubt was later cast on the number of tests, considered exaggerated by outside analysts). There was no accompanying "no first use" pledge.

As a consequence of the tests the US and Germany announced sanctions. The US sanctions would be the same as those against India (*see supra*).

[The US had already ended all military aid to Pakistan in 1990 after the Soviet withdrawal from Afghanistan and the end of Pakistan's role in that war. Under a 1985 US law requiring the president to certify that Pakistan was not building nuclear weapons and thus eligible for continued military and economic aid, that certification was withheld in 1990, thereby cutting off military aid. *See* the non-delivery of jet fighter planes ordered and paid for, 2 AsYIL 371; 3 AsYIL 442; 4 AsYIL 508; 5 AsYIL 486; 6 AsYIL 448.]

Among the Asian states Japan ordered sanctions, and China expressed "deep regret" about the tests, calling on all South Asian countries "to exercise the utmost restraint and to immediately abandon all nuclear weapons development programs".(IHT 29-05;30/31-5;02-06 and 17-09-98) On 11 June the Group of Seven industrialized states together with Russia decided to deny non-humanitarian loans to India and Pakistan.(IHT 13/14-06-98) However, under pressure from farmers the US government tended to re-allow the sale of wheat to India and Pakistan soon afterwards.(IHT 16-06-98) In early November 1998 the US president decided to lift most of the economic sanctions imposed on India and Pakistan. Left in place were bans on military equipment sales, restrictions on the export of US-made "dual-use" items and US objection, amounting to a veto, to development-project lending to India by the World Bank and other international institutions.(IHT 09-11-98)

On 11 June Pakistan also announced a moratorium on further nuclear tests, calling it a "confidence-building measure at the regional level".(IHT 12-06-98)

Both India and Pakistan offered lengthy explanations to the IAEA as to why they had proceeded with the tests. (IHT 09-11-98)

**Russian construction of nuclear reactors for India**

Russia decided on 22 June 1998 to revive a ten-year-old agreement on the construction of two 1,000-megawatt nuclear reactors in Kudankulam, Southern India, with an estimated worth of $3 billion. The agreement had been on hold since the collapse of the Soviet Union. The facility would be subject to safeguards by the IAEA.(IHT 23-06-98)

**Russia-Iran nuclear cooperation**

Russia offered to curtail nuclear cooperation with Iran if the US ended its sanctions against two leading Russian nuclear research centres. US fears concerned an eventual Russian delivery of heavy water and graphite reactors in particular. These fears had already led to sanctions against the research centres. The proposal would not interfere with the Iran-Russian scheme to build nuclear reactors at Bushere.(IHT 18-03-99)

OIL AND GAS

*See also*: Inter-state relations: China-Russia; Sanctions

**Iran and Central Asia**

*(See also:* Inter-state relations: Iran-US)

It was reported in October 1997 that Turkmenistan planned to open a pipeline that would carry two billion cubic metres of natural gas a year to power plants and refineries in northern Iran. On 29 December 1997 the 125-mile pipeline from the Caspian Sea basin to the northeast Iranian town of Kurd Kui was opened. Until 1993 the gas was exported to Europe exclusively through pipelines that traversed Russia.(IHT 01-01-98) Iran would also begin providing natural gas to Turkish power plants beginning 1998.

Furthermore, Kazakhstan was daily shipping oil from its Caspian Sea port to ports in northern Iran.(IHT 13-10-97)

Despite its non-objection against a pipeline through Iran in July 1997 (*see supra* at 279), the US later in the year sought to persuade Caspian Sea states to scrap plans for oil and gas pipelines through Iran in favour of a more costly "Eurasian transportation corridor" to the West. The corridor would involve a system of pipelines westward across the Caspian Sea to Baku, and then on to Georgia. From there the pipeline would cross Turkey to the Mediterranean port of Ceyhan. Although the real choice depended on a decision from the oil companies, leaders of the region (Azerbaijan, Georgia, Turkey, Kazakhstan, and Uzbekistan) on 29 October 1998 "strongly confirmed their determination" to realize the American-backed pipeline route, increasing political pressure on the companies.(IHT 21-11-97;30-10 and 09-11-98)

**Kazakhstan oil contracts**

Seven oil companies signed an oil-exploration accord with Kazakhstan, among which were Total, British Petroleum, Agip, Royal Dutch/Shell, BG (UK), Statoil (Norway) and Mobil. The accord covers a 6,000-square-kilometre tract in the northern Caspian Sea. A consortium was also formed by ENI (Agip's parent company) and BG, together with Texaco and AO Lukoil Holding, to develop the Karachaganak fields.(IHT 20-11-97)

On 24 September Kazakhstan granted a controlling interest in its second-largest oil field to the Chinese National Petroleum Company for the amount of $4.4 billion. China promised a 1,800-mile oil pipeline to China and one to refineries in northern Iran, which conflicts with US policy. *(See supra* at 300)(IHT 27/28-12-97)

**Chinese oil contracts**

Apart from the above contract with Kazakhstan, China formed a joint venture with the Iranian NIOC to explore offshore in Iran, China and other countries and to upgrade Chinese refineries for purposes of processing more Iranian oil.

It also concluded a $1.2 billion agreement in September 1997 with Iraq to develop the Ahdab field when the UN sanctions would be lifted. In 1996 China replaced the (US) Occidental Petroleum Corp. in a $1 billion oil and pipeline deal in Sudan.(IHT 27/28-12-97)

**Division and sharing of Caspian oil**

An agreement was concluded by Russia and Kazakhstan on the division of the northern part of the Caspian Sea into sectors and their allocation to each of the two states. Yet Kazakhstan agreed to a sharing of the Caspian waters, allowing both states equal access to the sea's fishing grounds. The accord was seen as a victory for Kazakhstan, given that it recognized the latter's claim to the oil near its coast.

The five states on the Caspian Sea had been divided over the question of ownership of the oil in the seabed. The three states with oil near their coastlines – Kazakhstan, Azerbaijan, and Turkmenistan – wanted the Caspian divided into national sectors while Russia and Iran, with little or no oil near their Caspian coasts, wanted the maritime resources to be shared by all.(IHT 07-07-98)

Iran reacted by stating that it would not recognize the agreement. It said that the five countries bordering the Caspian Sea "should reach a comprehensive agreement on a just and equitable share-out of the Caspian resources".(IHT 09-07-98)

**Turkmenistan-Afghanistan-Pakistan pipeline project**

Unocal Corp. withdrew from the Central Asia Gas Consortium *(see* 7 AsYIL 469) in early December 1998. The consortium project included a 1,600-kilometre oil pipeline and a companion 570-kilometre natural-gas pipeline.(IHT 07-12-98)

ORGANIZATION OF THE ISLAMIC CONFERENCE (OIC)

**Summit Conference**

In early December 1997 Iran hosted the (tri-annual) eighth summit meeting of the organization, which has fifty-five member-states.(IHT 08/09-12-97).

RECOGNITION

*See*: Association of South East Asian Nations: Admission of Cambodia

REFUGEES

**Myanmar Muslims deported from Bangladesh**

*(See also:* 2 AsYIL 347; 3 AsYIL 424; 4 AsYIL 502; 5 AsYIL 482)

Bangladesh on 20 July 1997 resumed its repatriation of 21,000 Myanmar Muslims from Bangladesh frontier camps, among about 250,000 Muslims, known as Rohingyas, who had fled to Bangladesh in 1992 in escaping alleged repression and human rights violations. Most were sent back after a 1993 accord.(IHT 21-07-97) In late July 1997, however, the UNHCR won a commitment from Bangladesh to halt the forcible repatriation.(IHT 28-07-97)

**Myanmar-Thailand**

Thailand and Myanmar agreed 9 December 1997 to establish a panel to screen about 100,000 refugees along their common border to determine whether they were fleeing persecution or merely for economic reasons.(IHT 10-12-97)

**Deportation of Indonesian illegal immigrants from Malaysia**

*(See also:* Migrant workers)

Among illegal immigrants who were to be deported from Malaysia were persons from the Indonesian province of Aceh who feared persecution in Indonesia. The Indonesian foreign minister denied this and said they should be deported by Malaysia as illegal immigrants without a right to claim refugee status. He also referred to an Indonesian-Malaysian agreement on illegal immigrants.(IHT 13/14-04-98)

**Bhutanese refugees in Nepal**

Relations between the two countries had been strained as a result of a great number of Nepali Bhutanese living in refugee camps in Nepal (see 2 AsYIL 349; 3 AsYIL 423; 7 AsYIL 461). Talks to resolve the issue were to be resumed in January 1999.(IHT 27-11-98)

REGIONAL SECURITY
*See also*: Inter-state relations: China – US

**US claim to flexibility of movement for its forces**

The US Defense Secretary stated, at a forum of political and defence experts at Kuala Lumpur on 12 January 1998, that the US military would not accept any restrictions on its freedom of movement in the Asia-Pacific region, even from well-intentioned friends and allies. He also said that the US was concerned about informal proposals for confidence building measures from ASEAN officials, which could require advance notice of the size and timing of US force movements.(IHT 13-01-98)

**Northeast Asian regional security body**

During his official visit to China in November 1998 the South Korean president called for the creation of a Northeast Asian regional security body to manage territorial disputes and military tension.(IHT 13-11-98)

RIVERS

**Indo-Bangladesh co-operation**

India and Bangladesh agreed on 20 July 1997 to take immediate steps to resolve a water-sharing problem over the Teesta (Tista) River and to continue co-operation in flood management, ending a major disagreement between the two countries.

Water sharing from the Teesta (Tista) and 53 other rivers that run in both countries came up for discussion in the Indo-Bangladesh Joint Rivers Commission, meeting after a break of seven years.(IHT 21-07-97)

SANCTIONS
*See also:* International economic relations and trade

**US legislation on sanctions in connection with Indian and Pakistani nuclear weapon tests**
*(See also:* Nuclear energy matters, *supra* at 298)

Frequent US sanctions against policies of Asian countries highlight the relevance of US legislation in the field.

Under the US Arms Export Control Act nuclear weapon tests by a non-declared nuclear weapons state, if confirmed by the president, oblige him to suspend foreign aid and military assistance, bar sales of military and other non-humanitarian exports, vote against the country in international financial institutions and prohibit US banks from making loans to the state concerned, except for agricultural purchases. The president can waive the sanctions if he determines them to be against US national security but the Congress has the power to override the waiver.(IHT 12-05-98)

**US economic sanctions relating to Iran**

The US Iran-Libya Sanctions Act *(see* 7 AsYIL 474) prohibited non-US investment of more than $20 million in Iran and prescribed punitive trade measures in case of violation. [All commerce between US companies and Iran had been banned earlier by executive order]. However, sanctions might be delayed or waived in the national interest if the country involved was shown to deter Iran from sponsoring terrorism. This had not prevented the conclusion of a multi-billion contract between the French oil company Total and the National Iranian Oil Company, giving rise to US protests and threats and French warning of the US not to retaliate. The agreement, in which the Russian Gazprom and the Malaysian Petronas also held a stake, was aimed at producing natural gas from South Pars field.(IHT 30-09 and 01-10-97) Shortly after the Total-NIOC contract, another French oil company, Elf, confirmed that it was also pursuing oil exploration and production deals with, *inter alia*, Iran.(IHT 02-10-97) Yet another agreement on offshore oil development was signed by (Canadian) Bow Valley Energy Ltd. and its Indonesian partner, Bakrie Minarak.

