

ASIAN YEARBOOK OF INTERNATIONAL LAW

FOUNDATION FOR THE DEVELOPMENT OF INTERNATIONAL LAW IN ASIA (DILA)

Governing Board

(As at 1 January 2000)

Florentino P. Feliciano, Appellate Body,
WTO

Jamshed A. Hamid, Ministry of Foreign
Affairs, Islamabad (ret.)

Rahmatullah Khan, Jawaharlal Nehru
University, New Delhi (emeritus)

Ko Swan Sik, Erasmus University, Rotterdam
(emeritus)

Tommy T.B. Koh, Ministry of Foreign
Affairs, Singapore

Kriangsak Kittichaisaree (Chairman),
Ministry of Foreign Affairs, Bangkok

Kozai Shigeru, Osaka Gakuin University

Li Zhaojie, Peking University, Beijing

R.St.J. Macdonald, University of Toronto
(emeritus)

Nakatani Kazuhiro (Treasurer), University of
Tokyo

Park Choon Ho, International Tribunal for
the Law of the Sea; Korea University, Seoul

M.C.W. Pinto, Iran-US Claims Tribunal,
The Hague

S.J. Seifi (Vice-Chairman), Shahid Beheshti
University, Tehran

Surya P. Subedi, University of Hull

Sompong Sucharitkul, Golden Gate
University, San Francisco

J.J.G. Syatauw, Institute of Social Studies,
The Hague (emeritus)

K. Tan Yew Lee, National University of
Singapore

Wang Tieya, International Criminal Tribunal
for the Former Yugoslavia;
Peking University, Beijing (emeritus)

Support received from:

- Netherlands Ministry of Development Cooperation (1991)
- Swedish International Development Authority (1994)
- The Japan Foundation (1996)

Patrons:

- The Paeksang Foundation, Seoul
- Tokibo Co., Ltd., Tokyo

Patronage and donations:

As of 1997, upon donation to the Foundation of US\$ 10,000 or
more the donor will be designated Patron of the Foundation

Mailing address:

52 Cesar Franckrode, 2717 BE Zoetermeer, The Netherlands — Fax 31-79-3211195, and

35/304 Noble House Phayathai Bldg., 27th Floor (27C),
Phayathai Road, Ratchataevee, Bangkok 10400, Thailand
E-mail: KRIANGSAKKITT@HOTMAIL.COM

Asian Yearbook of International Law

published under the auspices of the
Foundation for the Development
of International Law in Asia (DILA)

General Editors
(As at 1 January 2000)

Ko Swan Sik - M.C.W. Pinto - S.P. Subedi

VOLUME 7
1997



KLUWER LAW INTERNATIONAL
THE HAGUE/LONDON/BOSTON

A C.I.P. Catalogue record for this book is available from the Library of Congress.

ISBN 90-411-1533-1
ISSN 0928-432X

Published by Kluwer Law International
Sterling House, 66 Wilton Road, London SW1V 1DE

Sold and distributed in North, Central and South America
by Kluwer Law International,
101 Philip Drive, Norwell, MA 02061, USA
kluwerlaw@wkap.com

In all other countries, sold and distributed
by Kluwer Law International, Distribution Centre,
P.O. Box 322, 3300 AH Dordrecht, The Netherlands.

Suggested citation 7 AsYIL (1997)

Printed on acid-free paper

All Rights Reserved
© 2001 Kluwer Law International
Kluwer Law International incorporates the publishing programmes of
Martinus Nijhoff Publishers, Graham & Trotman Ltd.,
and Kluwer Law and Taxation Publishers

No part of the material protected by this copyright notice may be reproduced or
utilized in any form or by any means, electronic or mechanical including
photocopying, recording, or by any information storage and retrieval system,
without written permission from the copyright owner.

Typeset in 10,5/8,5pt CG Times by IK Publishing Service, The Netherlands
Printed and bound in the Netherlands

ASIAN YEARBOOK OF INTERNATIONAL LAW

Advisory Council

(As at 1 January 2000)

Florentino P. Feliciano, Manila

Kamal Hossein, Dhaka

N. Jasentuliyana, New York

Mochtar Kusuma-Atmadja, Jakarta

G.K.A. Lagergren, Djursholm (Sweden)

Roy S. Lee, New York

F.X. Njenga, Nairobi

Onuma Yasuaki, Tokyo

P. Chandrasekhara Rao, New Delhi

Datuk Wira Lal C. Vohrah, The Hague

Editorial Board

(As at 1 January 2000)

Rahmatullah Khan, Jawaharlal Nehru University, New Delhi (emeritus)

Kim Charn Kiu, Kyung Hee University, Seoul

Ko Swan Sik, Erasmus University, Rotterdam (emeritus) (General Editor)

Kriangsak Kittichaisaree, Ministry of Foreign Affairs, Bangkok

Li Zhaojie, Peking University, Beijing

R.P.M. Lotilla, University of the Philippines, Manila

Nakatani Kazuhiro, University of Tokyo

M. C. W. Pinto, Iran-US Claims Tribunal, The Hague (General Editor)

S.J. Seifi, Shahid Beheshti University, Tehran

Sheng Yu, Shenzhen University

M. Sornarajah, National University of Singapore

Surya P. Subedi, University of Hull (General Editor)

Sompong Sucharitkul, Golden Gate University, San Francisco

Sugihara Takane, University of Kyoto

K. Tan Yew Lee, National University of Singapore

Associate Editor

Karin Arts

Institute of Social Studies, The Hague

National Correspondents

Choe Kyong Soo, Korea University, Seoul

Jamshed A. Hamid, Ministry of Foreign Affairs, Islamabad

S. Charika Marasinghe, University of Colombo

Kotera Akira, Tokyo University

Lo Lai Mee, Malayan Law Journal, Kuala Lumpur

V.S. Mani, Jawaharlal Nehru University, New Delhi

Matsui Yoshiro, Nagoya University

Soh Tze Bian, Attorney General's Chambers, Singapore

Wan Arfah Hamzah, University of Malaya, Kuala Lumpur

TABLE OF CONTENTS

<i>Abbreviations</i>	ix
ARTICLES	
<i>Florentino P. Feliciano</i> , Reflections on good governance, development and judicial reform: Some perspectives on the problem of judicial corruption	3
<i>Onuma Yasuaki</i> , Towards an intercivilizational approach to human rights	21
<i>J. Castellino</i> , The secession of Bangladesh in international law: setting new standards?	83
<i>Su Wei</i> , Reservations to treaties and some practical issues	105
<i>V. Crnic-Grotic</i> , Object and purpose of treaties in the Vienna Convention on the Law of Treaties	141
<i>Suzuki Eisuke</i> , The review and repudiation of judgments of international administrative tribunals	175
<i>Raul C. Pangalangan</i> , The Asian Development Bank Administrative Tribunal: constitutive instruments and case-law	209
<i>T.L. MacDorman</i> , Port state control: a comment on the Tokyo MOU and issues of international law	229
<i>Zou Keyuan</i> , Maritime jurisdiction over vessel-source pollution in the exclusive economic zone: The Chinese experience	243
NOTES	
<i>M.M. Kenig-Witkowska</i> , Some remarks on BIMST-EC: a new international-legal instrument for co-operation in Asia	263
<i>Kong Qingjiang</i> , Enforcement of Hong Kong SAR court judgments in the People's Republic of China	269
LEGAL MATERIALS	
State practice of Asian countries in the field of international law	281
– India	281
– Japan	284

- Malaysia	289
- Singapore	314
Participation in multilateral treaties	321

ASIA AND INTERNATIONAL ORGANIZATIONS

Asian-African Legal Consultative Committee: Annual survey of activities 1996-1997	345
---	-----

CHRONICLE

Chronicle of events and incidents relating to Asia with relevance to international law – July 1996-June1997	391
---	-----

LITERATURE

Book reviews	495
Bibliography	511

SELECTED DOCUMENTS

Joint Communique: The Third ASEAN Ministers of Law Meeting, 13 September 1996	525
Declaration On The Establishment Of The Bangladesh - India - Sri Lanka - Thailand Economic Cooperation (Bist-Ec) 6 June 1997	526

<i>Index</i>	529
--------------	-----

<i>General Information</i>	553
----------------------------	-----

<i>Announcements</i>	554
----------------------	-----

<i>Sata Prize</i>	555
-------------------	-----

ABBREVIATIONS

AC	-	Appeal Cases
AIR	-	All India Reporter
Phil.	-	Reports of cases decided in the Supreme Court of the Philippines
ADBAT Rep.	-	Asian Development Bank Administrative Tribunal Reports
AFDI	-	Annuaire français de droit international
AIR	-	All India Reports
AJIL	-	American Journal of International Law
Annuaire	-	Annuaire de l'Institut de droit international
Annual Digest	-	Annual Digest and Reports of Public International Law Cases
Asahi EN	-	Asahi Evening News [Jap.]
ASDI	-	Annuaire suisse de droit international
ASIL Proc.	-	Proceedings of the American Society of International Law
AsT	-	Asia Times [Bangkok]
Austral. YIL	-	Australian Year Book of International law
BYIL	-	British Year Book of International Law
Cmdn.	-	Command Papers (1956-) [UK]
Col.JTr.L	-	Columbia Journal of Transnational Law
Dickinson JIL	-	Dickinson Journal of International Law
ECHR Series A	-	Publications European Court of Human Rights, Series A: Judgements and Decisions
ECR	-	European Court Reports
FEER	-	Far Eastern Economic Review
Fordham ILJ	-	Fordham International Law Journal
GYIL	-	German Yearbook of International law
HarvILJ	-	Harvard International Law Journal
HRLJ	-	Human Rights Law Journal
ICJ	-	International Court of Justice
ICJ Rep.	-	ICJ Reports of Judgments, Advisory Opinions and Orders
ICLQ	-	International and Comparative Law Quarterly
IHRR	-	International Human Rights Reports
IHT	-	International Herald Tribune
IJIL	-	Indian Journal of International Law
ILM	-	International Legal Materials
ILR	-	International Law Reports
JT	-	Japan Times
LNTS	-	League of Nations Treaty Series
Mainichi DN	-	Mainichi Daily News [Jap.]
MLJ	-	Malayan Law Journal

NILR	-	Netherlands International Law Review
NRC	-	NRC-Handelsblad [Neth.]
NST	-	New Straits Times [Malays.]
OECD	-	Organization for Economic Cooperation and Development
Özör	-	Österreichische Zeitschrift für öffentliches Recht
PCIJ	-	Permanent Court of International Justice
PCIJ Series A	-	PCIJ, Series A: Judgments and Orders (1922-1930)
PCIJ Series B	-	PCIJ, Series B: Advisory Opinions (1922-1930)
PCIJ Series A/B	-	PCIJ, Series A/B: Judgments, Orders and Advisory opinions (1930-1940)
PoIYIL	-	Polish Yearbook of International Law
RBDI	-	Revue belge de droit international
RCDIP	-	Revue critique de droit international privé
RdC	-	Recueil des cours (Collection of Courses of the Hague Academy of International Law)
RGDIP	-	Revue générale de droit international public
RIAA	-	Reports of International Arbitral Awards
SCRA	-	Supreme Court Reports Annotated [Phil.]
SCC	-	Supreme Court Cases [India]
SLR	-	Singapore Law Reports
ST	-	Straits Times [Sing.]
SyracuseJILC	-	Syracuse Journal of International Law and Commerce
TAM	-	Recueil des décisions des Tribunaux Arbitraux Mixtes
Tex.ILJ	-	Texas International law Journal
UNGA	-	United Nations General Assembly
UNTS	-	United Nations Treaty Series
VirgJIL	-	Virginia Journal of International Law
WBAT Rep.	-	World Bank Administrative Tribunal Reports
Yale JIL	-	Yale Journal of International Law
Yale LJ	-	Yale Law Journal
YILC	-	Yearbook of the International Law Commission
ZaöRV	-	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

ARTICLES

REFLECTIONS ON GOOD GOVERNANCE, DEVELOPMENT AND JUDICIAL REFORM: SOME PERSPECTIVES ON THE PROBLEM OF JUDICIAL CORRUPTION*

Florentino P. Feliciano **

1. PRELIMINARY – GENERAL CONSIDERATIONS

This brief essay proposes to focus on the problem of corruption in the judicial department of government. Its more specific objective is to address some of the aspects of this problem relating to judges themselves, as distinguished from officials and staff of auxiliary or support offices in the judicial department such as clerks of court or court registrars; court administrators; and sheriffs or enforcement-related officers. These latter types of subordinate officials present different kinds of regulatory or control problems than do judges, problems which do not seem to differ qualitatively from those which relate to officials in the executive department of government.

Two aspects of the problem of judicial corruption will be explored in this essay: the first relates to the context in which corruption among judges takes place; the second is concerned with the strategies or modes of control which are being employed to reduce or mitigate the incidence of judicial corruption. Necessarily, this paper draws from experience in my own country, since this is the only part of the world with which I have sufficient detailed familiarity.

These aspects are sought to be presented in terms sufficiently concrete and operational so as to generate a feel of the 'real world', as it were, in which the judiciary operates in the Philippines. Preliminarily, however, it seems useful to explore some considerations of a fairly general nature which bear upon the subject of judicial corruption and reform and good governance.

The first general submission which may be made is that – whatever else it may be – and it is often referred to as a social and economic and institutional

* This essay is based on an address delivered on 11 January 1999 at a Symposium at the East Asian Legal Studies Program, Harvard Law School. The address in turn constituted a revision and enlargement of a paper delivered at a Conference held in Rome, Italy, under the *aegis* of the International Development Law Institute (IDLI) and the *Avvocatura Generale dello Stato*, Government of Italy, in April, 1998. An earlier version of the present paper was published in 73 *Philippine Law Journal* (1999) 429-445. The essay will also be included in the *Liber Amicorum* for IBRAHIM F.I. SHIHATA.

** Member, Appellate Body, World Trade Organization, Geneva; Senior Associate Justice, Supreme Court of the Philippines (retired).

problem – judicial corruption is at bottom a personal and moral problem. From this perspective, a judge's response to a corrupt promise of some sum of money or of higher office or of any of the multitude of things that commonly are objects of human desire, will be affected by, *inter alia*, the judge's personal conception of his relationship with the rest of the universe. Given the ultimate nature of the problem of judicial corruption, judicial reform must realistically draw upon the well-springs and methods of moral reform and these of course include religious and spiritual and social resources and methods. One lesson that history teaches us is that movements aimed at basic moral and social reform are often accompanied by religious fundamentalism. This was true in the Reformation of the late medieval Christian Church in the 15th century by MARTIN LUTHER and the Counter-Reformation of St. IGNATIUS OF LOYOLA. Recall, in more recent times, the role of fundamentalist Islam in the revolution against and eventual overthrow of the Shah of Iran; of the so-called 'liberation theology' of many Catholic priests in Central and South America during the decades of the 1960s, 1970s and 1980s; and the strategic role of the Catholic Church in the Philippines in the 1986 revolution against the MARCOS regime.

A second general point that may be worth making is that corruption in the judiciary is a reflection of corruption in the civil service of a country. And the latter may be a symptom of corruption in the private sector and in society itself. Significant corruption among judges does not, and cannot, exist autonomously where the rest of the civil service and the civil society are substantially unaffected and in a healthy condition.

My third general consideration is in part a trite one: it is that corruption, public and private, has existed, and does exist, in all forms of human society as we know it from history.¹ Nevertheless, certain cultural factors in a particular

¹ J.T. NOONAN, Jr., *Bribes: The intellectual history of a moral idea* (Univ. of California Press, 1984) traces the 4000 year history of the concept of a bribe in the context of the culture or society in which the bribe-giver and the bribe-taker carry out their non-legitimate reciprocity. NOONAN (a judge of the Ninth Circuit US Court of Appeals and Robbins Professor of Law Emeritus, University of California, Berkeley) describes the central concept of a bribe as "an inducement improperly influencing the performance of a public function meant to be gratuitously exercised. The concrete constituent elements ... change with culture. The concept of a bribe contracts or expands with conventions, laws, practices". (p. xi) NOONAN's work remains the standard scholarly examination of the moral philosophy, law and cultural anthropology of various societies' responses to, and efforts to control, corruption, including in particular judicial corruption.

W. M. REISMAN, *Folded lies: bribery, crusades and reforms* (Free Press, 1979) p.2 and chap.2, refers to bribery as "tendering and accepting a private reward for defection from a manifest duty". He distinguishes between a 'myth system' and an 'operational code': "an observer may distinguish in any social process, a *myth system* that clearly expresses all the rules and prohibitions (the 'rights' and 'wrong' of behaviour expressed without nuances and shadings), and an *operational code* that tells 'operators' when, by whom, and how certain 'wrong' things may be done. An operator is someone who knows the code in his own social setting – certain lawyers, some police officers, some business men, an agent, a kid at school". (op.cit. at 1). The myth systems of all human societies stigmatise varying forms of bribery; the operational codes of differing segments of a society frequently recognise that bribery continues to be prac-

society may bear significantly upon the incidence, growth and amenability to legal and social controls of corruption in general, and judicial corruption in particular. This is clearly a task for social anthropologists, but certain fairly common features in Philippine culture need examination in this regard. For instance, (a) deference to authority is clearly a desirable thing insofar as generating habits of law-observance is concerned; but it also makes difficult open complaints against and reporting or denouncing dishonest or incompetent public officials. (b) 'Pakikisama' – one aspect of which relates to submission to demands for group harmony and reluctance to 'upset the official applecart,' – is important in a society like ours which prizes consensus-building; however, such reluctance frequently renders problematical the discovery and investigation of official wrongdoing. (c) The concept of gratitude as constitutive of a personal social debt or obligation seems of central relevance. Gratitude for what? Among other things, for securing or assistance in securing a judicial appointment or promotion. Most generally put, the relevant point appears to be that the agenda of judicial

reform must include, among other things, the gradual modification of the systems of identifications and loyalties prevailing in our society. Effective identification with national ideals and institutions will need to be cultivated; loyalties to family clan or linguistic tribe or other sub-grouping will need to be restructured and modernized.

Another general submission which may be essayed is that judicial corruption is particularly deleterious in its consequences for the institutions of government and the body politic in general. Corruption of any public officer or employee is bad enough; corruption of a judicial officer is infinitely worse. The judicial process is often described as a system for delivery of justice; it is also sometimes described as a system and process for resolution of disputes. In responsible and representative governments, both the delivery of justice and the resolution of disputes are to be carried out on the basis of and in accordance with law. From this perspective, one effect of judicial corruption may be seen to be the substitution of the private exclusive interest of one of the parties to the dispute, and of the judge, instead of the inclusive interest of the general community, as expressed in law, as the effective determinant of decision. In this very basic sense, judicial corruption subverts the role of law as the authoritative instrument of peaceful and legitimate change in society.

Insofar as impact upon the legal system is concerned, it may be observed that corrupt judgments may be rendered with or without distortion of the written norm. There is no necessary distortion of the relevant norm if that norm itself contemplates the exercise of judicial discretion within certain limits and the corrupt decision is rendered arguably within the limits of that discretion.

ticed, under differing names and in varying circumstances, notwithstanding the prohibitory norms of the myth system. He describes his book as "an attempt at exploration into the interrelations of the myth system and operational code as they pertain to bribery. It is a study of the processes and techniques of social stabilization rather than of social change" (op.cit. at 6).

The result, in other words, may be reached without a clear and palpable violation of the applicable norm. The ensuing result may even be plausibly regarded as the correct or a reasonable outcome normatively speaking; in such situation, the detection and proof of accompanying judicial corruption becomes more difficult.² The judge, however, who acts from a corrupt motive and receives extra-judicial consideration, nevertheless commits a separate violation of the criminal law.³ Where the terms of the applicable legal norm do not allow the exercise of discretion by the judge, or where the result is otherwise evidently inconsistent with the requirements of the norm, the corrupt decision necessarily

² Prof. G. GUNTHER in his authoritative biography of Judge LEARNED HAND (*Learned Hand: the man and the judge* (Harvard Univ. Press, 1995), ch.XII) provides detailed, fascinating illustration in respect of Chief Judge MARTIN MANTON who was forced to resign from the Second Circuit Court of Appeals in February 7, 1939. The resignation came after then N.Y. County District Attorney THOMAS E. DEWEY forwarded to the Chairman of the House of Representatives Judiciary Committee whose tasks include consideration of possible impeachment, detailed charges concerning receipt by Chief Judge MANTON, in six incidents, of more than US\$400,000 from parties involved in litigation before the Second Circuit.

Judge LEARNED HAND himself had sat in two cases in which MANTON had accepted bribes. In the first case, *General Motors Corp. v. Preferred Electric & Wire Corp.* 79 F.2d 621 (2d Cir. 1935), the Second Circuit (MANTON, LEARNED HAND and SWAN, JJ.) unanimously invalidated the General Motors patent on which suit was brought. The pre-conference memoranda showed that all three judges agreed on the result from the outset and that nothing in MANTON's memorandum "could clearly provoke suspicions of corruption" and that MANTON's analysis of the legal issues closely resembled those of HAND and SWAN. (GUNTHER, op.cit. *supra* at 506-507) The Second Circuit, on rehearing granted after MANTON had resigned, been charged and convicted, upon a fresh review of the old record and with full knowledge of MANTON's bribery, once again found the patents invalid; 109 F.2d 615 (2d Cir. 1940).

The second case was much more complex: *Art Metal Works v. Abraham & Straus*, 70 F.2d 641 (2d Cir. 1934). HAND had dissented from MANTON's majority opinion. In 1939, the Second Circuit, several months after MANTON's conviction, unanimously reversed the earlier decision and adopted HAND's dissenting opinion. Prof. GUNTHER commented that "[b]y thus limiting his corrupt votes to reasonably close cases and arguably plausible positions, Manton made much of his dishonesty difficult to detect". (GUNTHER, op.cit. at 507)

The Second Circuit continued to enjoy its reputation as the most highly respected US Circuit Court of Appeals with the great triumvirate of LEARNED HAND, as Chief Judge, THOMAS SWAN and AUGUSTUS HAND.

³ After his resignation from the Second Circuit, and on appeal from his conviction under a federal statute penalizing conspiracy "to defraud the United States", "in any manner or for any purpose", MANTON argued that there had been no defrauding of the US and no obstruction of justice because the cases in which he had received payments from, or on behalf of, litigants, had been correctly decided. Moreover, he had been merely one of the members of the Division sitting on the cases involved and could not by himself have delivered success to the litigants who had paid him. NOONAN, op.cit. *supra* at 569.

Retired US Supreme Court Justice SUTHERLAND, who had been designated to sit with the Second Circuit to hear MANTON's appeal, was willing to assume that all the cases concerned had been correctly decided. Nevertheless, SUTHERLAND rejected MANTON's argument, holding that correctness of those decisions was not the issue. SUTHERLAND wrote: "Judicial action, whether just or unjust, right or wrong, is not for sale". *United States v. Manton*, 107 F.2d 834 at 846.

distorts and undermines that norm. Such is the ordinary, garden variety concept of judicial corruption.

The next general submission that might be made is that if corruption in the judiciary is sufficiently widespread, or (what may be functionally equivalent) if the public perception is that such corruption is sufficiently widespread, the other institutions of government – legislative, executive and administrative – may be substantially weakened and the government's claim to legitimacy or official rectitude may be substantially eroded. In a community like that we have in my country, erosion and eventual loss of legitimacy must be carefully and self-consciously guarded against. Legitimacy is a finite and exhaustible resource of governments that may be squandered by, among other things, widespread corruption, especially corruption in the judiciary which in the perception of the public, is uncontrolled and unchecked for a prolonged period of time. This is a principal lesson that may be derived from the contemporary still unfolding situation of Venezuela.⁴ Our community relies heavily, almost instinctively, on legal (i.e., statutory) prohibition and criminalization as modes of control of socially undesirable types of behavior. The resulting prescriptions naturally require judicial interpretation and application. Our judiciary is also empowered to intervene decisively in the processes of government by striking down legislative measures as unconstitutional, and executive and administrative acts as unconstitutional or illegal. We have not seriously developed (outside the field of labor relations) alternative, private, non-judicial, methods of dispute resolution – such as mediation and conciliation – and we have barely begun with commercial arbitration. In other words, the judiciary, in our system of government, has a very large and important role to play. By intervening or failing to intervene under certain circumstances, or by the quality of their intervention, the judiciary can in measure affect the course and direction and the pace of social, economic and political development of the country.

Thus we arrive at the nexus between the basic principles and constitutive practices of good governance – with which legal and judicial reform and control of corruption are integral – and national development processes. In the last several decades, there has been increasing recognition that a sound legal

⁴ The current turmoil and constitutional crisis in Venezuela have been attributed by commentators to the loss of political legitimacy by the traditional political and judicial institutions of Venezuela. It is reported that 94% of the Venezuelan people distrust the judiciary as corrupt and inept and frequently take the law into their own hands by lynching persons accused of crimes while disputes involving business enterprises remain mired in court for years. The Venezuela legislature is reportedly viewed with the same widespread distrust. In the February 1999 presidential elections, a former unsuccessful coup leader, Mr. HUGO CHAVEZ, was elected President by a landslide vote and a 'constituent assembly' consisting almost completely of Mr. CHAVEZ' party mates, was elected. This 'constituent assembly' has effectively claimed power and authority to 'transform the state' and to dismiss the Venezuelan Supreme Court and to strip the Venezuelan Congress of its legislative functions. The judges of the Supreme Court preferred to resign *en masse* rather than be physically thrown out of office. See the report entitled "Debunking democracy" by R. COLITT and R. LAPPER, *Financial Times*, 31 August 1999: 12.

framework or system is a basic prerequisite for the success of the social and economic development efforts of a state.⁵ A sound legal system is not simply a black box which mechanically grinds out legally binding rules. It is most appropriately conceived of as comprising a series of processes by which laws and regulations are formulated and prescribed, applied and enforced, and evaluated and amended or terminated. Good governance relates to the participatory nature, the quality and efficiency and transparency of these processes of law-prescribing, law-applying and law-enforcing, and law-revision or law-repeal. Indispensable for the efficacy of these inter-related processes is the existence of 'well functioning public institutions' staffed by trained individuals who are accountable to the general community and who are bound by and do comply with laws and regulations and apply them in an efficient and transparent manner, without arbitrariness or corruption.

Arguably the most important of those 'well functioning public institutions' is an independent, fair and impartial, honest and well-trained judiciary. In all well-ordered modern societies, the judiciary is not merely the arbiter of disputes between private individuals. It must also resolve citizens' disputes with their own government, their charges of unconstitutional or illegal or arbitrary or corrupt behavior on the part of public officials, as well as conflicting claims of jurisdiction and competence by public agencies inter se.

It should also be noted that the requirements of good governance – which include, again, an independent, impartial, honest and competent judiciary – and the extent to which they are effectively realized within the internal processes of a state, are widely regarded as giving rise to legitimate concerns on the part of other states. Legislation by home countries of multinational corporations have, for instance, defined the giving of bribes to officials of foreign governments as criminal behavior punishable in the home country and the bribes themselves as non-tax deductible.