Reacting to the European protests against measures under the act and threats of a formal complaint with the WTO, the US considered holding off sanctions in exchange for increased European pressure on Iran to curb "terrorism" and, generally, to isolate Iran.(IHT 06-10 and 12-11-97)[Another factor that played a role in the US evaluation of one of the investment cases was the fact that Gazprom was not only participating in the investment but was also preparing a $1 billion bond-issue on financial markets including the US markets, and stopping the issue would mean interfering with efforts to stabilize the Russian economy. Besides, the main underwriter of the Russian bond issue was GOLDMAN SACHS, one of biggest financial supporters of the CLINTON campaign, with RUBIN, at that time Finance Secretary, being its former co-chairman.(IHT 17-10-97) Moreover, under an agreement between Gazprom and the US Exim Bank the latter guaranteed $750 million in financing Gazprom purchases of US equipment. In December 1997 Gazprom cancelled the agreement.(IHT 19-12-97)]

All these and other intricacies and complexities involved led the US to refrain from any action.(IHT 23-03-98)

In late April 1998 it was reported that a consortium led by Royal Dutch/Shell Group and including Petronas (Malaysia) and Gaz de France intended to enter a framework agreement for the development of Iranian offshore gas reserves of parts of the South Pars field for export to Pakistan. The project would involve the construction of a 1,600-kilometre pipeline linking Iran with Karachi and Multan in Pakistan.(IHT 28-04-98)[On 18 May 1998 the US and the EU reached a solution for their dispute: the US would seek Congressional waiver of the sanctions, and the European states committed themselves to stepping up cooperation in combating terrorism and fighting the spread of weapons of mass destruction; this included EU support in persuading Russia to cease assisting Iran in its ballistic missile program.(IHT 19-05-98)]

**Enforcement of UN sanctions against Iraq**

Iran in mid-February 1998 began effectively taking steps to close loopholes in the economic embargo of Iraq (see UNSC res.687) by acting against those oil shipments that broke sanctions. The amounts concerned were, however, too small to make a significant difference to the market price of oil. It was interpreted by the US as a gesture to show goodwill to the US. Most of these oil transports by barges and small boats were using forged Iranian manifests and passed through Iranian waters into UAE ports.(IHT 17-03 and 27-03-98)

**US sanctions against Pakistan**

*(See also:* Missile technology: Pakistan)

There were new developments in the case of the jet fighter planes ordered by Pakistan but never delivered as a consequence of the so-called Pressler Amendment (*see supra* at 293; and 1 AsYIL 271; 2 AsYIL 286; 4 AsYIL 508; 5 AsYIL 486; 6 AsYIL 338;449). New Zealand agreed to acquire the 28 F-16 fighters on a ten-year lease-buy arrangement. However, there was still no clarity about the amount to be reimbursed to Pakistan.(IHT 03-12-98)

**Western sanctions against China**

After having started selling weapons to China since the 1980s as part of its strategy to weaken the Soviet Union by strengthening China, the Tiananmen incident caused the US to introduce a string of sanctions, among which was a ban on weapons sales. There was also a prohibition against Chinese launches of US satellites, relaxed on a case-by-case basis because of an enormous backlog in satellite launches around the world. For instance, such a launch did take place on 12 June 1999.

The European Community (Union) also instituted a weapons embargo, which was based on a gentlemen's agreement among member states and was not legally binding.(IHT 25-05-98 and 14-06-99)

SELF-DEFENCE

*See also:* (Non-)Intervention; Missile technology: North Korea; Territorial sovereignty; Weapons

**Japanese spy satellites**

The government announced on 6 November 1998 that Japan would launch a series of intelligence-gathering satellites within five years, beginning in the spring of 2003. The long-held plans were reaching realization because of alarm at the launch of a North Korean rocket in September 1998. (See: Missile technology, *supra* at 292)(IHT 07/08-11-98)

**Pre-emptive strikes as self-defence**

In connection with the North Korean launch of a three-stage rocket *(see supra* at 292) it was stated on behalf of the Japanese prime minister that Japan has the

theoretical right to carry out pre-emptive strikes against countries that pose a military threat. The official was quoted as saying: "I think it was already clarified many years ago in Parliament that, theoretically, self-defence could include pre-emptive attacks on the territory of a country which is contemplating a military attack on Japan."

In response to the statement a Chinese foreign ministry spokesman said that Japan's attitude "would only lead to confrontations and tensions in the region and be quite disturbing for Japan's neighbours."(IHT 10-03-99)

## SELF-DETERMINATION

### East Timor

*(See also:* previous Volumes of this *Yearbook* under: Specific territories within a state: East Timor)

[Indonesia had invaded the former Portuguese colony and annexed it in 1976. The UN had not recognized this annexation and continued to regard Portugal as the administering power of East Timor.]

For the first time in twenty years the Indonesian government signalled its willingness to address the status of East Timor. On 9 June 1998 the president of Indonesia proposed that the territory be granted a special administrative status while ruling out the possibility of independence. He later emphasized that the proposal was contingent on an agreement by the UN and Portugal to recognize Indonesian control of the territory. The separatists immediately rejected the proposal.(IHT 11-06-98)

Later one of the independence leaders said he would accept an offer of limited autonomy within Indonesia now and a five-year delay on a referendum on the territory's permanent status. But he would not agree to the recognition of Indonesian sovereignty in the meantime.(IHT 01-07-98) On 5 August 1998 Portugal and Indonesia reached agreement on the outlines of an autonomy plan that would give East Timor the right to self-government except in foreign affairs and defence; however, the East Timorese leaders were not prepared to join any talks while their main resistance leader was detained in prison in Indonesia.(IHT 06/07-08-98)

On 27 January 1999 the Indonesian foreign minister, with the president's sanction, said that if the Indonesian offer of autonomy (*see above*) were rejected, the government would propose that Indonesia's highest legislative body, the People's Consultative Assembly, should consider granting independence to East Timor after the national elections of 7 June 1999. In response to calls by the UN Secretary General Indonesia also moved the imprisoned East Timorese resistance leader from prison to *de facto* house arrest.(IHT 28-01 and 11-02-99)

Meanwhile Indonesia continued talks with Portugal to try to reach an agreement on the territory. It was difficult to reach agreement on the question of how to gauge whether a majority of the population supported autonomy and whether such autonomy should be a stepping stone to an act of self-determination such as a vote on independence in a referendum supervised by the UN. Indonesia was against a referendum as it could cause civil conflict.(IHT 04-02-99)

On 11 February 1999 the Indonesian president vowed that a solution of the Timor crisis be achieved by the end of the year, and that if the autonomy package was rejected, then East Timor could become independent.

In an effort to bridge the remaining differences the Indonesian foreign minister stated on 11 March that Indonesia would back a "direct vote" by the people of East Timor on the Indonesian draft autonomy package, but he again rejected a UN proposal, backed by Portugal, for election of a consultative assembly that would decide on the autonomy question.(IHT 12-03-99) The Indonesian proposal was finally accepted, and it was agreed that a direct vote on the autonomy plan would be organized under UN auspices but without the official requirements of a referendum. Indonesia said that it would grant independence if the autonomy plan was rejected.(IHT 13/14-03-99)

Unfortunately, the East Timorese leader, from his house arrest, called for an armed uprising against pro-Indonesian forces in early April 1999, although previously he had steadfastly urged his supporters to maintain a cease-fire and work for peace and reconciliation. The immediate cause of his reversal of policy appeared to be reports about attacks by pro-Indonesian militia on pro-independence groupings, particularly an attack on a church at Liquica on 6 April 1999 involving the killing of tens of civilians. He blamed the international community for its failure to intervene to halt the conflict.(IHT 07-04-99) However, Indonesia kept refusing to allow a UN civilian presence to be established on the ground until agreement was reached with Portugal on details of the proposed ballot. On the other hand the UN (and Australia) made it clear that a UN peacekeeping force cannot be sent to the territory unless it was invited by Indonesia and had a peace to keep.(IHT 14-04-99)

As referred earlier, a long-time unsolved question in the Indonesia-Portugal talks was how to gauge whether a majority of the East Timorese population support autonomy and whether it should be followed by an act of self-determination for independence in a referendum supervised by the UN.(IHT 20-04-99)

A UN-brokered agreement was finally reached on 23 April 1999 and signed on 5 May 1999.(IHT 24/25-04-99) The UN-sponsored vote was to be held on 8 August, which date was later postponed two weeks due to the security situation in the territory. It would be supervised by at least 600 UN monitors and police advisers. Under the agreement Indonesia was committed to disarm rival political groups and ensure the neutrality of the Indonesian armed forces, which would have the primary responsibility for providing security in the run-up to the vote.(IHT 29-04 and 07-05-99)

Pro-independence and pro-autonomy factions in June 1999 signed a principle accord on disarming and withdrawals while follow-up talks took place at Jakarta in late June on implementation. They were organized, with Indonesian blessing, by Church authorities.(IHT 26/27-06 and 28-06-99)

A first attack against the UN presence took place when pro-Indonesian militiamen surrounded a new outpost of the UN Assistance Mission in East Timor (UNAMET) on 29 June 1999 and showered the building with stones. According to the Indonesian foreign ministry, however, the incident was merely a brawl between rival factions throwing stones at each other.(IHT 30-06-99)

SPACE ACTIVITIES
*See also*: Sanctions

**US satellites for China**

The US contemplated to revise a decision taken in June 1996 (announced in February 1996, see 6 *AsYIL* 453) to allow the sale of certain satellites to China. The satellites would be the cornerstone of a commercial mobile telephone network for China and twenty-one other Asian countries. They would include an antenna of a type that is common in US and Russian eavesdropping satellites, and of a nature that was inherently dual-use.(IHT 19-06-98)

SPECIFIC TERRITORIES WITHIN A STATE: EAST TIMOR
*See*: Self-determination

SPECIFIC TERRITORIES WITHIN A STATE: KASHMIR

**Indian air strikes and Pakistani response**

Pakistani armed forces on 27 May 1999 shot down two Indian fighter planes that they said had crossed six to eight kilometres inside the Pakistan-controlled portion of Kashmir. It happened during a fourth round of Indian air strikes aimed at dislodging pockets of Muslim guerrilla infiltrators inside India-controlled Kashmir *(see infra)*. Indian officials insisted that their jetfighters had not crossed into Pakistani airspace intentionally and that only one plane had been hit by hostile fire. They said that one plane had developed engine trouble on the Indian side of the cease-fire line and might have flown into Pakistan-controlled territory as the pilot ejected from the cockpit and that the second had followed it to assist and was shot down on the Indian side of the line. The officials emphasized that there were no aggressive intentions against Pakistan.(IHT 28-05 and 29/30-05-99)

**Renewed fights near Kargil**

In May 1999 about 700 Islamic guerrillas, or, according to Indian description, infiltrators supported by Pakistan and including members of the Pakistani Army, had seized mountaintop positions a few miles inside Indian territory in the Kargil area, overlooking supply routes extending from the Kashmir Valley to an important Indian military base in Ladakh. Indian forces normally held these positions in warmer months and abandoned them during the winter. When Indian troops wanted to re-occupy them in May, the ridges had by then been seized by hostile forces. This gave rise to renewed fighting, the most intense in 30 years, including the use of fighter planes *(see supra)* as India tried to recapture the territory. Since it was estimated to have taken a few months to plan and execute the encroachment with the precision and back-up support shown, the suspicion was that it was plotted in Pakistan at the time of the Lahore meeting of the prime ministers in February 1999.