In 1977, the Foreign Corrupt Practices Act⁶ was enacted by the US Congress and defined as a criminal offence the bribery of foreign officials by US corporations seeking to obtain and do business abroad. The Act did not render criminal all acts of bribery of foreign officials. It explicitly excludes gratuities frequently paid to low-level foreign government officials to secure or expedite the performance of routine non-discretionary duties. These are commonly re-

⁵ See, in particular, the extensive work done by Dr. I.F.I. SHIHATA, General Counsel of the World Bank on this subject, e.g., SHIHATA, "Good governance and the role of law in economic development", preface to A.SEIDMAN, R.B.SEIDMAN, and T.WÄLDE (eds.), *Making development work: legislative reform for institutional transformation and good governance* (Kluwer, 1999); SHIHATA, *The World Bank in a changing world*, vol. II (1995) chap. 3; id., "Complementary reform", in *Essays on legal, judicial and other institutional reforms* (1997) chap. 1 (Law, development and the role of the World Bank); id., "The role of law in business development", 20 *Fordham ILJ* (1997) 1577; id., "Corruption – A general review with an emphasis on the role of the World Bank", 15 *Dickinson JIL* (1997) 451.

⁶ 15 USC Secs.78m, 78dd-1, 78dd-2, 78 ff. Text in 17 *ILM* (1978) 214; the Foreign Corrupt Practices Amendments of 23 Aug.1988 appear in 28 *ILM* (1988) 455.

ferred to as ‘facilitating’ or ‘grease’ payments and typically are not made ‘for the purpose of obtaining business’.⁷ Payments unlawful under the Foreign Corrupt Practices Act are also denied deductibility under Section 162(a) of the US Internal Revenue Code which authorizes US taxpayers to deduct ‘ordinary and necessary’ expenses incurred in carrying on a trade or business.⁸

On 29 March 1996, twenty-one out of the thirty-four member states of the Organization of American States (OAS) signed the Inter-American Convention Against Corruption.⁹ In the same year, the United States and Canada,¹⁰ the principal capital- and technology-exporting countries in the hemisphere, signed this Convention and on 6 March 1997, the OAS Convention went into effect. The Preamble of the OAS Convention eloquently underlines the relationship between democratic legitimacy, development and efforts to combat and control corruption:

“The Member States of the Organization of the American States

Convinced that corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of peoples;

Considering that representative democracy, as essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance;

Persuaded that fighting corruption strengthens democratic institutions and prevents distortions in the economy, improprieties in public administration and damage to a society’ moral fiber;

Recognizing that corruption is often a tool used by organised crime for the accomplishment of its purposes;

...

Deeply concerned by steadily increasing links between corruption and the proceeds generated by illicit narcotics trafficking which undermine and threaten legitimate commercial and financial activities, and society, at all levels; [and]
 ...”

⁷ See L.A.LOW, A.K.BJORKLUND and K.C.ATKINSON, “The Inter-American Convention Against Corruption: A comparison with the United States Foreign Corrupt Practices Act”, 38 *Virg.JIL* (1998) 243, 257, 269.

⁸ On the deductibility of bribes or ‘questionable foreign payments’ for tax purposes, see, e.g., M.CHU and D.MAGRAW, “The deductibility of questionable foreign payments”, 87 *Yale LJ* (1978) 1091, and L.DENYS et al., “Bribes as deductible business expenses”, 16 *European Taxation* (1976) 370.

⁹ Text in 35 *ILM* (1996) 724.

¹⁰ Under Act XXIII of the Convention, states which are not members of the OAS may accede to the Convention.

Probably the most important provision of the OAS Convention for present purposes, is Article VIII which sets forth the undertaking of states parties to the Convention to criminalize what is often called ‘active bribery’ or the giving or offering of bribes, as distinguished from ‘passive bribery’ understood as the soliciting or accepting of bribes in transnational commerce by foreign government officials. This article reads in part as follows:

“Article VIII. Transnational Bribery

Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such a gift, favour, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official’s public functions.

...”

Two observations might usefully be made in this connection. Firstly, the definition of ‘transnational bribe’ now includes the ‘facilitation payments’ typically made to minor foreign public officials.¹¹ Secondly, the applicability of the Convention’s provisions is not dependent upon a showing that the acts of corruption imputed to the accused resulted in harm to state property, that is, that the country of the official bribed has suffered some economic injury by reason of the acts of corruption involved.¹²

Soon after the OAS Convention went into effect, the member states of the Organization for Economic Cooperation and Development (OECD) followed suit and signed a Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions on 17 December 1997. The OECD Convention, like the OAS Convention, recognizes in its preambular paragraphs that the use of bribery by multinational corporations as an instrument in securing and expanding business opportunities, had become common place in some developing countries and that efforts to control and suppress corruption must be supported by international cooperation:

“[B]ribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions; [and]

¹¹ Act I, OAS Convention defines ‘public official’, ‘government official’ or ‘public servant’, as meaning “any official or employee of the State or its agencies, including those who have been selected, appointed or elected to perform activities or functions in the name of the state or in the service of the state, *at any level of its hierarchy*”. (Emphasis added)

¹² See Act XII, OAS Convention.

[A]ll countries share a responsibility to combat bribery in international business transactions.”¹³

The OECD Convention establishes, again much like the OAS Convention, treaty undertakings by states parties to it to enact domestic legislation criminalizing the employment of ‘active bribery’ by their nationals, individual and corporate, in promoting their business interests abroad. That parties to the OAS Convention or to the OECD Convention may carry out such undertakings not necessarily or exclusively for moral or ethical reasons, but as well for more pragmatic objectives of reducing the comparative cost of doing business abroad and achieving equality of competitive conditions – need not detract from the importance and desirability of implementing those treaty undertakings.¹⁴

From a national criminal law perspective, the noteworthy effect of statutes like the US Foreign Corrupt Practices Act and of legislation implementing the OAS and the OECD Conventions, is that although some or all of the constituent elements of the act of bribery may occur outside the territorial domain of the state party enacting the legislation, the courts of that state nevertheless acquire jurisdiction to try and punish the corporate officials or representatives offering or dispensing the bribes. Sometimes the realistic prospects of detecting

¹³ Text in 37 ILM (1998). It is noteworthy that the bribery of a foreign public official is required, under the Convention, to be penalized as a criminal offence “irrespective of, *inter alia*, the value of the advantage [secured through bribery], its results, perceptions of local custom, the toleration of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage”. See *Commentaries on the OECD Convention adopted by the Negotiating Conference on 21 November 1997* para.7, text in 37 ILM (1998) 9. Moreover, bribery of a foreign public official to obtain or retain business or other improper advantage is required to be criminalized “whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business”. *Commentaries* para.4, *ibid.* at 8.

See, further, Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, recommended by the Council of the European Union on 26 May 1997 for adoption by the Member States in accordance with their respective constitutional requirements, 37 ILM (1998) 12. The EU Convention requires each member state to render both ‘passive corruption’ and ‘active corruption’ criminal offences.

REISMAN, *op.cit.n.1*, at 157, referring to earlier proposals relating to an international agreement to criminalize bribery by multinational corporations, expresses doubt as to the prospects of success of such an agreement. He notes that the formal code of virtually every country in the world already prohibits bribery. An international agreement might win quick acceptance but result in no more enforcement than is currently obtained under the different domestic laws it replicates.

¹⁴ The OECD has had no monopoly of concern over the use of, or acquiescence in, bribery of foreign public officials by multinational enterprises. The UN Commission on Transnational Corporations produced lengthy studies on a Code of Conduct for Transnational Corporations prohibiting, *inter alia*, bribery of foreign public officials; so did the UN Economic and Social Council. A useful list of these studies may be found in the extensive bibliography on bribery appended to REISMAN, *op.cit.n.1* at 266-267. The 1984 Draft UN Code of Conduct on Transnational Corporations appears in 23 ILM (1984) 602.

and punishing bribery in transnational business may be greater in the national state or domicile of the multinational enterprise than in the home country of the foreign bribe-taker. Practical immunity in that home country may well form part of the corrupt bargain. There is, too, clear recognition that the bribery of foreign officials affects the interests of the national state or domicile of the bribe-giver.

Finally, it may be observed that the same requirements of good governance are also taken into account, with varying degrees of explicitness, by multilateral financial institutions in the granting (or withholding) and structuring of development loans to developing and transition-economy countries.¹⁵

2. THE CONTEXT OF CAUSES AND CONDITIONS

We turn to the context of more specific causes and conditions within which the problem of corruption among judges may be examined.

By context, one commonly refers to the aggregate of causative and conditioning (that is, environmental) factors within which judicial corruption occurs. It is commonly difficult to distinguish, in the real world, between causes and conditioning factors but, one might believe, it is not really necessary to make such a distinction for preventive and regulatory purposes.

The first of these factors relates to the protracted and complex nature of the judicial process as we know it, which in itself is the result of many factors including the great number of statutes and administrative regulations which have to be judicially applied and controlled. The ultimate outcome is multiplicity of litigations which are processed through the judicial system. The sheer volume of incoming cases is such as to lead to significant congestion of judicial dockets and the slow but inexorable accumulation of backlogs of judges, at least those who are stationed at urban and commercial – industrial centers.¹⁶

In our country, the congestion of dockets is observable at just about all levels of the judiciary. A sense of the realities of the situation may perhaps be conveyed by citing that in the Supreme Court of the Philippines, in the last ten (10) years (1989-1998), the average number of newly filed cases per year has

¹⁵ Sometimes the message is conveyed with considerable explicitness indeed. Consider the following: Recently, on 25 August 1999, the *Financial Times*, p.12, carried a report entitled "World Bank threatens to stop lending to Indonesia". It had been previously reported that senior officials took bribes to transfer government funds to a private bank, Bank Bali, which then transferred more than half the payment (i.e. US \$ 80 million) to an agency run by a senior member of the ruling Golkar Party. Opposition leaders accused senior advisers and a younger brother of President B.J.HABIBIE of involvement in the scandal. MARK BAIRD, the World Bank's Indonesia Director, was quoted as stating that "[I]f this case is not resolved early, and satisfactorily, it is difficult for us to provide budget support to the Government of Indonesia". Mr.BAIRD is described by the *Financial Times* as "now exerting the heaviest foreign pressure on Mr.HABIBIE's government since it took office in May [of 1998]".

¹⁶ See, generally, F.P.FELICIANO and E.L.CAPARAS, "The Problem of delay in the Philippine court system", 62 *Philippine Law Journal* (1987) 201.

been 5,555.3 cases. The average number of cases disposed of per year during the same period has been 5,282.8 cases.¹⁷ While the jurisdiction of the Supreme Court is, in theory, optional in character, the Constitution requires the Court to explain why it rejects a petition for review or petition for certiorari, which means that each case must be processed and decided one way or the other.¹⁸ This is true for all courts below the Supreme Court.

It should also be noted that our Judiciary Act, as it stands at present, permits successive appeals – from the Municipal Court to the Regional Trial Court, and then to the Court of Appeals and finally to the Supreme Court. Decisions of administrative agencies may also be tested in the courts, from the Regional Trial Court and onwards.

The net result of the system is that the losing party may try in successive appeals up the hierarchy of courts to reverse the original judgment or, at least delay the finality of the judgment and the execution thereof. This situation creates incentives for attempts by litigants and their lawyers to short-circuit the ordinary lengthy procedure by extra judicial means.

The second element of the context which should be noted is that the levels of compensation in the judiciary are very low, indeed, unreasonably low. A certain disparity in the compensation structures of civil servants and the private sector is, of course, commonplace, especially in developing countries. In the case of the judiciary, however, the disparity is so severe as to be appalling. Not more than 1-1/2% of the national budget is allocated to the judicial department. The figure used to be 1% until a former Chief Justice lobbied with the Department of the Budget and Management and the legislative department of the government. He quickly found out, however, that there was a limit beyond which

¹⁷ 'Newly filed cases' with the Supreme Court include both judicial cases and administrative (disciplinary) cases involving judges and other officials of the judicial department. The above figures may be grossed up and broken down as follows:

I (1) Total judicial cases filed 1 January 1989 to 31 December 1998 -----	51,638
average over 10 years -----	5,163.8
(2) Total administrative cases filed 1 January 1989 to 31 December 1998 -----	3,915
average over 10 years -----	0,391.5
II (1) Total judicial cases disposed of 1 January 1989 to 31 December 1998 -----	49,950
average over 10 years -----	4,995
(2) Total administrative cases disposed of 1 January 1989 to 31 December 1998 ----	2,878
average over 10 years -----	0,287.8

The yearly figures relating to judicial cases were provided by the Judicial Records Office, Supreme Court of the Philippines, courtesy of Atty. NATALIE MENDOZA of the Office of the Clerk of Court (*en banc*), Supreme Court. The year by year figures pertaining to administrative (disciplinary) cases were supplied by the Office of the Court Administrator, Supreme Court; the assistance of Deputy Court Administrator ZENAIDA ELEPAÑO is acknowledged. The figures relating to the dockets of trial courts throughout the country, are much more difficult to assemble. It is believed that the differential between cases disposed of and cases filed, in respect of trial courts, is probably significantly higher than that pertaining to the Supreme Court.

¹⁸ Art. VIII, Sec. 14, 1987 Constitution.

the independence of the judiciary would be endangered by further lobbying and he decided against further efforts to obtain a higher allocation of budgetary resources.

It is therefore not easy to attract bright young lawyers to the judiciary, except where they have independent means. Of course there are able lawyers who enter the judiciary at a relatively late stage in their professional careers, where substantial savings permit them to treat low judicial compensation levels as secondary in importance. For all, however, acceptance of judicial office requires a strong moral commitment to reject blandishments from, for instance, litigants who go to court to protect an economic interest from either the internal revenue officers or business competitors.

Some perspective is necessary in looking at this factor. Prosperity (in the form of high compensation levels) is not a guarantee of judicial integrity, competence and independence,¹⁹ any more than poverty (understood as modest pay scales) necessarily means easy judicial virtue or loss of judicial innocence. There is no more inevitability about either judicial corruption or judicial reform than about other important aspects of personal and social life and development.²⁰

Another factor to be considered is the public perception of the judiciary in general, to the extent that this perception is reflected in the mass media and opinion polls. There are, of course, in my country as elsewhere, dishonest judges who accept differing kinds of bribes, as well as ignorant judges and those whose personal behavior render them unfit for judicial office. It is not

¹⁹ A former senior law officer of a wealthy Asian country made the interesting comment (to the author) that the pay of judges could also be raised to such generous levels as to create marked, if unspoken, inclinations on the part of judges to uphold the position of the government in crucial litigations. It was stated that the pay scale of judges of the highest court in that country very significantly exceeds that of justices of the Supreme Court of the United States. The suggestion, apparently, is that judges, when so generously treated, may be less likely to take an aggressively independent stance vis-à-vis the Legislative and Executive Departments which control the public purse.

²⁰ Striking illustration is provided in Professor ANDREW KAUFMAN's superb biography of Mr. Justice BENJAMIN N. CARDOZO. Justice CARDOZO is widely regarded as second only to Mr. Justice OLIVER W. HOLMES of the US Supreme Court in the enduring importance and quality of their contributions to the case law of that Court: *Cardozo* (Harvard Un. Press, 1998). Justice CARDOZO's father, Judge ALBERT CARDOZO who had been elected to and had sat in the New York Supreme Court during the period of Tammany Hall dominance of New York City politics, was forced to resign on charges of corruption, fee-splitting with receivers and Masters of the Rolls appointed by him, etc. Justice CARDOZO almost never spoke of his father, except to say that the affair had taken place a long time ago when he was a young boy and that he remembered ALBERT as a loving father. By the end of Mr. Justice CARDOZO's life, he had redeemed his family honour by the sheer force of the exemplary moral and intellectual qualities of the life he led as a man and as a judge. KAUFMAN, *ibid.* passim, notes that this extraordinary redemption was accomplished within a single generation. Justice CARDOZO prevented a 'like father, like son' syndrome from arising. In the end, the name 'Judge Cardozo' ceased totally to refer to the disgraced father and recalled instead only to the great and universally respected judge the son had become.

possible to tell whether we have more than our 'fair share' of corrupt judges.²¹ It seems to me, however, that in the last few years, public perception has been generally severe with respect to judges. My personal belief is that there are many, many judges out there who are honest and committed and reasonably competent, but who are voiceless and largely unnoticed in the hurly-burly of episodic media crusades. Two considerations are worth mentioning. One is widespread lack of familiarity among the general public about the structure and requirements of our system for delivering justice. When, for instance, a person accused of crime is acquitted in court, there is an unfortunate tendency on the part of the victim or his family readily to assume either that the judge was ignorant or had been bribed by the accused person.

What is often forgotten is that the courts constitute only the last phase of the justice delivery system and that earlier phases – such as police investigative work, finding and protecting witnesses and other evidence, and preparation and handling of the public prosecutor's case – effectively limit what courts can do by way of reducing criminality. If insufficient admissible evidence is adduced in court – because the police did not do their work or because the public prosecutor was inept – the courts must acquit.

Another consideration is that litigants or their lawyers and even the bar associations have often been reluctant to come out openly against judges they might suspect or who are rumored to be dishonest so that investigation may be commenced. We noted earlier that cultural influences may be at work here. Still another consideration is that there are unfortunately some lawyers who are quick to explain an unfavorable court decision, or a large billing for legal fees, by telling the client that the judge had been 'bought' by the opposing litigant or that a portion of his legal 'fees' had to go to the judge. The client will never know whether or not his lawyer is telling the truth; and the judge, who could be completely innocent, is totally defenseless.

The general point that should be made is that corrupt judges do not exist in a vacuum. There are corrupt judges because, *inter alia*, there are corrupt lawyers and litigants willing to offer a bribe or who, for diverse reasons, are unwilling to resist a demand for a bribe from an aggressively corrupt judge and who refuse to go to the appropriate judicial authority which can discipline and remove such judges. Judicial reform must begin and go hand in hand with reform of the bar. Clearly, members of the bar and the general public must learn to cooperate with judicial authority, and the latter must in turn convincingly demonstrate its own ability to identify and remove unworthy and unfaithful judges so as to generate and reinforce the habits of trust and cooperation.

²¹ REISMAN, *op. cit.* n.1 at 9, acknowledges the methodological problems arising from the fact that although bribery in a particular society might be extant in a greater or lesser degree, "it is conducted in an atmosphere of understandable secrecy". Part of the reason for secrecy, he suggests, arises from fear of sanctions "not for violation of the laws against bribery but rather for violation of the operational code that some types of bribery are acceptable but are not to be talked about", and from the readiness of members of a group to impose effective sanctions on those who deviate from that code.

3. MODES OF REGULATING AND CONTROLLING JUDICIAL CORRUPTION

The modes which have been employed in my country to regulate and control corruption among judges, are multiple. There is, firstly, a general effort to upgrade the levels of judicial compensation, on the part of the Executive and Legislative Departments of government. However, there are structural limitations to this strategy, since such upgrading has to take into account the compensation levels of the entire civil service. It simply has not been politically possible to upgrade judicial compensation levels without at the same time upgrading the pay scales of the rest of the government sector. There is constant competition for finite budgetary allocations and the judicial department is at a severe disadvantage in such competition.

More specific strategies relate to the recruitment of judges. In the end, the problem of judicial corruption is the problem of the quality – moral and professional – of members of the bar; for judges are recruited exclusively from the bar.²² There are no elective judges in our jurisdiction; there have never been any. Under our earlier (*i.e.*, the 1935 and 1973) Constitutions, the appointment of all judges was vested in the President of the Republic, but such appointment was subject to confirmation by the Commission on Appointments – consisting of Members of the Senate and the House of Representatives. To minimize the perceived influence of political factors on the selection of judges, our present (1987) Constitution has done away with the need for confirmation by the Commission on Appointments. Instead, nominations to judicial posts are made by a Judicial and Bar Council composed of seven members: the Chief Justice of the Philippines, the Secretary of Justice and a Member of Congress as *ex-officio* Members; and a representative of the Integrated Bar, a law professor, a retired Member of the Supreme Court and a representative of the private sector.²³ The Chief Justice is *ex-officio* Chairman of the Council. Three or more nominations are made for each judicial vacancy; the final choice and the appointment is made by the President of the Republic.²⁴ This procedure makes possible a more focused effort to scrutinize carefully the record and credentials (personal and professional) of would-be judges. The list of names under consideration for nomination is published in national newspapers and bar associations and the public are invited to comment on those names. The Judicial and Bar Council may also interview the candidates for nomination. The process is generally analogous to the process of recruitment for positions in private corporations and enterprises.

The next effort to upgrade the quality of judges comes promptly upon the appointment of new judges. They are required to undergo training courses at the Philippine Judicial Academy, an entity originally created by an Administra-

²²Art. VIII, Sec. 7(2), 1987 Constitution.

²³Art. VIII, Sec. 8(1), 1987 Constitution.

²⁴Art. VIII, Sec. 9, 1987 Constitution.

tive Order of the Supreme Court and later reconstituted and chartered by statute and maintained by Government.²⁵ In addition, special courses and seminars are offered at the Academy; those hopeful of promotion to higher courts must confront the task of taking and passing these courses.

A third mode of control of judicial corruption relates to the administrative supervision exercised by the Supreme Court, by constitutional mandate,²⁶ over all courts and court personnel. Perhaps the most important aspect of this supervision is the monitoring of the administrative performance of judges, *i.e.*, the state of their judicial dockets and the disposition of cases within the prescribed period of time. This monitoring makes possible the rationalization of the distribution of case loads; additional judges are moved to districts generating high numbers of cases.

The supervisory jurisdiction of the Supreme Court over lower courts is not limited to administrative matters.²⁷ The Supreme Court has disciplinary jurisdiction over all judges of lower courts.²⁸ It receives and investigates complaints against judges. When probable cause is shown, formal charges are filed against a judge by the Court Administrator and hearings where the respondent judge is given the opportunity to defend himself, are held by a Regional Trial Court judge or by a Member of the Court of Appeals designated by the Supreme Court. The designated judge renders a report which is reviewed in a formal proceeding by the Supreme Court. In this proceeding, the respondent is accorded the opportunity to rebut the findings and recommendation of the investigating judge or justice. Thereafter, the Supreme Court renders judgment either dismissing the charges or penalizing the respondent judge. The penalties range from reprimand to dismissal.²⁹ Where appropriate, the Court may also order

²⁵See, in this connection, A.A.MELENICIO-HERRERA, "Legal and judicial education reforms and the Narvasa Court" in *Odyssey and Legacy: The Chief Justice Andres R. Narvasa Centennial Lecture Series* (1998) 40 et seq.

²⁶See Article VIII, Section 6 of the 1987 Constitution.

²⁷In *Maceda v. Vazquez*, G.R. No. 102781, April 22, 1993, 221 SCRA 464, the Supreme Court declared that this administrative supervisory and disciplinary authority over all lower courts is vested *exclusively* in the Supreme Court, and not shared by, *e.g.*, the Office of the Ombudsman.

²⁸Art. VIII, Sec. 11, 1987 Constitution.

²⁹The following data were provided by the Office of the Court Administrator, an agency directly under the supervision of the Supreme Court of the Philippines; the assistance of Deputy Court Administrator ZENaida ELEPAÑO is once again acknowledged with appreciation:

As of 31 March 1999, the total number of lower court (*i.e.*, trial) judges in the Philippine judiciary was 1524. On the same date, the number of vacant positions of trial judges was 694.

During the period from 1989 to 1999, a total of 43 lower court judges were *dismissed from office* by the Supreme Court: 14 were Regional Trial Judges; 28 were Metropolitan or Municipal Trial or Circuit Trial Judges and 1 Shariá Circuit Court Judge. Of these, eight were dismissed on charges of violation of the Anti-Graft and Corrupt Practices Act; twelve on charges of gross misconduct; seven on charges of grave abuse of authority; five on charges of immorality and disgraceful conduct; five on charges of inefficiency and failure to decide a case within the reglementary period; two on charges of ignorance of the law; one for violation of the Code

the initiation of criminal proceedings against the offending judge. Formal proceedings against respondent judges of course take time. But once they are ripe for decision, the Court assigns high priority to the resolution of such disciplinary proceedings.

A fourth mode of control – a fairly obvious one – is legislation that would limit the availability of successive appeals and provide for finality of judgments of the Court of Appeals in many types of cases, except those which, by constitutional provision, pertain to the exclusive jurisdiction of the Supreme Court. During the decade of the 90s, at least two bills were filed in our Congress seeking to do just that with respect to decisions of certain administrative, quasi-judicial agencies, such as the National Labor Relations Commission, whose decisions may be reviewed by the Court of Appeals on certiorari. The bills failed of enactment.

Another measure adopted by the Supreme Court, in the exercise of its administrative supervision, relates to the introduction of new electronic methods of court reporting. The objective here has been the reduction of the period of delay in the conduct of trials occasioned by the need for manual transcription of court stenographers' notes. The new methods make possible the completion of the transcript of oral hearings almost immediately after the end of each hearing. The acquisition of this new technology requires very significant capital investment, as does the re-training of present stenographers. It remains to be seen what degree of success in shortening litigation can be achieved with these new methods.

The degree of success of any particular strategy of prevention and control is commonly difficult to determine. What is perhaps most important, in the end, is that all available strategies must be employed with sustained commitment, fairness and large quantities of common sense. A sense of the human condition and an understanding of social powers would also be valuable in this enterprise.

A final reflection. This relates to the role of personal leadership in the task of judicial reform. Necessarily, in our system, the main burden of this leadership falls on the Chief Justice of the Supreme Court of the Philippines. Certain

of Judicial Conduct; one for knowingly rendering an unjust decision; and two for habitual absenteeism and falsification of certificates of service (*i.e.*, disposition of pending cases).

From 1995 to 1999, a total of 12 lower court judges were penalized with *suspension from office* without pay for varying periods of time, for offences ranging from violation of the Anti-Graft and Corrupt Practices Act, through gross ignorance of the law, sexual harassment and delay in rendering decisions.

From 1987 to 1999, 137 lower court judges were penalized with *monetary fines* in amounts equivalent to from 10 days salary to 2 months salary, for offences ranging from gross ignorance of the law (the most common offense) through serious misconduct in office and grave abuse of authority to immorality and knowingly rendering an unjust judgment.

Finally, from 1990 to 1999, 57 lower court judges were 'reprimanded' for a variety of minor offences while from 1987 to 1999, 75 lower court judges were 'admonished' for much the same kinds of offences.

qualities of heart, mind and will are indispensable for the successful assumption and discharge of the burdens and responsibilities entailed by that leadership. This burden, however, must realistically be shared by the Presiding Justice of the Court of Appeals and the Executive Judges of the Regional Trial Courts and of the Municipal Trial Courts. With such leadership, and with an informed and supportive citizenry, and a strong and vigilant bar itself deeply committed to professional reform, much may be expected by way of progress in judicial reform.

TOWARDS AN INTERCIVILIZATIONAL APPROACH TO HUMAN RIGHTS

For universalization of human rights through overcoming of a westcentric notion of human rights

Onuma Yasuaki*

1. INTRODUCTION

The problem of human rights has been an enduring object of fierce international controversy. Are human rights universal, or relative to some culture? Should developing nations first pursue economic development, to be followed by the realization of human rights?¹ Or should they pursue the latter from the beginning even at the alleged cost of economic development and political stability? This presentation of human rights as a problem reflects fundamental issues which will continue for many decades.