The foreign ministers of the two countries met on 12 June 1999 to try to defuse the tensions but the talks did not result in easing the disagreements. The Indian prime minister then said that India was willing to hold further talks only if Pakistan stopped violating the Line of Control in Kashmir. The US and other states, among which China and Russia, strongly called for a de-escalation of tensions, and urged the guerrillas and eventual supporting Pakistan forces to withdraw their forces. The turn-around in US policy was noteworthy. After its previous campaign against India after the latter's nuclear tests and its understanding for the Pakistani response, India was now drawing praise for its restraint in the Kashmir conflict while Pakistan was being criticized. The US appeared convinced that the bulk of the intruders were regulars from the 10th Corps of the Pakistani Army.

Meanwhile in late June 1999 Indian forces had re-conquered much of the territory and for the first time Indian authorities said that they would consider sending troops into Pakistani territory if necessary, i.e., if Pakistan did not pull back from the seized territory.(IHT 28-05; 29/30-05;04-06;09-06;14/15-06; 26/27-06 and 28-06-99)

## STATE RESPONSIBILITY

*See*: Diplomatic and consular relations: Iran-Argentina; Inter-state relations: Iran-Pakistan; Jurisdiction

## TERRITORIAL CLAIMS AND DISPUTES

### Spratly Islands

Philippine military officials divulged that the Philippines had torn down new structures allegedly built by the Chinese near the disputed Spratly Islands, on a rocky outcrop called Sabina Shoal, 120 kilometres west of Palawan Island.(IHT 01-07-97) It was reported that China had protested the removal, but the Philippine foreign minister emphasized the Philippines would continue the removal of Chinese markers on Philippine-claimed territory.(IHT5/6-07-97)

The Philippine navy arrested twenty Chinese fishermen in late November 1998 for having fished near *Alicia Annie Reef,* which is claimed by both countries (in August twenty-three Chinese fishermen were arrested in similar circumstances but were later released after charges against them were dropped). China demanded their release, describing the arrest as "illegal". The Philippine side responded that the fishermen would be released "after an appropriate time" and with a lecture about not poaching in waters claimed by the Philippines.

It was reported that the Philippine and Chinese presidents had discussed the dispute over the islands and had agreed to settle it peacefully and to have the natural resources used jointly by the two countries.(IHT 01-12, 02-12-98)

It was reported in January 1999 that the Philippines planned to call a meeting among countries with rival claims to the islands and the US in an effort to reduce tensions but this attempt to involve other claimants in resolving the Philippine – Chinese dispute over *Mischief Reef* seemed to have failed. Malaysia and Vietnam

said that the dispute should be settled by the claimants concerned themselves, the US said that it had not taken a position on the sovereignty of the islands, and China rejected the proposal because it included the US.

According to Philippines sources in February 1999 the permanent structures being built by China (*see* this *Yearbook*, Vol.5 at 495) were completed that month.(IHT 13-01;21-01 and 17-02-99)

The two countries again held talks in March 1999.(IHT 23-03-99)

**Kurils (Northern Territories)**

It was reported that the Russian foreign minister told his Japanese colleague that Russia would offer plans for jointly developing the disputed islands, but that the Japanese minister said Japan could not accept such plans as they assume Russian sovereignty as a precondition. Proposals to this effect were floated on the occasion of a summit meeting in early November 1997 (*see supra*, Inter-state relations: Japan-Russia; Joint development and joint ventures).

The two sides agreed to take steps to prevent recurrence of incidents as took place late June 1997 in which Russian vessels fired warning shots at Japanese fishing boats in Russian waters near the disputed islands.(IHT 01-07 and 03-11-97)

At the next summit meeting in April 1998 the dispute was not solved, but a proposal on the issue was submitted by the Japanese side and would be studied by the Russians.(IHT 18/19-04 and 20-04-98). In January 1999 there were unconfirmed reports according to which the Japanese government intended to propose an interim treaty that would involve the return to Japan of two of the four islands, Shikotan and Habomai.(IHT 07-01-99)

**Myanmar-Thai dispute over Manao Island**

The two countries claim rights over the small island, located in the Moei River that separates the Thai town of Mae Sot from the Myanmarese city of Myawaddy. Both countries have troops stationed on the island and in early February 1998 there were reports of the Myanmarese having fired on a Thai military plane that flew near the disputed island.(IHT 03-02-98)

**Scarborough Shoal/Huangyan Island**

This shoal is located outside the Spratly Islands and is claimed by the Philippines and China. On 23 May 1999 a Philippine navy patrol ship and a Chinese fishing boat collided near the shoal resulting in the sinking of the Chinese boat. According to the Philippine foreign ministry the patrol ship was conducting "routine sovereignty and maritime patrol" and caught up with the fishing vessel about seven kilometres northwest of Scarborough when strong waves caused the vessel accidentally to hit the Philippine ship and sink. China contended that the navy ship had rammed the wooden junk.

China rejected the Philippine claim that the island lies within the 200-mile exclusive economic zone of the Philippines. Chinese ancient historical documents as well as Chinese maps from 1935 to 1983 support the Chinese claim, while neither

Philippine treaties dating from 1898 nor the 1935 constitution show a similar claim on the Philippine behalf.(IHT 25-05;27-05 and 11-06-99)

## TERRITORIAL SOVEREIGNTY

*See also*: Inter-state relations: China-US

### Iranian attacks on Mujahidin Khalq in Iraq

Iranian planes on 29 September 1997 bombed two military bases of the Iranian opposition group Mujahidin Khalq inside Iraq, near the city of Kut. The Iraqi foreign ministry accused Iran of having violated "Iraq's sovereignty and airspace".(IHT 30-09-97) The intrusion met with sharp US condemnation, arguing that the attacks "complicate the enforcement of the no-fly zone". [This refers to both northern and southern no-fly zones designated and enforced unilaterally by the US and the UK without UN authorization.](IHT 04/05-10-97)

Iraq accused Iran on 11 June 1999 of firing three long-range missiles into a military base of the Mujahidin Khalq on Iraqi territory. Iran appeared to have stepped up attacks on the Mujahidin since the group claimed two months before that it had assassinated the Iranian armed forces deputy chief of staff.(IHT 12/13-06-99)

### Foreign vessels in Japanese waters

Japanese patrol boats and aircraft spotted and chased two vessels of unknown origin in Japanese waters and fired warning shots in order to stop the vessels to be boarded. It invoked the right to self-defence under which its Self-Defence Forces are authorized to try to board the vessels, which fled north into international waters. The Maritime Safety Agency said that it had spotted one of the ships on 23 March 1999 about 45 kilometres east of the Noto Peninsula in central Japan on the side facing the Korean Peninsula.

The Japanese response was startling since it often occurred that foreign vessels fish or drop off smuggled cargoes or illegal aliens without generating such serious response. IHT 24-03-99)

It became clear later that the vessels were suspected to be from North Korea, and the following day Japan urged that North Korea seize and hand over the vessels.(IHT 25-03-99) However, North Korea through its representative at the UN informed Japan that it had nothing to do with the ships.(IHT 27/28-03-99)

## TERRORISM

*See also:* Inter-state relations: Iran-US; (Non-)Intervention; Jurisdiction; Sanctions

### Liberation Tigers of Tamil Eelam classified as terrorists

The Liberation Tigers of Tamil Eelam (LTTE), the Tamil insurgent movement in Sri Lanka, was listed by the US as a terrorist organization in October 1997.(IHT 17-10-97) [The US classification bars the organization from raising money in the US and the members from entering the US.]

Sri Lanka urged the international community to follow the US measure, as such action would strengthen the battle against the rebels. (JP 10-10-97)

## UNITED NATIONS

### Chinese budget contribution

The US had asked China to consider paying 4 percent of the UN regular budget to help cover the gap that would arise if it succeeded in having its assessment reduced to 20 percent from the current 25 percent. China currently paid 0.7 percent. (IHT 01-09-97)[*See* 5 AsYIL 502-3 for the status of Asian contributions to the UN regular budget]

### Asian attitudes in UN Security Council

Japan co-sponsored a British initiated draft resolution authorizing automatic use of force if Iraq violated an agreement under which it would allow UN arms inspectors entry into presidential palaces. On the other hand China joined Russia and France in heading off such authorization. They wanted to ensure that the full Council would determine whether Iraq had violated the agreement and, if so, what response would be appropriate. The Council meeting ended with no agreement on the final language of the resolution. (IHT 28-02/01-03-98)

Finally, the resulting resolution 1154, adopted 2 March 1998, read, in its paragraph 3: "Stresses that compliance by the Government of Iraq ... is necessary for the implementation of resolution 687(1991) [i.e. the main resolution establishing the cease fire and the sanctions ending the Gulf War], but that any violation would have severest consequences for Iraq". (IHT 03-03-98)

When the US interpreted the resolution as allowing the UN member states to take unilateral action in case of violation, that interpretation was disputed by, inter alia, China, which interpreted the resolution to mean that military action cannot be taken against Iraq without specific authorization by the Council. (IHT 04-03-98)

### UN intervention in Myanmar political dissension

It was reported that the UN and the World Bank were offering $1 billion in financial and humanitarian aid in exchange for opening a dialogue with the opposition. It was the first UN attempt to include international financial institutions directly in political negotiations. It was said that the bulk of the funds would come from Japan. If the plan would proceed, the US would withdraw its long-standing automatic veto of any funding or assistance for Myanmar from the IMF and the World Bank.(IHT 26-11-98)

### Chinese veto

China announced its intention to veto an extension of a UN peacekeeping force in the Republic of Macedonia. It said that it had opposed such extension before because it did not consider the situation in Macedonia to represent a threat to inter-

national peace. There were suspicions that the real reason lay in the fact that Macedonia had established diplomatic ties with Taiwan.