These issues involve (1) conflicts between the transnationalization of economic and informational activities and the sovereign states system; (2) conflicts between the global quest for human dignity and the grudges held by developing nations against the past imperial policies of today's developed nations and

* University of Tokyo. This paper is a summary of the author's book *Jinken, kokka, bunmei* [Human rights, states and civilizations] (Tokyo: Chikuma Sobo, 1998). A shorter version of the article was published in J. BAUER and D. BELL (eds.), *The East Asian Challenge for Human Rights* (Cambridge, 1998). The author owes a debt of gratitude to many people. First, to Professors JAMES CRAWFORD, DAVID WEISSBRODT, BENEDICT KINGSBURY, YOGESH TYAGI, AMARTYA SEN, DANIEL BELL and JACK DONNELLY, for reading an earlier manuscript and giving critical comments. Second, to the Asia Foundation, the Carnegie Council on Ethics and International Affairs and the Japan Institute of International Affairs, for inviting the author to a number of workshops where he could exchange views with leading scholars and activists of human rights. Third, to his proofreaders for correcting and improving his English. Finally, to Professor TERAYA KOJI, Messrs. KAWAZOE REI and SAITO TAMITO, Ms. OSHIMA MAKIKO and other graduate students of Tokyo University who assisted him in checking references. Especially, without the devotion of Mr SAITO the author could not have finished this contribution. The author regrets that, due to the limited time available for the proofreading, the updating of data and references in view of the lapse of time since the writing of the manuscript could only be realized partially.

¹ Here, the term 'human rights' connotes only civil and political rights, ignoring economic, social and cultural rights. The problematic nature of this predominant usage of 'human rights' will be fully discussed later.

against the huge economic gaps between the former and the latter; and (3) conflicts between East Asian² nations as economic powers and the Westcentric³ structures of international information and culture. These fundamental problems require us to deal with the question of human rights not merely as a current visible issue. What is needed is a comprehensive framework within which issues of human rights can be understood as the expression of these fundamental problems. This paper seeks to present, albeit in an abstract and incomplete manner, such a framework.

2. CONFLICTS DESTABILIZING THE INTERNATIONAL ORDER AND THE NEED FOR AN INTERCIVILIZATIONAL APPROACH

2.1. **The conflict between the transnationalization of economics and information and the sovereign states system**

Post-war economic activities have been generated and supported by incessant technological innovation, the internationally predominant capitalist economy and peace among developed countries lasting half a century. Together with these economic activities, informational activities have also expanded their spheres on a global scale. Media institutions of developed countries constantly send global news to their citizens in a sensational manner. This news, especially if sent into the living rooms of ordinary citizens in developed societies on television, is often shocking to them, reflecting huge differences in economic situations, political regimes, religions and social customs between developed countries and developing countries. To those whose per capita national income is over US\$ 20,000 and whose life expectancy is nearly eighty years, the 'price of life' of those whose per capita income is less than US\$ 500 and whose life expectancy is approximately fifty years can appear extremely cheap. Political persecutions, the inhumane treatment of prisoners and apparent discriminatory practices are all vividly depicted on TV screens. This invites anger against the offenders and sympathy with the victims.

However, today's international society is based on the sovereign nation states system, the fundamental principles of which include the equality and the independence of states. The principle of non-intervention, though challenged in many respects, is a fundamental principle of current international law. The Declaration on Principles of International Law concerning Friendly Relations

² In this article, 'East Asia' is used in the broader sense of the term, i.e., including North East and South East Asia.

³ 'Eurocentrism' is generally used to designate a tendency to approach natural and social phenomena from a perspective which assumes the West European and North American way of thinking as the standard framework. However, it is not only the West European, but also – or rather – the US way, that is decisively influential in today's world. This is why the term 'West-centrism' will be used here rather than 'Eurocentrism'.

and Co-operation among States in Accordance with the Charter of the United Nations of 1970 expresses far-reaching obligations of non-intervention by providing that "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal and external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law".⁴ There are other resolutions of the United Nations and other international organizations or conferences to similar effect.⁵

Although the sovereign states system is becoming obsolete from the perspective of the global economy and information, it will most likely survive for the foreseeable future. This is evident especially in the field of security. For many developing countries, which comprise various linguistic, religious or ethnic groups struggling with each other, the case will be even more than a mere survival of the system. For them, the coming decades will be nothing less than an era of nation-building, overcoming domestic conflicts and consolidating the state mechanism.

Thus, the twenty-first century will witness conflicting developments. On one hand, the sovereign states system will be gradually eroded by the constantly expanding and penetrating global economy and information. Although this global economy and information is managed mainly by developed countries, or, more precisely, their corporations and regulators, it will penetrate developing countries as well. On the other hand, the sovereign states system will be adhered to and actually consolidated by many developing countries.⁶ This conflict will pose a serious problem to human beings in the twenty-first century. It may become even more serious in combination with the second conflict as discussed in the following section.

2.2. The conflict between the global quest for human dignity and the sense of victimization on the part of developing nations

In developed societies, where people generally enjoy a high standard of living, the quest for economic well-being no longer occupies such a high priority as it used to. Instead, a quest for human rights (understood mainly as civil and political rights), and a more recent demand for environmental protection are attracting more and more people. Accordingly, the voice becomes stronger of those who claim that they should not tolerate serious human rights violations

⁴ A/RES/2625 (XXV), GAOR 25th Sess., Suppl.No.28 (A/8028)[1970].

⁵ A/RES/2131(XX), GAOR 20th Sess., Suppl.No.14 (A/6014)[1965]; A/RES/36/103, GAOR 36th Sess., Suppl.No.51 (A/36/51)[1981].

⁶ ONUMA YASUAKI, *Wakoku to kyokuto no aida* [Between the country of 'Wa' and the 'Far East'] (Tokyo, 1988) 192-203.

– or massive environmental degradation – even if committed in foreign countries. These persons demand their government to intervene in the delinquent state and stop serious human rights violations. This phenomenon, typical in the US today, can also be witnessed in other developed societies. It will continue to spread.

However, most of the nations where serious violations of human rights occur and which are targeted] for criticism were once under colonial rule. Moreover, they have suffered from military intervention, or have been economically exploited by developed countries. Because of this humiliating past, they tend to respond to criticism by the developed countries in an excessively sensitive manner. For those who have experienced colonial rule and interventions under such slogans as ‘humanity’ or ‘civilization’,⁷ the term ‘human rights’ often sounds nothing more than another beautiful slogan by which great powers have rationalized their interventionist policies.⁸

To say that such a claim is a convenient excuse of the leaders of authoritarian regimes to evade criticism of their oppressive policies is certainly true, at least in part. No nation is monolithic. Even in countries which do not respect freedom of expression, one can hear dissenting voices criticizing the formal view of the ruling party or the government. It is necessary to encourage such voices. However, can we say that in these countries it is the voice of such dissenting activists, not the view of the government, that represents the people as a whole? Not necessarily. Herein lies a difficult problem.

It is true that the Chinese Communist Party, the Vietnamese Communist Party, the government of Singapore and some other Asian regimes suppress the voice of certain citizens who demand respect for freedom. It is not likely that these suppressive regimes can be maintained indefinitely in their present form. The desires of many people seeking more freedom will bring about political regimes which respect more freedoms than today. However, these facts and expectations do not necessarily mean that the present regimes have not represented the will of the people. It is in fact less certain that in these countries human rights activists represent the will of the people as a whole. Unlike the socialist regimes in Eastern Europe, these regimes were not imposed by an outside power, the USSR. Most of them grew spontaneously from struggles

⁷ The idea of ‘mission civilisatrice’ was utilized by the Western powers to rationalize imperialist policies. The idea of ‘humanitarian intervention’ was resorted to frequently by them, e.g. when they militarily intervened in Turkey, Rumania and other ‘uncivilized’ nations. See J. KUNZ, ‘Zum Begriff der ‘nation civilisée’ im modernen Völkerrecht’, 7 *Zeitschrift für öffentliches Recht* (1928) 89-95; TABATA S., *Jinken to kohosaiho* [Human rights and international law] (Tokyo, 1952) 41-48; G. SCHWARZENBERGER, ‘The standard of civilisation in international law’, *Current Legal Problems* (1955) 220-22; G. GONG, *The standard of ‘civilization’ in international society* (Oxford, 1984) 45-53, 76-81 et passim.

⁸ See, e.g., DING Y., ‘Opposing interference in other countries’ internal affairs through human rights’, 41 *Beijing Review* (Oct. 1989) 10-12. LANG Y., ‘Shehuizhuyi shehui de renquan shijian yu guoji renquan douzheng’ [Implementation of human rights in socialist countries and international struggles for human rights], *Qiushi Zazhi* 1991-2 (1992) 10-15.

against colonial rule, interventions by imperial powers, poverty, and privileged ruling classes of the past. Despite many shortcomings such as authoritarian rule, corruption, and violations of human rights, they were chosen (in the broader sense of the term) by their own people to fight the violence and misery of the past. As such, they have a certain legitimacy. Moreover, for these nations overcoming domestic conflicts in the course of nation-building is a vital task. While most of today's developed countries have already completed this task in a violent manner up to the early twentieth century, for most developing countries it is the task of today and tomorrow.

Given these facts, it is too simplistic to assert that the claims of the governments of these countries merely aim at rationalizing human rights violations. It is rather self-complacent to say that the voice of human rights activists represents the true will of their people. Resistance to the criticism by developed countries, whether by their governments or NGOs, is not limited to the ruling elite. When the Chinese government is criticized for its human rights violations, it often tries to offset the criticism by referring to imperialistic policies by the Western powers and Japan since the Opium War. It is true that these are 'diplomatic cards' against the Western nations and Japan. However, it is because historical facts of Western imperialism and Japanese aggression do exist, as does a deeply rooted rancor among Chinese people, that the Chinese leaders can use these diplomatic cards. Such rancor, grudges and animosities against colonial rule, intervention, economic exploitation, racial discrimination, and religious prejudice by the once imperial, now developed, nations are widely shared by people in many developing countries. In such situations, 'human rights diplomacy' or criticism by NGOs in developed countries are likely to be perceived as arrogant interventions or pressures. Hence, even legitimate criticism often can not fulfill its proper task of improving human rights conditions.

2.3. Emerging discrepancies between economic power and intellectual/informational hegemony in international society

The problem described above is closely related to the third problem, that of emerging discrepancies between the economic power of East Asian nations and the intellectual and informational hegemony of Western nations, especially the US. In the early 1990s, the controversy over the universality vs. relativity of human rights was fiercely contested between Western nations, particularly the US, and some East Asian nations such as China, Singapore and Malaysia. This can be seen as a symptom of those discrepancies which will become increasingly problematic in the twenty-first century.

In the twentieth century the US has had a tremendous influence upon the ways of thinking and behavior of people around the world. It spread its ideas and images on humans, societies and the universe by various means: English as the 'lingua franca' of the world; influential media institutions represented by

CNN, the AP and the New York Times; powerful popular cultures represented by Hollywood movies and popular music; and many other informational, educational and cultural institutions.⁹ In the early twenty-first century, when 'democratization' and 'marketization' make progress in developing countries, the Americanization of society will again prevail. The US's 'soft' power resources¹⁰ which define, orient and influence people's way of thinking are likely to become even stronger on a global scale.

On the other hand, many East Asian nations have achieved economic development and social stability in the latter half of the twentieth century. Japan is already on a par with the US and Western European countries in terms of human development indices, and Taiwan, Singapore and South Korea are catching up. These nations have generally achieved a more equitable distribution of wealth, and enjoy a better situation in terms of crime or narcotics than the US and many West European countries. For example, in terms of income share the ratio of the highest 20% to the lowest 20% is 3.4 in Japan, 5.2 in South Korea, 4.7 in Germany, 5.6 in France, 8.9 in the US, and 9.6 in Singapore (1980-94 for Singapore, and 1987-98 for the rest).¹¹ The number of homicide cases per 100,000 people from 1995 to 1997 is 1.0 in Japan, 3.6-4.4 in France and 6.8-8.2 in the US.¹² Other indices in criminal cases basically indicate similar tendencies. China is likely to become one of the largest economic powers in the twenty-first century. Although these increases in power, economic prosperity and social stability of East Asian nations are in many ways based on the introduction of Western ideas and institutions, they are also based on their own cultural heritage and social underpinnings. It is natural for these nations to become more confident in their own ways, and more critical of the self-righteous and assertive ways of Western, particularly US, diplomacy and the activities of Western NGOs.

However, as far as the problem involves human rights, we should not end the discussion by saying that it is natural for East Asian nations to be critical of Western, especially US, self-righteousness. Few would deny the importance of the prohibition of torture. Few would tolerate people dying from starvation. Differences in culture or religion, and the principle of non-intervention under

⁹ As to this influence, see, e.g., E. SAID, *Orientalism* (New York, 1979); M. FEATHERSTONE (ed.), *Global culture* (London, 1990); J. NYE, *Bound to lead* (New York, 1990) 188-201; J. TOMLINSON, *Cultural imperialism* (London, 1991).

¹⁰ NYE, *ibid.* at 188.

¹¹ UNDP, *Human Development Report 1999* (Oxford, 1999) 146; UNDP, *Human Development Report 2000* (Oxford, 2000) 172.

¹² HOMU SOGO KENKYUJO, *Hanzai hakusho heisei 11 nen han* [Criminal White Papers] (Tokyo, 1997) 26.

international law are not a licence for the violation of human rights.¹³ Nonetheless, if those critical of such violations and looking from the outside are ignorant of religions, cultures and social customs in the communities concerned, and lack self-criticism of their own behaviour, their criticism may be regarded as arrogant intervention by external powers. Consequently, we must explore ways to overcome these dilemmas.

2.4. The need for an intercivilizational approach to human rights

The foregoing analysis indicates that we should not regard the increased interest in human rights merely as an intellectual fashion arising out of some visible changes, such as the end of the Cold War. Nor should we confine this interest within the controversy over the universality vs. relativity of human rights. We need a more comprehensive and longer-term perspective on human rights.

On one hand, the mechanism of human rights has brought about tremendous benefit to a large number of people by protecting their vital interests in the modern era of sovereign states and capitalism. It will bring about the same profit to an even larger number of people in the process of modernization in developing countries. On the other hand, many of these countries have legitimate reasons for resisting the imposition of human rights from the outside. Conflicts between the spread of human rights and local cultures which are alien to individualism and legalism will pose another problem. Furthermore, the mechanism of human rights is the historical product of a specific time and place, with its own historical qualifications. One of the major counter-arguments raised by some East Asians against Western human rights advocates is that contemporary developed societies, especially the US, are suffering from various social diseases such as crimes, drugs, and the degradation of family and community ethics. They argue that these diseases may well be a consequence of excessive legalism¹⁴ and individual-centrism,¹⁵ which are major components of the idea of human rights.

¹³ As to human rights and the plea of domestic jurisdiction, see L.HENKIN, 'Human rights and domestic jurisdiction', in T. BUERGENTHAL (ed.), *Human rights, international law and the Helsinki Accord* (Washington, 1977) 21-40; A.CASSESE, 'The General Assembly: historical perspective 1945-1989', in P.ALSTON (ed.), *The United Nations and human rights* (Oxford, 1992) 28-29, 32-34, 43-44, 50; ONUMA YASUAKI, *Jinken, kokka, bunmei* [Human rights, states and civilizations] (Tokyo, 1998) 77-138.

¹⁴ Here legalism means a way of thinking whereby members of a society think highly of law and legal enforcement mechanisms for societal values, and their behavior is highly influenced by such ideas as 'law', 'rights', 'justice' and 'juridically enforced realization of values'. See also J. SHKLAR, *Legalism* (Cambridge, Mass. 1964).

The mechanism of human rights has developed hand in hand with the development of individual-centrism and the establishment of legal mechanisms stressing the importance of rights.¹⁶ Until recently, a modernist framework which sees only the positive aspects of this development of modernity has been predominant. The more individualistic a person becomes, the more liberated he or she is from various constraints such as the institution of the family, feudalistic ties, rural communities and religious authorities. The more firmly a legal mechanism is established to protect citizens from the power of states, the more secure their values and interests will become. Although such a naive modernist perception is no longer held by many experts in developed societies, it is still strong among the masses, and even among intellectuals in non-Western societies, because of a persistent image of the 'developed, right-oriented and individualistic West vs. the underdeveloped, non-legalistic and collectivist East'.

Legalization, stressing the importance of rights, and individualization of humans are certainly important and useful in societies where modernization has started only recently. Many developing countries belong to this category. However, no idea or institution is omnipotent. Particularly in societies where modernization has reached a certain stage, negative aspects are also becoming evident. For the last few decades, we have witnessed the emergence of communitarianism and a virtue-oriented philosophy as opposed to the individual-centered and rights-oriented philosophy in the US, where legalism and individual-centrism has been predominant. This phenomenon indicates that reappraisal is needed and has actually begun. We must therefore take a perspective which enables us to evaluate human rights in the long history of humanity, to judge its proper range, and to compare it with other mechanisms pursuing spiritual and material well-being.¹⁷ We may call this perspective an *intercivilizational approach to human rights*. This approach requires us to see human rights not

¹⁵ Here individual-centrism means a way of thinking whereby members of a society regard highly individuals who are independent from their societies and from the nature surrounding them, and tend to deny the dependence of individuals upon other people, collectivities, and nature. In this context modernization, especially the development of sovereign states and a capitalist economy, has liberated humans from various premodern collectivities, social institutions and superstitions. However, by urging individuals to be independent and autonomous although they are not so strong, it has created various problems of alienation in societies. Although 'individualism' sometimes carries connotations described above, it has equivocal meanings. This is why the term 'individual-centrism' is used here.

¹⁶ As to the importance of 'rights', see C.TAYLOR, 'Human rights', in *Philosophical foundations of human rights* (UNESCO, Paris, 1986) 49 et seq. On the other hand, problematic features of 'rights talk' in the US are vividly depicted by M.GLENDON in *Rights talk* (New York, 1991).

¹⁷ As to my view of human rights as a specific formulation of a universal pursuit for the spiritual as well as material well-being, see ONUMA YASUAKI, *In quest of intercivilizational human rights* (The Asia Foundation's Center for Asian Pacific Affairs, Occasional paper No.2, 1996) esp.8-9, 14 n.4, 15 ns.54 and 55.

solely within the context of Westcentric modern civilization, where it originated, but from other civilizational perspectives as well.

It is true that the 'civilization' has problematic features. It is an ambiguous notion with hundreds of definitions.¹⁸ There is also a danger of abusing and overestimating the notion of civilization in dealing with international or global affairs.¹⁹ Thus, it might be better to avoid the term and instead to adopt the term 'culture' as a comprehensive analytical concept, defined as a prevailing way of thinking and behavior in a society. There have been remarkable studies utilizing the notion of 'cross-cultural perspectives' in recent years.²⁰ These studies in many respects share perspectives with the intercivilizational approach.

However, there are problems in using the term 'culture' as a comprehensive analytical concept. First, in the field of human rights, 'culture' has not been used as a comprehensive notion designating a prevailing way of thinking and behavior in general. Rather, it is used as a narrower concept excluding economic, social, civil and political fields. International instruments on human rights have followed this narrower terminology. Thus, it is difficult to avoid confusion if one uses 'culture' as a comprehensive concept. It would be better to use 'civilization' as a comprehensive concept. Second, 'culture' has also hundreds of definitions and has been abused as an ideological notion. Assertions based on a 'national culture' reveal this danger. Third, there are factors which influence the ways of thinking and the behaviour of certain peoples whose existence transcends national boundaries but does not necessarily cover the entire globe. We may be able to call such a sphere of peoples a 'region'. Such a sphere of peoples has not only a geographical dimension but also a historical duration. It may last long with substantial changes in its characteristic features or may disappear as a distinctive sphere of peoples, while the component peoples themselves continue to live as distinct groups. Such a sphere of peoples with geographical and historical dimension can be most appropriately termed a civilization.

The term is most common, although with variations in such words as 'civilization' in English, 'civilisation' in French and 'Zivilisation' in German, whose meanings are not necessarily identical with each other. Religions, lan-

¹⁸ See L.FEBRE et al., *Civilisation: le mot et l'idée* (Paris,1930); A. KROEBER and C. KLUCKHOHN, *Culture: A critical review of concepts and definitions* (Cambridge,Mass.,1952); R.KEESING, 'Theories of culture', *3 Annual Review of Anthropology* (1974) 73-97. As an example of the equivocal nature of the term 'civilization' see S. HUNTINGTON, infra n.19.

¹⁹ SAMUEL HUNTINGTON, in his alarming article 'The clash of civilizations?', *Foreign Affairs* (Aug. 1993) 22-49, apparently made the mistake of overestimating the role of civilizations in international relations. His subsequent book, *The clash of civilizations and the remaking of world order* (New York, 1996) basically retains the characteristic features of the article.

²⁰ See A.AN-NA'IM and F.DENG (eds.), *Human rights in Africa: cross-cultural perspectives* (Washington,D.C.,1990); A.AN-NA'IM (ed.), *Human rights in cross-cultural perspectives: a quest for consensus* (Philadelphia,1992).

guages, ethics and customs that influence the thoughts and behavior of people transcend national boundaries and are shared within the framework of a civilization. It is true that the term 'international' will continue to be the most important concept for the understanding of various phenomena interrelating or transcending nations. However, the notion of 'inter-civilizational' will be both necessary and useful as a concept which can qualify and complement the international perspective of human rights and other global issues.²¹

A 'transnational' perspective also can qualify and complement an 'international' perspective. Both inter-civilizational (or cross-cultural) and transnational perspectives pay attention to transboundary activities of non-state actors such as individuals, non-profit organizations (NPOs), multinational corporations and masses sharing the same religious or other belief-systems. The transnational perspective has tended to assume that various actors and their activities go beyond the national border and assume global influence. However, most such actors with global influence are concentrated in developed countries. Moreover, individuals, NPOs and companies are all characterized as transnational actors in the same category. Thus, global activities of multinational corporations, which are most influential among them, tend to represent 'transnational' activities and perspectives. In this way, transnational perspectives have often strengthened rather than qualified international perspectives of developed societies.

In contrast, the inter-civilizational perspective pays attention to social beings, activities and characteristics with regional dimensions transcending nations, such as Islamic, Christian, and Confucian civilizations. Therefore, it can analyze and explain global phenomena from a more realistic and balanced point of view. For example, if we pay attention to a group of people who share Islam rather than paying attention to 'individuals', NPOs, or companies, which constitute transnational perspectives, we can see more clearly their actual influence in global law and politics. At a normative level, such views and activities based on diverse civilizations could more effectively qualify or counter-balance the predominant 'international' or 'transnational' perspectives, which are often Westcentric perspectives in disguise.

In order to minimize the ideological abuse of the term 'civilization', it should be used as a functional rather than a substantive notion. Accordingly, a nation need not necessarily belong to one civilization in an exclusive manner. Japan combines characteristic features of Westcentric modern, mass-culture-oriented twentieth century American with Confucian and Buddhist civilizations. The US is the center of mass-culture-oriented twentieth century American civilization, but also embodies characteristic features of Christian and Westcentric modern civilizations. The degree of such 'belonging' to diverse civilizations

²¹ See my remarks in 'Promoting training and awareness - The task of education in international law', Proc. ASIL 1981 at 163-67; ONUMA, *op.cit.*n.6 at 20-49.

varies from society to society. It varies even within a particular society according to generations, classes and the like.

The intercivilizational approach is needed not only for human rights but also for other problems related to the three major conflicts described earlier. A special case is China that is likely to become a superpower in the twenty-first century. Except for the last one hundred years China has always regarded itself as the center of the world and had substantial powers to support this egocentric world view. It will be difficult for China, in light of this resurgent Sinocentrism, to swallow the Westcentric (or US-centric) view of the world that we share today. However, the US, another superpower, is also accustomed to regarding itself as the center of the world. For the last fifty years it has been so powerful and prosperous that it believed propagating the American way on a global scale to be both possible and desirable. It will be difficult for the US to give up its egocentric universalist worldview within a short period of time. Hence the danger of direct confrontation between China and the US. To avoid this confrontation, a more pluralistic and longer-term perspective is needed. Sharing an intercivilizational perspective could moderate conflicts between the egocentric universalist perspectives.

3. PROBLEMS RELATING TO THE UNIVERSALITY VS. RELATIVITY OF HUMAN RIGHTS

3.1. The Range of 'Universality' of Human Rights

Human rights have been defined as the rights which a human has simply because he or she is a human (or human person).²² The 'human' in this definition has been required to meet certain qualifications. As suggested in some European languages designating a human (man, *homme*), in Europe the term was for a long time identified with the male, implicitly excluding woman. It was only after 1945 that the very term 'human rights' became predominant instead of 'rights of man'. In the French language, 'droits de l'homme' rather than 'droits humains' is still largely used today. The propertyless classes and

²² This definition has been adopted by many experts of human rights, especially those in liberal democratic countries. See J. DONNELLY, *Universal human rights in theory and practice* (London: Ithaca, 1989) 12, 49, 66; R. HIGGINS, *Problems and Process* (Oxford, 1994) 96, and ASHIBE N., *Kempo gaku* [A theory of constitution] Vol. 2 (Tokyo, 1994) 4. However, there are diverse definitions according to national constitutions, ideologies and other factors. See e.g. A. POLLIS, 'Liberal, socialist, and third world perspectives of human rights', in P. SCHWAB and A. POLLIS (eds.), *Toward a human rights framework* (New York, 1982) 1-26.

'people of color' were also excluded from enjoying human rights, especially political rights.²³

The century and a half following the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen, two of the most famous human rights declarations witnessed the peak of colonization by Western powers. Although in some colonies legal practices improved over time, people under colonial rule were generally denied the rights proclaimed in these Declarations. It was only after the adoption of the Universal Declaration of Human Rights, the successful developments in the field of civil rights for 'people of color' in the US, the worldwide decolonization, as well as the rise of feminist movements, that 'humans' as the alleged bearers of human rights gradually came to lessen the barriers of sex, property, race, religion and other qualifications in a substantial manner.

Despite, or rather because of, these implicit qualifications, human rights were alleged to be based on an abstract humanity. 'Humans' thus implicitly qualified were homogeneous – 'white' men of the propertied classes, mostly Christians – and could be regarded equal within this homogeneity. Although in a pseudo- and self-deceptive manner, 'universality' was thus warranted in the mainstream discourse on human rights. Few dared to question the exclusion of women and 'people of color' from the term 'humans'. Even if some raised the issue, their claim was either ignored or effectively defeated by dominant forces such as men or 'whites'.²⁴

However, since human rights are defined simply as rights based on humanity, it was inevitable that those implicitly excluded from the rights would claim entitlement to these rights as well. It was difficult to deny the legitimacy of this claim, precisely because the rights were defined as 'human' rights. It is true that the male-dominated French National Assembly of 1792 denied the Declaration of the Rights of Women, and that the Westcentric Versailles Conference of 1919 rejected the Japanese proposal for including a racial equality clause in the Covenant of the League of Nations.²⁵ However, these denials were finally rectified. The 1948 Universal Declaration of Human Rights and the two 1966 International Covenants on Human Rights accepted the equality of sex and race in a clear and explicit manner. Contemporary international society is still making various efforts to substantiate the provisions of these instruments.

In this way the history of human rights indicates that the idea of human rights, despite its ideological nature of protecting the interests of a limited group of bearers, constantly sought to overcome, and did gradually overcome, at least to a certain extent, its limitations. Like other ideas characterized as uni-

²³ H. VON SENGER, 'From the limited to the universal concept of human rights', in W. SCHMALE (ed.), *Human rights and cultural diversity* (Golbach, 1993) 52-66.

²⁴ *Ibid.* 53-79.