China had only used its veto power four times before, most recently in 1997 when it voted against sending a UN mission to Guatemala. Guatemala had invited a Taiwanese delegation to attend a ceremony marking a treaty that ended the civil war.(IHT 25-02-99)

### UN-sponsored settlement of Kosovo conflict

With regard to the efforts to terminate the conflict in Kosovo, China, as a permanent member of the UN Security Council, said on 11 May 1999 that NATO must stop its bombing of Yugoslavia before it would consider an international peace proposal, but the US rejected the suggestion.(IHT 12-05-99)

The Chinese attitude was maintained in respect of the Kosovo peace plan supported by the West and Russia in May 1999: a halt to the NATO bombing campaign as a "precondition" of Security Council talks. China had vehemently opposed the campaign, arguing that it sets a dangerous international precedent of "human rights over sovereignty".(IHT 09-06-99)

Finally, NATO did suspend its bombing, and the UN Security Council voted 14-0, with China abstaining, for a resolution authorizing an international peacekeeping force.(IHT 11-06-99)

## WEAPONS

*See also:* Nuclear energy matters

### India declares possession of chemical weapons

Among the states which were party to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction two states (US and Russia) had declared to be in possession of chemical weapons stockpiles, and another half dozen had declared to have the ability to make them. Under the treaty these declarations may be made under condition of secrecy.

Several months after the entry into force of the Convention (29 April 1997) India openly declared its possession of a chemical weapons stockpile.(IHT 18-08-97)

### Chinese attitude toward land mines

China on 30 November 1997 stated its objection to plans for a treaty to ban land mines because it needed land mines for self-defence. It supported reasonable restrictions over the use of such mines but reserved the right to use them on its own soil, to defend its borders. The general principle in solving the problem should be one that takes balanced account of both humanitarian concerns and the legitimate needs of sovereign states for self-defence.

In September 1997 nearly hundred states had reached agreement on banning the use, stockpiling and production of anti-personnel land mines. The treaty was signed at a conference in Ottawa on 5 December 1997. (IHT 01/02-12 and 03-12-97)

**Chinese prevention of chemical weapon proliferation**

China on 17 December 1997 issued new rules to tighten controls on the import and export of chemical weapon-related materials.(IHT 18-12-97)

**China–US on use of nuclear weapons**

According to newspaper reports, China and the US were negotiating an agreement to retarget their nuclear missiles away from each other. China maintained that such agreement should be preceded by another agreement pledging no first use of nuclear weapons. The US refused to make such a pledge as being meaningless and unverifiable. [China had 18 long-range missiles; the US had about 6,000 nuclear warheads.](IHT 19-06-98) The mutual pledge was after all made as one of the results of the visit of the US president to China in late June 1998.(IHT 06-07-98)

**Indian response to Sino-US joint communiqué**

The Sino-US communiqué issued on the occasion of the visit of the US president to China in late June 1998 called, inter alia, on India and Pakistan to curb their nuclear and missile programmes.

India accused the two countries of hypocrisy and showing a "hegemonistic mentality". The statement said, *inter alia*, "It is most ironical that two countries that have directly and indirectly contributed to the unabated proliferation of nuclear weapons and delivery systems in our neighbourhood are now presuming to prescribe the norms for non-proliferation."(IHT 29-06-98)

**Indian and Pakistan attitudes toward the Comprehensive nuclear test ban treaty**

After they had conducted their nuclear tests in May 1998 both India and Pakistan declared they would be prepared to participate in the treaty if some conditions would be fulfilled. Thus, Pakistan demanded the US to lift its sanctions and help Pakistan with an aid package to prevent its default on $30 billion in debt. India wanted, inter alia, the lifting of sanctions and the possibility to buy advanced technology from the US.(IHT 01-10-98)

## WORLD WAR II

**Damages for comfort women**

*(See also:* 2 AsYIL 383; 3 AsYIL 453; 4 AsYIL 525; 5 AsYIL 506; 6 AsYIL 467; 7 AsYIL 491)

The (Japanese) District Court of Yamaguchi sentenced the Japanese state to pay damages to three Korean women for having forced them into sexual slavery for Japanese soldiers during World War II. The court called it a "fundamental violation of human rights", and found that the government should have passed laws to repay the women for their suffering. The ruling was the first in a lawsuit filed by so-called "comfort women".

The court rejected the claims of seven other plaintiffs, who had been forced to work in Japanese military plants, but were not sex slaves.(IHT 28-04-98)

**No compensation for former prisoners-of-war**

A Tokyo court rejected a claim for compensation filed by former soldiers and civilians of states with which Japan had been at war and who had been held prisoner by Japanese troops during World War II.

The lawsuit was filed by seven plaintiffs, on behalf of 20,000 nationals of Australia, Britain, New Zealand, and the US, in 1995. It was the first decision in such a case. The court ruled that the issue was resolved on the government level in 1951 with the signing of the peace treaty.(IHT 27-11-98)

# LITERATURE

# BOOK REVIEWS*

*Sovereignty over the Paracel and Spratly Islands*, by MONIQUE CHEMILLIER-GRENDREAU, Kluwer Law International, The Hague/London/Boston, 2000, pp. vii + 265.

The Paracel and Spratly Islands are offshore archipelagos lying in the northern and southern parts of the South China Sea respectively. Territorial title to both is contested by a number of States. China and Vietnam are the sole disputants over title to the Paracels, while the question of sovereignty over the Spratly Islands is the subject of contention between China, Taiwan, Vietnam, the Philippines, and Malaysia. The circumstances of the dispute surrounding the Spratly Islands are far more complex than those involving the Paracel Islands. The reasons for this are that not only is title to the Spratly Islands contested by a greater number of States, but the political and economic issues involved here are also more acute. On the political front, the emotive issues of sovereignty and historic patrimony are supplemented by the strategic significance of the islands and the role that they play in the process of nation-building and territorial expansion. Economically, the Spratly Islands are reported to be well endowed with hydrocarbon resources and have the potential to form the basis of extensive maritime claims, with the impact that these will have on access to fishery resources. These various factors make a potent mix which, if not resolved, could lead to serious military conflict. Indeed, Vietnam and China have already sparred militarily over certain of the Spratly Islands, and most strategists recognise the Spratlys as potentially one of the world's most dangerous military flashpoints. It would seem, therefore, that some form of peaceful resolution of the dispute over the territory in question is a prerequisite to developing a safer world. This book seeks to make a contribution to understanding the Paracel and Spratly Islands dispute by reviewing the question of territorial title primarily by using historical-legal method. In so doing, the author relies to a significant degree on materials from the French archives that have not hitherto been the subject of detailed consideration.

Although the Spratlys and Paracels are two distinct archipelagos; nonetheless, they are treated as a single entity in Chinese and Vietnamese claims. While the author analyses the claims in this way, she acknowledges that the conclusions arising from this form of treatment differ. The author begins by providing a *mise en scène* in which she examines the fundamental geographical, physical, political, economic, and strategic significance of the islands is reviewed. Some interesting points arise from this. The first is that the islands have never been inhabited: they have never had a native population, although some of the larger islands are capable of occupation. The second point of note is that there are a large number of uninhabitable sandbanks, shoals and rocks which do not constitute islands proper within the meaning of article 121 of the Law of the Sea Convention of 1982 because they are incapable of sustaining human habitation or economic life of their own. The net result of this is that while claimant States would be able to claim a twelve-mile territorial sea around these rocks, they will be unable to use them as bases for claiming either an exclusive economic zone or a continental shelf. This, however, is a controversial area of the law of the sea, and there is no guarantee that a suc-

* Edited by Surya P. Subedi, General Editor.

*Asian Yearbook of International Law*, Volume 8 (B.S. Chimni *et al.*, eds.)

cessful claimant would not find some method of maximising their maritime claims by exploiting the uncertainty generated by this controversy. Despite this, however, the author is of the clear opinion that whether they be rocks or islands, the territory in question is susceptible to claims of sovereignty, a view which is supported by the approach of the International Court of Justice in the *Minquiers and Ecrehos* case between France and England.

In analysing the various claims to territorial title by the disputing States, the author adopts a traditional approach by attempting to analyse who has the stronger claim. At the outset, she rejects the argument of sovereignty over territory by virtue of geographical contiguity or by virtue of the fact that, in the case of the Paracels, the islands potentially lie within the exclusive economic zones of either of the contesting States. Indeed, this latter cannot be an operative factor since, as the author points out, the delimitation of the respective EEZs of China and Vietnam cannot be determined until the question of sovereignty over the islands is solved. The case of the Spratlys is different since these lie outside any potential maritime claim based on the mainland of the contesting States. The author also emphasizes the role of inter-temporal law in the determination of territorial title. In the case the Spratlys and Paracels this is of considerable importance since the colonial period in the region served to disrupt the continuity of claims, with France, for example, not pressing Vietnam's claims as strongly as it might for a variety of political reasons. Furthermore, the events of the Second World War, the French abandonment of Vietnam, the creation of two Vietnams and the ensuing Vietnam War (or American War, as the Vietnamese call it) created a situation of confusion in which the elucidation of the various claims became difficult to achieve. As the author concludes (p. 33):

> "In the long, chaotic, conflict-ridden, and even for a long period, dramatic history of this part of the world, it is very difficult to assemble the sort of incontrovertible documents which constitute evidence and are the material on the basis on which the law can be established."

Despite this, the author attempts to show that the material and psychological elements necessary for the acquisition of territory are sufficiently available to support claims for the better right to title on the part of one of the actors in this dispute. Following a review of the available archival evidence, the author comes to the conclusion that it is Vietnam which has the better title to territory in both the Paracels and Spratlys, this despite the fact that China has actual physical control of the Paracel Islands. The reason the author rejects the fact that physical control gives China the right to sovereignty is because it is based upon the use of force, now considered illegal under both general and particular international law. The claims of the other contesting States are generally perceived as having little or no merit.

While this book makes an important and useful contribution to the question of the Paracel and Spratly Islands through its analysis of hitherto-unknown French archival material, it is doubtful whether it really takes the matter much further forward. It certainly helps to fill out the picture, yet it is not certain whether it will form the basis for a resolution of the dispute. In a sense the historical uncertainty and confusion surrounding most of the claims renders it unlikely that an application of conventional legal norms associated with acquisition of territory will solve the problem. While the author is correct in stating that the contesting States by virtue of Article 33 of the United Nations Charter are under an obligation to settle their dispute peaceably, it seems clear that it will take more creative methods than simply relying on what are essentially a series of early twentieth century rules. Although the author does canvas the possible use of a condominium arrangement for the islands, it is unlikely that this would satisfy the parties. Perhaps the answer is not to become too obsessed with resolving the question of territorial title through an application of historical method, but to find other modes of operating which will circumvent this issue. In a sense, this is what is happening with the development of a code of conduct for the South China Sea that will allow States to function cooperatively in the area without sacrificing their respective claims to territorial sovereignty. This "without prejudice" approach might well lead to the construction of a regime that avoids the rigidities and dangers of a fruitless zero sum game.

Although this book is a useful contribution to a fuller understanding of the disputes surrounding the Paracel and Spratly Islands, particularly through the author's scholarly analysis of the French archival material and the reproduction of a substantial amount of the original material in the latter half of the book, there are nonetheless some minor defects in the work. First, the final chapter, entitled "Conclusions and Bases for the Settlement of the Dispute" contains no reference to the considerable efforts being made in a variety of forums to do just that. There is no reference to the Canadian-sponsored South China Sea Workshop or to the ASEAN Regional Forum, both of which have been actively engaged for some time in attempting to seek workable solutions to the problems of the area without necessarily resolving the issues of territorial title. Second, there are no modern charts showing the relative claims of the competing States. These would have been useful as a reference point. Finally, there is no index. Readers are likely to find this rather frustrating when attempting to pinpoint a particular piece of information. Despite these minor criticisms, however, this book is a very welcome addition to the literature on this complex and fraught issue and should be in every library claiming to have an interest in South East Asia.

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*Japanese Law* by Hiroshi Oda, Oxford University Press, Oxford, 1999, pp. 494, ISBN 0-19-8764 561.

Even in this modern age when high-tech products labelled "made in Japan" are easily available all over the world, it is probable that very few lawyers, academics, and students outside Japan would have much knowledge of Japanese law. Japanese law may still be confused with Chinese law; while many simply do not have a clear idea about Japanese law, except for Article 9 of the Constitution that famously renounces war. Thus, ODA's new edition of "Japanese Law" in English is an excellent piece of work, demystifying Japanese law.

"Japanese Law" is not a monograph that focuses on any specific area of Japanese law, but a textbook covering almost all aspects of the law. It starts, as traditionally, with comparative study, the history and sources of Japanese law. What is important in this very first part of "Japanese Law" is ODA's contention that Japanese law is not part of the legal system of the Far East; he claims that it belongs to the Western legal system. This becomes an important aspect throughout this book. ODA refers to German, French, English, American, and other Western legal systems whenever necessary in order to explain the background to Japanese law. Indeed, it would be correct to assert that no Japanese scholar seriously believes the present Japanese legal system to have been influenced by Chinese law or Confucianism. First-year law students at universities are taught not what Confucius said, but German terms and schools of thought, such as *Recht, Burgerliches Gesetbuch* and *Rechtssicherheit*. ODA rightly proves the fact that Japanese legal system is very much Western in character.

Next, the author proceeds to the administration of justice, the legal profession, and the protection of human rights. The law's delay was lamented in SHAKESPEARE's *Hamlet*, and the Japanese legal system, as ODA explains, notorious for its delay in bringing justice, is no exception. Notwithstanding problems of justice, it is significant for him to state in these chapters that the Japanese judiciary has played an important part in developing case law, particularly in the area of Constitutional Law. He contends that human rights law has developed as the result of the judiciary's interpretation of the vaguely worded and never amended Constitution. Scholars may tend to think that Japanese law, which basically stems from the Continental law, should be heavily dependent on written law, but his argument clearly refutes such a traditionally held view.

The writer next moves on to the most important part of this textbook, namely, chapters on the Civil Code, commercial law, financial law, anti-monopoly law, and intellectual property law. As he states in the preface, the second edition puts a great deal of emphasis on commercial law, unlike the first edition of *Japanese Law*. Limited space does not allow the comprehensive listing of the major changes to which the textbook refers, but they include the following: a new law concerning product liability; the introduction of stock options; simplification of

procedure for merger and acquisition; new developments in insolvency and bankruptcy laws; the establishment of a new supervisory body over the financial sector, namely, the Financial Supervisory Agency; improving disclosure of companies; and the liberalization of holding companies. In addition, in the last chapter of *Japanese Law*, he discusses those areas of Japanese law to have international dimensions, but he mainly focuses on commercial law relating to international relations, such as foreign exchange and cross-border insolvency. For those who are following Japanese economic news and others directly involved in business with Japanese companies, these chapters offer an understanding of Japanese business and economy in a legal context.

In the last part of the book, ODA expounds labour law, family law and succession, civil and criminal procedures, and criminal law. Although his elucidation of these laws may not be as detailed as that of commercial law, he covers necessary issues and refers to recent developments. For example, in the chapter on family law and succession, he describes recent controversies regarding this area of law, such as a common family name and succession by an illegitimate child. In the chapter of criminal law, he refers to a new law regarding organ transplantation, a development that has changed the traditional concept of death, as well as to the introduction of laws to fight against organized crime, a continuing problem in Japan.

Notwithstanding both ODA's clarity in explaining Japanese law and his efforts to bring up to date cases and materials, those who major in public law might be less content with *Japanese Law* than those in private law. This may be disregarding the stated intention of the author who, in the preface, declares that the second edition of *Japanese Law* highlights commercial law. Despite the fact that Japan has been in a serious recession for almost ten years, it has retained its status as the second-largest economy in the world; therefore, it is natural that greater attention has been paid to its commercial side. Having said this, Japan is now facing many political and social changes as well, and more attention should be devoted to new developments in public law. For instance, Japanese people have been extremely reluctant to debate any possibility of changing their Constitution for more than fifty years, but recent discussions have increasingly frequently taken place in various fora, including in the Diet, the national parliament, on future changes of the Constitution. The aforementioned Article 9 of the Constitution is an area that almost always raises controversy in such debates. Unfortunately, however, this edition of *Japanese Law* places little emphasis on such recent dynamism. Similarly, the chapter on criminal law appears to be minimal. It is to be hoped that the next edition of *Japanese Law* will focus equally on public law and on private law.

In spite of the above shortcomings, *Japanese Law* presents a good overview of the present Japanese law in a clear fashion. In addition, after a thorough reading of this book, certain readers, including this reviewer, start to consider what Japanese law will and should be in the future. Readers, particularly those who are not Japanese, will notice from the book that Japanese law is not as unique as they may have expected. As the author points out, Japan has pursued a goal of "emulating and surpassing Western powers" since the beginning of her modernization and for that purpose Japan has "imported" a legal system from Western Europe and the US. However, Japan is in a state of uncertainty because she has virtually achieved the goal and lacks examples from whom she can receive further instruction. Therefore, it appears to this reviewer that it is time for Japan to consider what kind of legal system the state will have in the future. Will she continue to have the present legal system, or will she transform her legal system into something uniquely Japanese?

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*Droit International Public,* by JOE VERHOEVEN, Précis de la Faculté de Droit de l'Université Catholique de Louvain, De Boeck et Larcier s.a., Brussels, Belgium, 2000. pp. 856, ISBN 2-8044-0630-X.

This book is aimed primarily at students and the author hopes it will also prove interesting to legal specialists such as lawyers, judges, and civil servants who increasingly face questions of international law in "ordinary" practice.

While public international law is no longer of interest solely to an intellectual elite, it remains a complicated, and often vague, form of law. This gives rise to fears on the part of those new to the subject that there are no definite answers and that the subject is insurmountable. In this book, Professor VERHOEVEN raises relevant issues of controversy and debate, without dwelling on those topics that, however interesting, are no longer moot. He does not, however, lull the reader into the false belief that the subject is clear-cut.

He has a critical approach, providing commentary on the efficacy or otherwise of various practices and the validity of rulings of the ICJ, as well as pointing out various idiosyncrasies inherent in the structures and practices of public international law. However, he does this only where appropriate, sometimes with an ironic tone, thereby managing to avoid politicizing that which is supposed to be a technically descriptive work.

Professor VERHOEVEN has structured the book to deal with the main areas of public international law and still manages to address possibly minor issues in greater depth than in a dismissive paragraph. The book is divided into five sections: the Subjects of International Law, the Sources of International Law, the Judicial Regime of Spaces, Reparation and Sanctions, Dispute Resolution, and Collective Security. Although each section is extensive, the subsections are efficient and clear, providing an overall structure that can easily be followed.

As a Francophone textbook, this work follows a certain traditional civil law approach, which should make it more, rather than less, interesting to readers grounded in the common law system. In particular, it is clear that the author is not pressed by an overriding need to justify all his statements through reference to an institutional judgment or the work of another. The credit given to others is thus presented in the more accessible form of a brief footnote, combined with a comprehensive bibliography at the end of each chapter. Further, the author has quoted from works in many languages, providing the reader with a usefully wide range of material for further research.

One of the assets of the work is that the historical context is given not as a chapter on the History of Public International Law, but issue by issue in order to enhance understanding of particular areas of the law. Obviously, for the sake of brevity, not all historical contexts can be analysed, so various judicious choices have been made; for example, in the section on subjects of international law, the author explains the political, legal, and social history of the Roman Catholic Church before outlining the current status of the Holy See and Vatican City. This recognises that not all readers are steeped in the Western Christian tradition and, further, exposes the reality behind the anomaly of attributing international personality to such confessional entities.

A special feature of this work is the chapter on Belgian solutions to matters of international law. There are two main reasons why this section is a positive attribute. Firstly, the issue of national law is dealt with in depth in a separate section rather than being cited only in a fragmentary manner throughout the book; the approach provides a focus for all students to consider how their countries deal with international law. Secondly, and more importantly, the unique federal system in Belgium provides a fascinating example of the extension of international capacity to internal regional entities.

If there is a criticism to be made, it is in the lack of detailed reference to recent developments in Belgian legislation relating to specific issues of international law, for instance violations of international humanitarian law.[1] In the light of the *Pinochet* case, and the forthcoming International Criminal Court, the Belgian example in this field could give rise to rich debate.

Professor VERHOEVEN is very clear that his book is a technical handbook ("*un manuel de solfège*") and that it is a summary of public international law; it is not necessarily a short book, but one that exposes and teaches the essentials. He states that students should not be the only ones interested in a relatively complete and systematic expose of international law. While wishing to reach a larger readership is a legitimate aim for this type of book, it is not achieved as successfully as it might have been.

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[1] Loi du 10 février 1999 relative à la répression des violations graves de droit international humanitaire, *Moniteur Belge*, 23 March 1999.

The style is very much that of the Francophone academic and as such tends towards the intellectually élitist. The essentials are covered, the moot points are raised, but there is confusion rather than clarity in the mode of delivery, if not in the substance. This is disappointing because there are many interesting aspects to this book. If it were more accessible to the reader who does not attend university lectures, it would be an asset to that additional readership.

Whereas a student may have to read the whole book, other professionals will want to be able to read it selectively. The current style tends to mix factual conclusions on the actual status of international law and practice, on the one hand, with the various discussions surrounding the issues, on the other. Therefore, one would have to read entire sections, including all the academic debates, in order to find a few sentences stating the current situation. This is of course beneficial to students, but is less so to legal professionals and to those using the book as their secondary textbook.

In order to reduce the impact of this prose style, the current index pages could be expanded; it would also be of greater assistance if at least the major cases and primary sources were mentioned in the index. Further, the structure might be reconsidered to the extent of making certain chapters more specific, and certain conclusions more apparent.