²⁵ *Ibid.* 54-55, 66-79; ONUMA YASUAKI, 'Harukanaru jinshu byodo no riso' [The unreachable ideal of racial equality], in ONUMA YASUAKI (ed.), *Kokusai ho, kokusai rengo to nihon* [International law, the United Nations and Japan] (Tokyo, 1987) 447-56.

versal, the strength of the idea of human rights lies in this *universalizing* power. Controversies over universality vs. relativity in the 1990s were a consequence as well as a part of this historical dynamism.²⁶ Seen from this longer-term perspective, we should note certain contradictions in these controversies.

3.2. Contradictions in the Universality vs. Relativity Controversies of the 1990s

3.2.1. Reversals in the position of western and non-western nations

The 'universality' of human rights, as suggested by the history described above, was claimed by 'the people of color' who had been alienated from enjoying human rights. Western powers in contrast were inclined to deny the universal nature of human rights by resorting to differences in religion, culture, or social customs. Today, the anti-universalist arguments based on cultural or religious differences are raised by many leaders of Asia and Africa.²⁷ In contrast, it is now the Western powers that assert the universality of human rights. One can thus see a radical reversal of positions on both sides.

Similar changes can be seen in the attitude of states toward the international mechanism for the protection of human rights. Today, the US government loudly voices the high cause of human rights. The US Congress and government, however, were reluctant to establish an effective mechanism for human rights in the UN at its inception. The Congress was extraordinarily cautious of 'interventions' by international organizations in US domestic questions. The US government was concerned that race problems in the US might be taken up in the UN. Other major powers such as the USSR and the UK were equally reluctant to establish an effective mechanism for human rights. It was govern-

²⁶ Marxists have criticized the notion of human rights as nothing more than an ideology masking the domination of the bourgeois class over the proletarian class. Freedom of expression, e.g., existed merely on paper for those without effective means of propagating their opinions. Today, this criticism is less effective in developed countries, many of which distribute a certain portion of economic prosperity to the working class. But it is still valid in most developing countries, where huge gaps between the rich and the poor prevent not only the realization of economic and social rights but also effective guarantees of civil and political rights. For the mechanism of human rights to respond to this criticism, it must overcome the absolute poverty and the huge gaps between the rich and the poor in these countries.

²⁷ See, e.g., the argument employed by LEE KUAN YEW, one of the most eloquent critics of the universal notion of human rights: F.ZAKARIA, 'Culture is destiny - a conversation with Lee Kuan Yew', 73 *Foreign Affairs* (1994) 109-26. See also A.POLLIS and P.SCHWAB, 'Human rights: A western construct with limited applicability', in SCHWAB and POLLIS (eds.), *Human rights: cultural and ideological perspectives* (New York, 1979) 1-18; S. SINHA, 'Human rights: a non-western viewpoint', 67 *Archiv für Rechts-und Sozialphilosophie* (1981) 76-91; B. KAUSIKAN, 'Asia's different standard', 92 *Foreign Policy* (1993) 24-41.

ments of smaller nations such as Panama and Cuba as well as NGOs that were eager to strengthen the mechanism. They contributed to the improvement of the Dumbarton Oaks Proposals, which contained only a poor provision on human rights.²⁸

For three decades after the establishment of the United Nations, the US was reluctant to strengthen the mechanism for the protection of human rights. Although the UN Human Rights Commission received thousands of petitions to deal with concrete violations of human rights, it refused to take up these petitions until as late as the late 1960s. A major reason for this negative attitude was the reluctance of the major powers, especially the US. The latter was also extremely reluctant to ratify the 1966 International Covenants on Human Rights and other human rights treaties. The atmosphere in the US Congress at the time was so strongly against human rights treaties that the EISENHOWER administration promised that it would not ratify them. Only as late as 1992 did the US ratify the ICCPR (as compared with most other developed countries which had ratified during the 1970s), with reservations, understandings and declarations substantially nullifying its effect.²⁹

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination for the first time established a monitoring body: the Committee on the Elimination of Racial Discrimination. The Committee began to deal with concrete cases of human rights violations in terms of racial discrimination. The ECOSOC adopted Resolutions 1235 and 1503 in 1967 and 1970 respectively, enabling the UN Human Rights Commission to deal with specific cases of human rights violations. Developing countries and socialist countries, rather than Western nations, brought about these changes. They sought to strengthen the human rights mechanism, though mainly to attack 'apartheid' South Africa, Palestine-occupying Israel, and PINOCHET's Chile. They became less enthusiastic with or even hostile to such mechanism when it took up human rights violations of their own.³⁰

These examples reveal the highly ideological nature of human rights. Like the notions of humanity, equality, freedom, or democracy, human rights is an attractive term which few can deny. Therefore, governments or politicians have abused it to attack their opponents by labeling them violators of human rights or characterizing themselves as standard-bearers of these rights. However, because it is defined as 'human' rights, not 'bourgeois', 'white', 'male' or

²⁸ See J.BURGERS, 'The road to San Francisco', 14 *Human Rights Quarterly* (1992) 475-77; NISHIZAKI F., 'Sekai jinken sengen to Amerika gaiko' [The Universal Declaration on Human Rights and US diplomacy], in ARUGA T.(ed.), *Amerika goiko to jinken* [Human rights and US foreign policy] (Tokyo, 1992) 37-65, esp. 41-42, 47-48, 54.

²⁹ N.KAUFMAN and D.WHITEMAN, 'Opposition to human rights treaties in the United States Senate', 10 *Human Rights Quarterly* (1988) 309-37; D.FORSYTHE, 'Human rights in US foreign policy', 105 *Political Science Quarterly* (1990) 436-43; T.EVANS, *US hegemony and the Project of Universal Human Rights* (London, 1996) 105-18.

³⁰ P.ALSTON, 'The Commission on Human Rights', in *op.cit.*n.13 at 141-44, 145-81.

'Christian' rights, the notion of human rights can recoil on those who abuse it for political purposes. Therefore, the above examples need not necessarily lead to cynicism about human rights. Rather, they can be, and should be a basis for further universalization. States that once have asserted human rights for whatever reason can be demanded to abide by these rights themselves because of their essential feature of universal applicability. For example, the US government has severely attacked human rights violations by the governments of socialist and developing countries. Although the US government tackled its racial problem mainly for domestic reasons, there was a concern in the US government to respond to the criticism of hypocrisy.³¹ Similar examples can be found in many countries.

3.2.2. *Problematics of the theory of the universal origin of human rights*

It has been frequently asked whether human rights were solely of European origin, or existed in other regions as well. Some intellectuals in developing countries criticize the universalist discourse of human rights by the West, yet claim that human rights have been known in their own civilization, religion or culture since ancient times (one may call this a 'theory of universal origin').³² This view is often shared by intellectuals in developed countries. Why has this question been repeatedly asked and answered in the affirmative? Aside from a passing interest among Western intellectuals as to whether human rights existed in non-Western societies, there are the following factors to bear in mind.

First, one should consider various unfavourable factors surrounding intellectuals or human rights advocates in many non-Western societies. The term 'human rights' invites certain suspicions and antipathies from the government, the military, religious leaders or influential persons in local communities. It is still alien to a majority of the population. Under these circumstances, it is understandable for intellectuals or human rights advocates in those societies to argue: "Look, human rights are not alien. They are already present in the teaching of *our* religion (culture, customs, etc.)". In order to propagate the idea of human rights in non-Western societies, it is thus generally both useful and effective to resort to the theory of universal origin.

Second, many non-Western intellectuals are critical of Westcentrism which has spread an image that anything good in human history originates in the West. The notion of human rights is one of these historical products characterized as good, and therefore must have originated in the West. Some non-

³¹ See SEKIBA C., 'Tiaso seisaku to jinken mondai' [US Diplomacy towards the USSR and human rights], in ARUGA, op.cit.n.28, and NISHIZAKI, *ibid*.

³² See, e.g., M.NAWAZ, 'The concept of human rights in islamic law', 11 *Howard Law Journal* (1965) 325-32; Y.TYAGI, 'Third world response to human rights', 21 *IJIL* (1981) 119-40; Y. KHUSHALANI, 'Human rights in Asia and Africa', in F.SNYDER and S.SATHIRATHAI (eds.), *Third World attitudes toward international law* (Dordrecht, 1987) 321-34.

Western intellectuals have tried to challenge such a false way of thinking. If such good thing as human rights existed in Europe, they argue, it should also have existed in their own culture or religion.³³ There is a psychological background to this argument. The pride of intellectuals in many developing countries is hurt by today's realities surrounding them, such as poverty, dictatorship and corruption. Under such circumstances, it is understandable that some make rather self-contradictory arguments, severely criticizing Westcentric universalist discourse of human rights, yet claiming that human rights – something good – once existed – albeit not fully existing today – in their own cultures or civilizations.

Third, there is an element of guilt-consciousness on the part of certain intellectuals in developed countries. While they are generally critical of human rights violations in developing countries, at least some of them, whether consciously or unconsciously, feel guilty of, or at least concerned, about the wide gap between the affluent North and the poor South, their nations' past colonial rule, and their resource-consuming life styles. They are also sensitive to the criticism of Eurocentrism. For them, it is somewhat difficult to assert that human rights (something good!) existed exclusively in Europe. Nodding to the assertion that human rights existed in Islam, Hinduism, Confucianism, etc. is much easier than refuting it.

Fourth, many intellectuals have been committed to securing acceptance of the idea of human rights on a global scale. They have engaged in a project of common myth-making, establishing a history of universal human rights deriving from various religions, cultures and civilizations, in order to bring universal human rights into being. In this way, both developed countries and developing countries have substantive and psychological factors which give rise to, and sustain, the theory of universal origin. Therefore this theory will not disappear. However, it is difficult to support it theoretically.³⁴ Even in Europe the idea of human rights did not exist in pre-modern days. What existed were specific rights or privileges of persons belonging to specific groups or classes. For example, rights guaranteed in the Magna Carta were not rights of human persons per se. They were the special rights or privileges of specific persons such as peers, feudal lords, and the clergy. Rights characterized as those of indi-

³³ Professor TYAGI claims that it has been asserted that the history of human rights began with the Magna Carta; that the human rights movement was initiated by Western scholars or statesmen; that the civilized nations of the Western world fought two world wars for the reinstatement and protection of human rights; and the like. He argues that "all these assertions reflect a typical Western 'monopoly of wisdom'". *Loc.cit.n.32* at 119. Similar arguments are made by many Third World intellectuals.

³⁴ ONUMA, *loc.cit.n.17* at 7-8, 16 n.52.

viduals abstracted from specific belongings were born only after *corps intermédiares* were dissolved in the formation of sovereign states.³⁵

Every civilization in the past had its own mechanisms to pursue the spiritual and material well-being of people. However, they were not characterized as human rights mechanisms. They protected the interests of people in various ways, although in a very limited manner when seen from today's perspective. With the spread of the sovereign states system and the capitalist economy, however, these mechanisms disappeared, at least on the surface. Instead, we have today human rights mechanisms not only in Europe but in other regions as well, although their effectiveness varies greatly from one society to another.

The mechanism of human rights has proved to be the most effective means for the protection of the vital interests of human persons in the modern period. However, as a human product it is not immune from flaws. It must be replaced or supplemented by some other useful mechanisms when it does not work well or when its flaws become apparent. Thus it is useful to search for the *homeomorphic* or *existential functional* equivalent of human rights³⁶ in various civilizations so that we may adopt their merits. This does not mean asking whether human rights *per se* existed in non-Western civilizations. Such a question is theoretically futile. It is also undesirable for discussions on human rights to center on the dichotomy of 'universality vs relativity' as it creates further antagonism between developed and developing countries. Far more constructive and meaningful is it to seek common standards and frameworks of human rights which are based on today's political, economic and social realities, as well as diverse civilizational underpinnings. These standards and frameworks must be accepted as legitimate by as many people as possible, transcending national boundaries and civilizational backgrounds. The intercivilizational approach seeks such standards and frameworks.

³⁵ During this process the Aristotelian idea of a human person as a *zoon politikoon* was replaced by the idea of an abstract individual. The absorption of the decentralized powers of *corps intermédiares* by the absolutist state, the destruction of rural communities by the progress of capitalist economy, the decline of the authority of Christianity, and the rise of the theory on social contract and natural rights were needed to give birth to the idea of human rights (see the arguments and references in ONUMA, loc.cit.n.17 at 8-9, 16 ns.50 and 54). One could talk of forerunners or similar ideas of human rights in medieval Europe or antiquity, but not of human rights *per se*.

³⁶ R. PANIKKAR, 'Is the notion of human rights a Western concept?', 120 *Diogenes* (1982) 77-8. This article is one of the most important writings on the question of the universal or particular origin of human rights.

4. CRITICAL ANALYSIS OF THE EXISTING ASSESSMENT OF HUMAN RIGHTS PRACTICE

4.1. Analysis of the international assessment of human rights by major human rights NGOs

When governments, international organizations and NGOs are engaged in improving human rights conditions, they should avoid selecting target states arbitrarily. This is important for the following reasons. First, international society has limited resources with which it can improve its human rights conditions. However, international actors have thus far tended to select target states either for political or for haphazard reasons, and have thereby often ignored more serious cases of violations. As to which human rights conditions should be focused, it is necessary to decide on the basis of priorities from the viewpoint of common human rights policies. Second, 'human rights' should not be an excuse for great powers to put pressure on smaller nations. There must be objective and intercivilizational standards for assessing human rights conditions which are valid to all nations. Third, such objective standards are needed in order to overcome resistance from targeted states, which often resort to a criticism of double standards or arbitrariness in human rights diplomacy by the developed countries and international organizations.