It may be suggested that the issue of style is a personal one, and that much of the criticism of this book is based on a misunderstanding of the prose style of Francophone textbooks. However, as public international law moves into ever-wider areas of law and life in general, increasing numbers of lawyers of all nationalities will be seeking access to academic and other textbooks on the subject. Indeed, this is the type of book they will be hoping to read.

It is therefore necessary that all authors start to simplify their use of the written language, irrespective of which one it may be. Academics have long been accused of living in ivory towers, and while this accusation is often ill-founded, it finds some evidence in the textbooks in this field.

Law is a complicated subject; its complexities are what provide so many of its acolytes with their interest and enthusiasm. However, complex ideas can nevertheless be analysed and explained simply, and this is a challenge that international lawyers should take seriously.

This book will have an immediate readership in French-speaking students of the subject. It provides them with an interesting outline and analysis of the foundations needed in public international law, after which students can proceed to works that are more highly specialized. Other groups will also find it of interest; future editions can only expand that readership.

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*International Refugee Law: A reader*, edited by B.S. CHIMNI, New Delhi/Thousand Oaks/ London, Sage Publications, 2000, pp. 613, ISBN 0-7619-9362-2 (US-Hb); 81-7036-853-7 (India-Hb), Price: Rs. 695.

Producing a comprehensive publication of this nature and especially on such a complex area of international law is quite a laborious task for the author or editor, but a very useful book for the readers to have. This appears to be the first publication of its kind on the international law of refugees. Professor CHIMNI has a well-established reputation as a leading scholar in the law of refugees and the publication of this book by him is a welcome addition to the body of literature on the subject matter. As stated by Dr SADAKO OGATA, the UN High Commissioner for Refugees, in her foreword to the book, "Professor CHIMNI has been a strong voice and critic of the current international refugee regime, in particular the restrictive practices of states on international protection." (p.xi)

This book is a collection of material on international refugee law. It is divided into eight chapters covering all major aspects of the current regime of refugee protection under international law. The material presented is organized around certain thematic lines and the editor has provided his own introduction to each of the chapters outlining the basic strands of thought on the issues covered. The first four chapters deal with the basic rules of the law of refugees, including the definition of a refugee, the law of asylum, the right and duties of refugees, and the mandate and functions of the UNHCR. After

providing a good exposé of the basic law, the next three chapters go on to examine the issue of the root causes of refugee flows and the law of state responsibility, durable solutions to the refugee condition, and the internally displaced persons. In doing so, these chapters go beyond the ambit of the 1951 Convention on Refugees and consider a wide variety of social, economic, political, and legal issues relating to the global refugee problem. The last chapter analyses the Indian practice on the protection of refugees.

The book begins by providing, in Chapter I, the definition of a refugee in international law. It looks at the provisions of both the 1951 Convention on Refugees and other instruments such as the OAU Convention, the Cartagena Declaration, and the AALCC principles. Chapter II deals with the issues surrounding the institution of asylum and considers the principle of non-refoulement, temporary protection and burden sharing, etc. Chapter III provides a detailed account of the rights and duties of refugees under international law. The functions and powers of the main UN agency responsible for the protection of refugees, i.e. the UNHCR, are analysed in Chapter IV. Both the mandate of the UNHCR and its limitations come under close scrutiny in this chapter. While Chapter V outlines the causes of refugee flows and the law of State responsibility, Chapter VI discusses the solutions to the problems of refugee flows. Some of the most controversial issues and the dilemmas faced by many states hosting the refugees have been discussed in this chapter. They include the question of local integration, voluntary repatriation, organised repatriation, and spontaneous repatriation.

Chapter VII considers a slightly different yet related issue of internally displaced persons. This chapter demonstrates the inadequacies of the existing international law on internally displaced persons. They are more often than not in need of as much protection as refugees, but, sadly, they do not get as much protection under international law as do refugees. Chapter VIII deals with the legal condition of refugees in India. This chapter begins by surveying the plight of refugees from the time of the partition of India and goes on to examine the protection afforded by India to the Tibetan refugees, the Bangladeshi refugees during the Indo-Pak conflict of 1971/72 and the flight of Tamil refugees from their homeland owing to the on-going conflict in Sri Lanka.

The attempt of the editor in this publication seems to be to provide a comprehensive collection of material on all major aspects of refugee law and he has succeeded in it. As stated by Professor CHIMNI, his aim was also to offer a text that "presented international refugee law from a Third World perspective." Although it is difficult to present a third-world perspective on any area of law through the publication of a reader of this nature, the editor has done his best both through his introduction and through the careful selection of material to outline the problems involved; this is done from the perspectives of both northern and southern countries, making the book truly comprehensive in character.

His decision to include a separate chapter on the practice of India has added a welcome Indian flavour to the exercise. By analysing the practice of a third-world country that has provided protection to refugees from neighbouring countries without ratifying the main international treaty on refugee protection, the editor has highlighted the strengths and weaknesses of the existing international legal regime on refugees. Since the editor of the book has himself contributed a great deal to the debate on the protection of refugees under international law, he has not hesitated to include his own published and unpublished material in the book since these provide an interesting insight into the status of the law and its application in practice.

All in all, this is a very welcome collection of material on the subject matter from a person who has contributed a great deal to the subject. Although the editor states that the publication was designed to cater mainly for readers from India and South Asia, it has all the qualities to make it a publication suitable for recommended reading for courses on international refugee law offered by any university located anywhere in the world. This is a very useful and valuable source of material for the teachers and students alike of international law of refugees.

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*Comparative Studies on Governmental Liability in East and Southeast Asia,* by Yong Zhang, (ed.) The Hague/London/Boston: Kluwer Law International, 1999, pp. xx, 252, ISBN 90-411-1074-7.

The book is the product of a conference of the same name and is the second volume in a trilogy on the protection of citizens' rights against the State in East and Southeast Asia. It contains a number of essays by distinguished academics from a range of East and Southeast Asian countries, including Korea, Taiwan, China, Japan, Indonesia, and Malaysia. Moreover, it also contains two essays regarding the state of the law in Germany and the Netherlands that serve to demonstrate the influence of western legal systems in the development of Asian legal systems. They also provide a wider comparative perspective, and offer a benchmark for an appraisal of the less sophisticated Asian systems. The establishment of governmental liability in East Asian countries is a relatively recent phenomenon, occurring for the most part in the mid to latter part of this century under pressure from Western powers. Social and economic demands have led to a changed role for Government, and in turn have demanded modernisation of Asian legal systems. The recent modernization in the area of governmental liability is the focus of this volume.

DR. ZHANG introduces the volume and draws the reader's attention to a number of points. Some comparative works on the legal systems of East Asia have been affected by a superficial understanding of the divergent colonial histories of the countries, and by a lack of research into the actual functions of legal systems therein. He also notes that the modernization of legal systems in East and Southeast Asia share similar patterns, partly derived from shared historical experiences, and partly from the shared environment in which they at present operate. It might be added that each country is faced with similar concerns regarding development, and the consequent demands which are placed on the institutions of the State to accommodate such concerns. He asks the reader to read the subsequent essays in this light. Apart from a useful introductory chapter by TOSHIRO FUKE on the historical development of State Liability and the Law of Remedies, and the final commentaries by DR. ZHANG, the remainder of the book consists of a series of essays written by distinguished academics in the field of Public Law. Although the issue of government liability is a large one the essays manage to review many of the key issues. Each essay examines the scope and limits of government liability in a particular country, and as well as précising the general regime for liability, they make reference to particular heads of liability. These include the expropriation of property, which may be the most common instance where governmental liability arises, employment liability, negligence by the police and penal authorities, and medical victim compensation. Questions of liability arising from lawful activities, vicarious liability and the scope and limits of reparation are generally considered. However, it is not the aim of this book to provide a comprehensive analysis of every area of government liability, and readers should not expect that depth of coverage. Indeed each essay differs in both content and approach, perhaps reflecting the respective ideologies of each system. Certainly the book is a comparative exercise and designed to illustrate certain dynamic issues or problem areas, and to provoke reflection.

DR ZHANG concludes the book with his own commentaries on comparative studies on governmental liability. His chief concern is the lack of sophisticated in forms of preventative action in most East Asian countries as opposed to basic systems for compensating damages. Compensation ought to be a final safeguard of citizens' interests, and the absence of proactive measure places undue stress on the legal system. Although States have introduced systems of judicial review they leave much to be desired, and as a consequence they are likely to be inuring themselves to unnecessary and fruitless litigation. This section provides an important comparative overview and remarks on key issues such as compensation and reparation from losses arising out of lawful activities.

The individual essays are by necessity quite descriptive of the systems of government liability they portray. Yet the respective authors manage to suffuse them with a valuable degree of critical appraisal. For example, DR HARDING is highly critical of the situation in Malaysia where unnecessarily obstructive protection is afforded to public authorities in the absence of legitimate policy considerations. PROFESSOR HADJON is equally dissatisfied with judicial

constraints that inhibit the Indonesian system of governmental liability. For the most part these 'flaws' in the respective legal systems appear to flow from entrenched conceptions about the proper role of the State, and even ideologies about institutions such as property rights. Thus in China, Taiwan and Indonesia the State enjoys a high degree of discretion in providing compensation for the expropriation of private property. In practice there is often a low level of compensation that may reflect a preference for public considerations over private rights, or at the very least a failure of the legal system to adequately facilitate private property interests. As the legal systems in the region are undergoing extensive modernisation they offer an excellent opportunity for examining the confluence of ideas and philosophies, and the book seizes this opportunity. As PROFESSOR DEPPENHEUER's essay on Germany notes this process is occurring in Europe under the influence of the European Union. Arguably East and Southeast Asia are experiencing a similar process resulting from their shared economic concerns.

The book is a quality publication in an area of continuing practical and academic concern. Primarily, it is a valuable introduction to the different systems of government liability and would appeal to public lawyers as such. Yet it also provides profitable insights into those factors which underpin and shape the letter of the law. Implicit and explicit in the text are concerns such as the reticence to develop proactive administrative remedies, the treatment of property rights, and even the influence of human rights in effecting the limits of citizens redress against the state. Such concerns add greatly to its value as a comparative text. Given that principles tortuous liability underpins the subject of government liability, the book might well appeal to students with an interest in the private sphere, or at least the relationship between public and private law. Overall the book is a recommended addition to the law library of any institution.

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*International Law and the Use of Force*, by CHRISTINE GRAY, Oxford University Press, 2000, pp. 243, ISBN 0-19-876527-4.

Apart from the important provision of Article 51 that admits unilateral forcible action in exercise of the right of individual and collective self-defence against an armed attack, the UN Charter makes clear that the use of force under the United Nations system is intended to be monopolized by the Organization. This monopoly finds its corollary in the context of the United Nations, in the prohibition of the unilateral resort to force by States when the Charter, for the first time, referred directly to not resorting to force in Article 2(4). However, as a consequence of unilateral actions in the final decade of twentieth century by some States, the Article is currently the subject of fundamental disagreement; the perennial problems surrounding the legality of the use of force, the subject of fierce debate and fundamental doctrinal difference during the Cold War, still continue. Indeed, not only have the problems not been solved but other problems have emerged.

This book attempts to cover the whole of the large and controversial subject of the use of force under contemporary international law. It examines the use of force by States, the role of the UN and regional organizations in the maintenance of international peace and security, and State practice in the light of doctrinal debates. It is divided into seven chapters on the following diverse topics: Law and Force (Ch. I), The Prohibition of the Use of Force (Ch. II), Invitation and Intervention: Civil War and Use of Force (Ch. III), Self-defence (Ch. IV), Collective Self-defence (Ch. V), The UN and the Use of Force (Ch. VI), and Regional Peacekeeping and Enforcement Action (Ch. VII).

The question of self-defence in the light of recent academic debate over the issue, the role of the Security Council under article 51 of the UN Charter, and the scope of self-defence are well discussed by GRAY in what is perhaps the most interesting part of this book. The author tries to highlight fundamental disagreement on the issue on law of self-defence among States and also among jurists. The divisions over the scope of the right of self-defence whether anticipatory or preventive, the protection of nationals, and the right of self-defence in response to colonial occupation and terrorism are addressed. If there were an armed attack the right of self-defence arises. This is an issue upon which all States agree. It is expressed in the

*Declaration of Non-Use of Force* in 1987, which relies on the UN Charter; it is stated that "States have the inherent right to individual or collective self-defence if an armed attack occur, as set forth in the Charter of the United Nations". However, the important issue is what constitutes an armed attack. This disagreement was well demonstrated in the *Nicaragua Case,* where the US claimed that its use of force against Nicaragua was justified as collective self-defence of Costa Rica, Honduras, and El Salvador in response to armed attacks on those States by Nicaragua. However, the Court rejected the US argument and found that there was no armed attack by Nicaragua. With reference to *Nicaragua Case* and the *Legality of the Threat or Use of Nuclear Weapons,* the Court reaffirmed that necessity and proportionality are conditions for self-defence, individual and collective. Necessity and proportionality help to distinguish unlawful reprisal from lawful self-defence. The Security Council has in its resolutions condemned disproportionate responses by Israel, South Africa, and Portugal.

Another important issue that the international community has recently dealt with is response to a terrorist attack by military force based on self-defence. The author discusses the issue in Chapter IV (pp. 115-119). A quick look at certain events shows that an extended concept of self-defence has been used by the US against Libya in 1986, Iraq in 1993, Sudan and Afghanistan in 1998; also by Israel against Lebanon in 1968 and Tunisia in 1985 in order to respond to terrorist attacks. Those actions combine the protection of nationals and anticipatory self-defence. The first action by Israel in 1968 against Lebanon, on the pretext of response to a terrorist attack on an Israeli plane in Athens airport, met with strong objections from the international community. The UN Security Council also unanimously condemned in Resolution 262 the action taken by Israel. Other actions met a more or less similar response.

Does the right of self-defence apply in this situation? The wide doctrine of self-defence was used by the US in 1993 against Iraq, following an assassination attempt on ex-president Bush by an Iraqi agent in Kuwait in April 1993, against a Sudanese pharmaceutical plant and in Afghanistan, against Osama Bin Laden's training camp, as well as missile attacks in 1998 after terrorist attacks on USA embassies in Kenya and Ethiopia in August 1998. CHRISTINE GRAY argues that these actions appear to be reprisals, because they were punitive rather than defensive. She also notes that "even if the actions were aimed at those actually responsible for terrorist attack, and even if the response could be accepted as proportionate, it is difficult to see how the use of force was necessary, given that the attack on the nationals had already taken place. The USA and Israel aimed to retaliate and deter and said that their actions were preemptive. The problem for USA and Israel is that all States agree that in principle forcible reprisals are unlawful. Moreover, the GA also made it clear in the *Declaration on Friendly Relations* and the *Resolution on Inadmissibility of Intervention."*

The book also well refers to the end of the Cold War when, with the co-operation of the Soviet Union and the US starting in the late 1980s, UN missions increased in various respects. Analysis of UN missions makes clear that the UN authorised its missions first in conflicts that were primarily internal, such as the tragedy in Angola, Cambodia, Congo, Kashmir, Middle East, Somalia, Bosnia, Kosovo and finally in East Timor. The wide latitude offered in the terms "international peace and security" and the extent to which such conflicts were indeed connected to international security issues made it possible to say that the conflicts were indeed linked to international peace and security. The invasion of Kuwait by Iraq in the late 1990s prompted the second experience of the UN with full-scale Chapter VII enforcement operations, such as had been undertaken in Korea. After the occupation of Kuwait, a series of SC resolutions was issued in order to end the crisis in a peaceful manner. When the imposition of sanctions proved unable to guarantee the liberation of Kuwait, the SC moved towards enforcement measures in response to the invasion. The SC authorized a group of countries to carry out the enforcement action on its behalf for the liberation of Kuwait. The UN, in the name of peace and security, also took an important step by issuing an *Agenda for Peace* in 1994, addressing a whole spectrum of peace and security actions: preventive diplomacy; peacemaking; peacekeeping, and peace building.

This book well explores the current pattern of legal regulation in a manner that combines

clarity of presentation with rigour in academic scrutiny. The special attention paid by the author to the recent unilateral use of force in the light of various arguments upon the issue, as well as the author's own conclusions which appear at the end of the last four chapters, are notable features of the book. In my opinion, this book is a valuable and rich resource for international lawyers, students, and all those who wish to study the question of use of force in international law.

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*Just War or Just Peace? Humanitarian Intervention and International Law*, by SIMON CHESTERMAN, Oxford University Press, Oxford and New York, 2001, pp.295, ISBN 0-19-924337-9

Following the NATO military action against Federal Republic of Yugoslavia on 24 March 1999, politicians and commentators gave various reasons for its occurrence. Among those reasons, the doctrine of humanitarian intervention was cited even though later the behaviour of States showed great reluctance to rely upon it. The place of humanitarian intervention and its legality was and still is a controversial issue in the contemporary modern legal system. The Charter of the UN clearly prohibits the use of force in international relations with the sole exceptions of self-defence and enforcement actions authorized by the Security Council. There are long-standing arguments that a right of unilateral intervention pre-existed the Charter.

This book attempts to explore the humanitarian intervention doctrine in its historical and political context and also covers various arguments surrounding it. Attention is drawn to the crucial tension in the international legal order between sovereignty and human rights, between the prohibition of the use of force and the protection of human dignity. In this regard, the author first examines the origins of the right and then pays special attention to the doctrine and debate surrounding it, such as the argument that the right has survived the passage of the Charter, through a loophole in Article 2(4) or as part of customary international law.

The book is divided into six chapters. Chapter One considers the origins of humanitarian intervention, based on an analysis of the early international law writings of scholars, natural law theorists, and positivists, and concludes that its moral and legal heritage lies in the earlier conflict between the moral impetus to war over religious differences and the legal restraints that came to be placed on States entering into a society of equals. The principle of non-intervention in international law was propounded by positivists in the eighteenth century and encouraged by the political transformation in Europe in the nineteenth century. Adherents of this school are generally committed to sovereignty and to the State as a morally free entity, and strongly reject all intervention in the sovereignty of other States, because any intervention on their behalf, no matter how great the moral claim, is incompatible with sovereignty. State practice between 1815-1945, cited by the author, demonstrates the paucity of evidence of a general right of humanitarian intervention in customary law. Following the emergence of the term "humanitarian intervention" in the nineteenth century, a group of jurists argued that humanitarian intervention existed as a legal right. They tried to define the theory in an attempt to give a juridical basis to the right of one State to exercise control over the internal acts of another State. WOOLSEY and ARNTZ approached GROTIUS' conception of punitive war and adopted the view that it was representative of civilized government intervening in the affairs of other States. BLUNTSCHLI and CREASY recognized the legality of humanitarian intervention based on States' entitlement to assert the rights of subjects *vis-à-vis* their sovereignty in certain circumstances. This was the modern equivalent of GROTIUS' right to wage war on behalf of the oppressed.

The status of humanitarian intervention in the first half of the twentieth century, however, shows that the doctrine at that time became more problematic. Collective action on the part of the international community was politically difficult, and the notion of unilateral intervention by a State or group of States sat uncomfortably with the increasing emphasis on the inviolability of the domestic jurisdiction. CHESTERMAN argues that the League of Nations neither prohibited nor explicitly supported humanitarian intervention. By acceptance of obligations not to resort to war and "the maintenance of justice and a scrupulous response for all treaty obliga-

tions in the declaring of organised reports with one another" the Covenant aimed at peace. The use of force was not outlawed as such, but war was made a matter of concern to the entire League; members were required in the first instance to submit any dispute to arbitration, judicial settlement, or to enquiry by the Council. It is at least arguable that internal human rights violations could have constituted such a dispute, though the Council explicitly disclaimed any capacity to make recommendations on a matter that "by international law is solely within the domestic jurisdiction of [a] party". The author also notes that the Pact of Paris makes no mention of humanitarian intervention, although its tenor was clearly inconsistent with any such right. States parties stated their conviction that "all changes in their relations" should be sought only by pacific means, condemned recourse to war for the "solution of international controversies", and renounced it as an instrument of national policy. There was considerable diplomatic activity concerning reservations to this prohibition, but the reservations were limited to the right of legitimate defence or self-defence. Since World War II, war is to be renounced as an instrument of national policy, human rights are to be affirmed, but the tension between sovereignty and human rights in the established international legal order is manifest in the opening words of the United Nations Charter.

Both Chapter Two and Three examine whether a right of humanitarian intervention can exist and be compatible with the UN Charter provisions and acceptable as customary international law. Opinions of some jurists such as TESON and REISMAN, as well as claims to intervene to promote democracy (the Reagan doctrine) are examined in the light of State practice from 1960 till 1999. Under Article 2(4) of the Charter, the threat or use of force is prohibited and protection of human rights is limited to the provisions of Articles 55 and 56. The author indicates that the most recent writer who paid attention to humanitarian intervention recounts this tension then proceeds to consider a series of alleged instances of intervention on humanitarian grounds, in order to conclude whether or not such a right exists in practice (p.45).

Enforcement actions authorised by the Security Council for humanitarian reasons, called "collective humanitarian inter-vention", are considered in Chapters 4 and 5. At the end of the Cold War a more unified and active SC sought to fulfil its primary responsibility for the maintenance of international peace and security. At the same time, by blurring the boundaries of the exception to the prohibition of the use of force established by Chapter VII, it threatens to undermine this cardinal principle of international legal order. Lack of international institutions capable of dealing with this increased responsibility led to a reliance on delegation. Therefore, according to the author, "Security Council actions were limited to situations where acting States had the political will to bear the financial and human costs of such measures." As a result of that, a series of ambiguous resolutions and conflicting interpretations of the extent and duration of the authority conferred by the Council were issued, particularly against Iraq throughout the 1990s. Chapter 5 demonstrates that the transition from Operation Desert Storm in Kuwait to Operation Allied Force in Kosovo is not as great as it might at first appear. Those SC resolutions that authorized the coalition action against Iraq depended not only upon a broad international consensus but also upon a coincidence with the national interests of the acting States. Therefore, the author concludes that "... As subsequent enforcement actions showed, however, this coincidence of interests quickly resolved into a condition precedent to action. This was reflected most graphically in the changing role of the Secretariat, as the Secretary-General's reports to the Council increasingly reflected pre-arranged deals with the P5. In the lead up to and during Operation Allied Force – where there was no deal – this role as salesman seamlessly transformed into that of apologist."

With regard to East Timor and the Kosovo disaster in 1999, the final Chapter explores how international law responds to the disjunction between recognised norms and enforceable law. Following depth discussion on this issue, the author concludes that none of these arguments is found to have merit, either in principle or in the practice of States. He notes that none of the arguments upon the legitimacy of humanitarian intervention put forward by commentators and politicians, claiming that the right has survived or emerged after the enactment of the UN Charter, and that recent humanitarian action for

human rights is compatible with Article 2 (4) of UN Charter, are persuasive.

CHESTERMAN takes a very narrow view of just war theory and classical precursors to humanitarian intervention. In the view of the present reviewer, study of the origin of just war as presented by traditional scholars and the criteria for legitimate war, including religious and secular approaches, would have been useful in this work. Apart from this suggestion, it can be said that the author has given a comprehensive discussion of humanitarian intervention in the light of policy and political considerations, as well as the moral ideas lying behind the emergence of principles. The examination of the latest cases, treaties, and SC and General Assembly resolutions in the light of various arguments that are addressed in the work, make the book remain a rich resource for anyone wishing to study the issue. As Professor IAN BROWNLIE says, the text is, "of considerable value to lawyers, historians, and students of international affairs".

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*The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960,*
by MARTTI KOSKENNIEMI, Cambridge University Press, 2002, ISBN 0521-62311-1 (hardback)

No one interested in the history of international law over the past century and a half can afford not to read this book. Anyone who does will be rewarded with a wealth of insights into the nature of this curious branch of jurisprudence. Professor KOSKENNIEMI takes as his basic theme the emergence of a system of international law with the growth of empires in the second half of the nineteenth century, its heyday and its decline with the collapse of those empires. He has succeeded in his objective of placing the lawyers responsible for the development of international law within social and political contexts, evoking in an unusually powerful narrative their attitudes and emotional dispositions ("sensibility").

His account takes as its starting point the *Revue de Droit Internationale et de Legislation Comparée* launched in 1869 under the editorship of the Belgian liberal activist GUSTAVE ROLIN-JAEQUEMYNS. It began a process by which international law came to be seen as part of European history and the development of European conscience, a concept rooted in political liberalism and finding its highest expression in an aspiration to act in a civilized manner. Expressly anti-communist and bourgeois, the *Revue* counterposed the "civilization" of the European powers with the "barbarism" that ruled much of the rest of the world, and that it was the obligation of the civilized to correct.

KOSKENNIEMI dissects with great delicacy and wit the web of assumptions and attitudes that were the stock-in-trade of international lawyers in the closing third of the nineteenth century. He shows the circularity of much of their argumentation and the prejudice colouring their view of non-European races. He deals in detail with their relationship to the great colonial enterprises of the day, and particularly with the Berlin West African Conference of 1884: it sought to agree a legal basis for European penetration into the Congo basin. His restrained and balanced account of the debates among the European international lawyers of the day about the institutional packaging of the civilizing mission is a delight.

The problem of the relationship between international law and formal empire, in KOSKENNIEMI's view, arises from the connection made by liberals between progress and civilization on the one hand, and a particular political form, Western statehood, on the other. As he points out, Western political institutions do not carry the good society with themselves. "The same types of government create different consequences in different contexts; there is nothing predetermined about the State form. It can be used for freedom and for constraint, and history is full of examples of both." And he draws the contemporary moral: "whatever the choice of institution, it should be a matter of debate and evidence, and not of the application of universal principles about 'civilisation', 'democracy', or 'rule of law'."

Four substantial essays follow on traditions of international law in pre-Hitler Germany, France from 1870 to 1950, on HERSCH LAUTERPACHT and on the American international law tradition epitomised by CARL SCHMITT and HANS MORGENTHAU. In a short review it is not possible to do justice to these chapters, containing as they do a wealth of valuable insight and acute critical observation. They are followed by

an Epilogue drawing together biographical observations on his main protagonists with reflections on the state of international law in the post-colonial period. As KOSKENNIEMI observes, "Today it has become much harder to believe that there is a rationality embedded in international law that is independent from the political perspectives from which it is seen. On the contrary, a Security Council sanctions regime or a multilateral trade arrangement within the World Trade Organisation appear as completely legal and completely political at the same time, rather like Wittgenstein's image of the duck-rabbit. If there is no perspective-independent meaning to public law institutions and norms, what then becomes of international law's universal, liberating promise?"

His answer to this key question is that the energy and hope of international law lies in its ability to articulate existing transformative commitment in the language of rights and duties and thereby to give voice to those who are otherwise routinely excluded. Its content cannot be fixed permanently to definite institutional or normative structures. Instead, it should embody the understanding that every community is based on a form of exclusion and that an acceptable community must constantly negotiate that exclusion and widen its horizon.

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*Transnational Environmental Law: lessons in global change*, by PETER H. SAND, The Hague, Kluwer Law International, 1999, pp. 385, ISBN 90-41197249.

PETER SAND is a name highly regarded in the area of international environmental law. He has been an important figure in international environmental law making within the last three decades or so. A prolific writer with his own intellectually sharp and practical vision for the safer and better world, Dr SAND has contributed much to both the development and the dissemination of international environmental law over a long period of time. This book, published in the *International Environmental Law and Policy Series* edited by Professors DANIEL BODANSKY and DAVID FREESTONE for Kluwer Law International, is a collection of his essays written over a long span of time. There are altogether twenty chapters in this volume, each chapter tackling a highly significant aspect of environmental law.

The essays selected for inclusion in this volume have been updated and the author has gone to great lengths to provide as much both traditional and current information as possible, including items posted on the Internet, on the subject matter covered by the relevant chapters. This accessibility provided by the author adds to the usefulness of the volume to teachers and students alike of international environmental law. His writings seem to be a distilled and mature expression of the views he has gained through working for various environmental organizations. His views are inspiring and thought provoking. As the editors of this series point out, "What makes Peter's work so valuable is its unique marriage of theory and practice".

The book covers a wide variety of topics and presents an intellectually rich analysis of extant and evolving principles of international environmental law. It is an interesting read and a very useful source of reference on the topic. International environmental law is still in its infancy and, as stated by Dr SAND, "experiments have been going on all the time" in this area. He rightly sums up the contemporary experiments taking place at four distinct levels: "(1) new techniques of international law-making; (2) transformations in response to innovative national law-making; (3) new focal area of legal regulation; and (4) a new emphasis on the effectiveness of laws and legal institutions" (p.5). Accordingly, the essays included in this book address these four themes in turn.

The volume is divided into four Parts, with the twenty Chapters grouped together along certain themes. Part I deals with the new ways of making environmental law. Here, the author deals with the evolving machinery of environmental standard setting with particular reference to Eco-standards, Eco-permits and Eco-audits, and the new approaches to trans-national environmental disputes. In assessing the 1992 Rio de Janeiro Conference on Environment and Development in Chapter 5, the last of Part I, Dr SAND provides much food for thought for international environmental lawyers with his analysis of the dichotomy of "hard" and "soft" law rules, non-law and pre-law outcomes of the UNCED

and the issues surrounding the UN reform or UN by-pass. Since Dr SAND had first-hand experience of leading the way to the UNCED, his analysis in this Chapter is particularly interesting since he gives here his wealth of experience on the subject matter.

While Part II deals with the impact of innovative national law on the development of environmental legal norms, Part III discusses the new focal areas around which a great deal of international environmental law has developed. The topics analysed here are the regional approaches to trans-boundary air pollution, protection of the Ozone layer, and the new financial mechanisms for global environmental protection. Part IV contains an assortment of issues put together under a broad title, "A New Emphasis on Effectiveness of Legal Institutions". The areas covered to assess the effectiveness of environmental law principles and the institutions created for their implementation are CITES; international environmental governance through standard-setting, licensing and auditing; use of economic instruments for sustainable development, and institution building. Since this book is not a monograph but a collection of by and large self-standing essays, there is no concluding Chapter to encapsulate the foregoing discussion.

However, the author has made an attempt in each of the chapters to convey a powerful message to the decision and policy-makers around the globe. As expressed in the cartoon pictured on page 348, legal measures are lagging in arresting the environmental problems facing the world today. It is where the book makes an effective plea for the adoption of rapid legal and political measures designed to protect the environment. All in all, this book is a welcome and rich addition to the body of literature on international environmental law. Accordingly, the present reviewer would gladly recommend this book as a very valuable and insightful work to those interested in international environmental law and policy.

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## Editorial introduction

Except for a few minor modifications this bibliography follows our usual format: it provides information on books, articles, and other materials dealing with Asian topics and, in exceptional cases, it includes other publications considered of interest.

In the preparation of this bibliography good use has been made of book review sections in established professional journals of 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 list of acquisitions of the Palace of Peace Library in The Hague, The Netherlands.

The headings used in the bibliography of this volume are:

1. Surveys of state practice
2. Surveys of literature
3. International law in federal states
4. States as subjects of international law
5. State immunity
6. Status of particular states and territories
7. Extra-territorial jurisdiction
8. International law and national law
9. Customary law
10. Rights and duties of states
11. Boundaries
12. Rivers, lakes and canals
13. Law of the sea
14. Dispute resolution
15. Space
16. Environmental protection
17. Responsibility and liability
18. Human rights
19. Nationality, statelessness
20. Entry and departure – aliens
21. Refugees and asylum
22. Ethnic groups and minorities
23. Self-determination of peoples
24. Extradition
25. World economic order and social order
26. Movement of goods, services, freedom of establishment
27. Most-favoured-nation treatment, non-discrimination

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* Edited by SURYA SUBEDI, General Editor, and compiled by MISS HELEN O. UBJAKA, Middlesex University.

*Asian Yearbook of International Law,* Volume 8/ (B.S. Chimni *et al.*, eds.)

28. Property, expropriation, investment
29. Protection of intellectual property
30. Regional forms of economic integration
31. Finances, currencies, taxes
32. Radio, television (ITU, INTELSAT, etc.)
33. Labour matters, social standards
34. Transport
35. Culture, education, sport
36. Regional and economic organizations (Asian and Pacific organizations)
37. United Nations and specialized agencies
38. The ICJ and PCIJ
39. Peacekeeping, collective security, prohibition of the use of force
40. Unilateral measures/counter measures
41. Armaments, arms trade
42. Alliances, security
43. Regional, foreign and comparative law and politics
44. Development
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46. International public and private law cooperation

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