Thus far, many experts and some Western governments, international organizations, and human rights NGOs have published information and assessments of human rights conditions in various countries. Influential media institutions have played their part too. In particular, major human rights NGOs have played an important role by regularly providing vivid information on human rights violations. Through these publications people can learn of human rights violations on a global scale. Some of these violations are not reported by the ordinary media and only reach the public through those publications, which have also contributed to putting pressure on oppressive regimes. Further, one could compare and even rate human rights conditions on a country by country basis through some of those publications. These publications are widely regarded as more reliable than government publications because of the independent status of the NGOs concerned and their devotion to the cause of human rights. The NGOs have fulfilled, are fulfilling, and will fulfill an important public function in disseminating crucial information on human rights violations all over the world, giving human rights education and training, providing food and fulfilling other basic needs for the poor and disadvantaged. Their role in monitoring, supplementing, and rectifying the human rights policies of governments and international organizations should be appreciated and encouraged.

However, unlike activities of the governments and international organizations,³⁷ their activities have not been fully scrutinized thus far. This is a serious problem, given their crucial importance and global influence. The objectivity and reliability of their activities must be critically analyzed and evaluated, and their legitimacy must be enhanced.

Let us first reflect on *Amnesty International Report*, probably the most well-known among the NGO human rights reports. The 1999 edition,³⁸ which covers 142 countries, starts with an introduction and a few essays dealing with issues such as campaigns, human rights education, and work with international organizations. It then reports human rights conditions country by country, spending half a page to four pages on each country. The method employed is purely descriptive. The report states explicitly that Amnesty "does not grade countries according to their record on human rights".³⁹ Rather, the purpose of Amnesty is "to prevent some of the gravest violations by governments of people's fundamental human rights", focusing on freeing "prisoners of conscience", ensuring fair and prompt trials, abolishing the death penalty, torture and other cruel treatment of prisoners, and ending extrajudicial executions and 'disappearances'.⁴⁰ Thus, it almost exclusively deals with civil and political rights, and pays little attention to economic, social and cultural rights, although it "considers human rights to be indivisible and interdependent".⁴¹ Little explanation is provided regarding the] method through which Amnesty selects countries, allocates pages and describes each country's human rights conditions. This criticism also holds for the grounds for its judgments which are included in the descriptions. It is difficult for readers to judge the standards and procedures applied in these critical areas. Given the huge influence which Amnesty and its annual report have on a global scale, this lack of transparency and accountability should be rectified.

Human Rights Watch World Report has similar characteristics. The 1996 edition⁴² starts with an introduction, and surveys human rights conditions in some sixty-eight countries and areas, country by country and arranged according to regional groupings, including a brief overview of each region. The Re-

³⁷ The UN Human Rights Commission, its Sub-Commission, as well as committees and courts under human rights conventions have engaged in the assessment of human rights situations when they take up cases of human rights violations within their mandate or jurisdiction. The problems they face in their assessment activities are different in nature. The assessment of human rights situations by national governments has been criticized in various ways (See, e.g., the critical review of the US Department of State's Country Reports on Human Rights Practices by the Lawyers Committee for Human Rights, published annually since 1979).

³⁸ *Amnesty International Report 1999* (Amnesty International Publications, London, 1999).

³⁹ *Amnesty International Report 1996* (Amnesty International Publications, London, 1996), ii.

⁴⁰ *Ibid.* The 1999 version employs the term "civil and political rights" instead of "fundamental human rights".

⁴¹ *Ibid.*

⁴² *Human Rights Watch World Report 1999* (Human Rights Watch, New York etc., 1999).

port ends with brief descriptions of specific issues and campaigns such as the academic freedom and child soldiers issues. Again the method is descriptive, with sporadic value judgments on the human rights conditions presented. Like *Amnesty International Report*, it deals almost exclusively with civil and political rights, showing little concern for economic, social and cultural rights. Nor does it satisfy the requirements for accountability and transparency in its descriptions and judgments.

Freedom in the World by Freedom House (1996 edition)⁴³ is different from the former two Reports in the following respects. First, it evaluates political and civil rights in 191 nations and 57 related territories by grading them from 1 (most free) to 7 (least free), and classifies countries as 'free', 'partly free' and 'not free'. Secondly, it provides information on economic systems, purchasing power parities, life expectancy and, for most of the countries it covers, the population percentage by ethnic groups. Finally, it contains a table of social and economic comparisons, composed of real GDP per capita and life expectancy.⁴⁴ These facts seem to suggest that Freedom House has more interest in economic, social and cultural rights than Amnesty and Human Rights Watch have. In fact, Freedom House published another annual report, *World Survey of Economic Freedom 1995-1996*, in 1997.⁴⁵ It deals with six economic freedoms (to hold property, earn a living, operate a business, invest one's earnings, trade internationally and participate in the market economy), and rates 82 countries on a scale from zero to three.

However, the basic stance of Freedom House has far more serious problems than Amnesty and Human Rights Watch. First, Freedom House not only describes human rights conditions in countries all over the world, but also rates them. Its arbitrariness in rating countries with diverse civilizational backgrounds is most problematic. Second, the economic rights that Freedom House regards important are almost exclusively freedoms to undertake economic activities in a capitalist market economy. They are very different from the economic rights guaranteed in major international human rights instruments such as the ICESCR.

In order to rate countries by human rights standards one must have sophisticated methods which are endorsed from a number of perspectives. First, they must reflect major international human rights instruments including the Universal Declaration of 1948, the ICESCR and the ICCPR in a comprehensive and well-balanced manner. Otherwise they cannot have international legitimacy. Second, they must reflect major religions, cultures and societal norms in a comprehensive and well-balanced manner. Otherwise they cannot claim transnational and intercivilizational legitimacy, which is not necessarily represented

⁴³ Freedom House Survey Team, *Freedom in the world: The annual survey of political rights & civil liberties 1995-1996* (New York, 1996).

⁴⁴ *Ibid.* 530-538, and the first page of each country's review.

⁴⁵ R.MESSICK (ed.), *World Survey of Economic Freedom 1995-1996* (New Brunswick, 1997).

by 'international', i.e. intergovernmental, instruments on human rights. Third, they must satisfy basic requirements of statistical methodology⁴⁶ Otherwise they cannot claim scientific legitimacy. Finally, they must make explicit the substantive bases and procedures which are employed to reach a rating, such as (1) substantive standards of selection and judgment of data; (2) actual data and materials used; (3) information as to who selected and operationalized them, and in what capacity; (4) the procedures adopted to minimize biases and pre-conceptions; and (5) other requirements for transparency and accountability.

When assessed against the above critical requirements, the survey methodology in *Freedom in the World* is far from satisfactory. Although it presents checklists of civil and political rights, it does not elaborate by what specific standards and procedures it classifies countries from most free to least free. It claims that "Freedom House does not have a culture-bound view of democracy"⁴⁷ but does not substantiate that claim. In 1986, GOLDSTEIN criticized Freedom House, saying that "the basis of scores seems to be entirely impressionistic; furthermore, the scales are obscure, confusing, and inconsistent and change from year to year".⁴⁸ Eight years later, basically the same criticism was expressed by GUPTA et al. Referring to *Freedom in the World*, they pointed out that "[n]o specific attempt is made to evaluate the respective weight of one freedom vis-à-vis the other. Rather, apparently intuitive overall judgment is made".⁴⁹ Similar criticism applies to the *World Survey of Economic Freedom 1995-1996*.

Even in the case of factual observations without ratings, such as those by Amnesty International and Human Rights Watch, the requirements of objectivity, international legal foundation and intercivilizational legitimacy must be satisfied. One can hardly escape from one's own subjective judgments in collecting facts, selecting perspectives, weighing them, and in many other respects. The problem becomes even more serious if one rates various countries by judging the degree of freedom in these countries. The most effective ways to minimize subjectivity, preoccupation and arbitrariness in making observations and judgments are: (1) make explicit the bases, materials and procedures used in selecting, observing and assessing the human rights situations (to satisfy the requirement of transparency); (2) invite outside criticism on the methods used and conclusions drawn; and (3) improve both methods and conclusions by including constructive criticism (to satisfy the requirement of discursive legitimacy).

⁴⁶ See R. BARSH, 'Measuring human rights', 15 *Human Rights Quarterly* (1993) 87-121.

⁴⁷ Loc. cit. n.43 at 531.

⁴⁸ R. GOLDSTEIN, 'The limitations of using quantitative data in studying human rights', in T. JABINE & P. CLAUDE (eds.), *Human rights and statistics* (Philadelphia, 1986) 48.

⁴⁹ G. GUPTA et al., 'Creating a composite index for assessing country performance in the field of human rights', 16 *Human Rights Quarterly* (1994) 137.

However, none of the reports of the major human rights NGOs (not only the 1996 edition but other editions as well) meets these requirements. They do not set out the method, procedures and evidence of their observation and judgment in an explicit and elaborate manner. What they do provide are sources of information and the very general policies of the authors. It is almost impossible to judge the objectivity, precision, reliability, validity, legal foundations and intercivilizational legitimacy of the descriptions and assessments of these reports.

These NGOs started their activities in the realm of the protection of civil rights, and gradually expanded their activities. In this process, they have played an indispensable role in mitigating cruelties of human rights violations around the world for years. It should also be admitted that some sources of information must be kept secret to protect the informant from repressive governments or non-governmental violators of human rights. Thus, one may object, this author's criticism is too harsh. However, the predominant image of human rights held by a huge number of people is largely influenced by the activities of these NGOs, which are reported by world-wide media. Moreover, although to a certain extent based on misunderstandings or unfounded preconceptions, some people in developing countries are suspicious and critical of the activities of the NGOs concerned. Such suspicion and antagonism constitutes an obstacle to the dissemination and expansion of human rights to the people in the developing countries. Given these facts, the activities of the NGOs must be constantly scrutinized, their flaws must be rectified, and their intercivilizational legitimacy must be strengthened. Transparency and accountability are not only required of governments and international organizations, but also from influential non-governmental actors. Only by satisfying these requirements can they respond to the criticism of cultural imperialism or biased self-righteousness of the West, often made by Third World countries.

4.2. The World Human Rights Guide and its problems

CHARLES HUMANA's *World Human Rights Guide* has been far less influential than the reports of the major human rights NGOs. However, from a theoretical perspective it is more interesting because it explicitly elaborates the method of assessment. It covers states with a population exceeding one million, and assesses conditions of forty rights in these countries. Its main sources of information are major Western human rights NGOs and Western mass media. It classifies the degree of protection of rights into four categories: (1) unqualified respect, (2) qualified respect with occasional breaches, (3) frequent violations, and (4) constant pattern of violations. In the assessment, it weighs seven sorts of violations of freedoms involving physical suffering. In this way, it assesses human rights conditions in the countries with a rating from 100% to

0%.⁵⁰ HUMANA's index was adopted by the UNDP as a human freedom index in the *Human Development Report 1991*.⁵¹ However, this decision was severely criticized by developing countries, and the index was thus abandoned in the subsequent versions of the Report.⁵²

Although a human development index should incorporate human rights perspectives, the decision to use HUMANA's index was wrong. His index shares a fundamental problem with the major reports described above: failure to embrace internationally recognized human rights in a comprehensive manner. The existing international human rights instruments such as the 1966 International Covenants on Human Rights and the 1993 Vienna Declaration formulate respect for and ensurance of human rights in a comprehensive and interdependent manner. However, HUMANA fails to reflect this formulation. He excessively focuses on civil and political rights, thereby underestimating the significance of economic, social and cultural rights.

HUMANA claims that he adopted "human rights which can be clearly assessed" as his criterion.⁵³ However, he includes few economic, social and cultural rights: only three out of the forty rights come from the ICESCR. He justifies this selection by arguing that "the articles [of the ICESCR] usually refer to vague guarantees such as 'recognizing the right of' or 'taking steps towards' respecting a particular human right".⁵⁴ By citing Article 12(2) of the ICESCR, he says that "[s]ince promises and aspirations cannot be measured, the questionnaire could make only limited use of the articles of the ICESCR".⁵⁵ However, this argument cannot be maintained.

Article 12(2) provides for the right to the enjoyment of the highest attainable standard of health. To achieve the full realization of this right it provides for such steps as the reduction of the stillbirth-rate and of infant mortality; the improvement of environmental and industrial hygiene; the prevention, treatment and control of epidemic and other diseases; and the creation of conditions assuring medical service and medical attention in the event of sickness. One can show the degree of the realization of 'promises' of the states parties to take these steps by objective indices such as the rates of stillbirth, infant mortality, epidemic mortality, the number of medical doctors, nurses and hospitals per unit population, and similar data. These figures can be used either as indices

⁵⁰ C. HUMANA, *World Human Rights Guide*, 3rd ed. (New York/Oxford, 1992) 3-6.

⁵¹ *Human Development Report 1991* (UNDP, New York/Oxford, 1991) 19-21.

⁵² *Human Development Report 1993* (UNDP, New York/Oxford, 1993) 105. See also BARSH, loc.cit.n.46 at 87-90; M.UL HAQ, *Reflections on Human Development* (New York/Oxford, 1995) 67-72.

⁵³ HUMANA, op.cit.n.50 at 3.

⁵⁴ Ibid. 7-8.

⁵⁵ Ibid. 8. In employing this argument, HUMANA ignored earlier studies such as GOLDSTEIN's, which had demonstrated that the area of economic and social rights has far more reliable and operationalizable data than the area of civil and political rights. Cf. GOLDSTEIN, loc.cit.n.48 at 40 et passim).

indicating the improvement or degradation of the human rights condition in a certain country, or as indices of international comparison during a certain period.

This is true for other economic, social and cultural rights as well. For example, HUMANA does not address protection of and assistance to the family (Art. 10 of the ICESCR), the right to an adequate standard of living (Art. 11), nor the right to education (Art. 13). However, the enjoyment of these rights can be assessed more objectively than the rights which he examines. For example, the question of whether and how adequately a state accords to mothers paid leave or leave with adequate social security benefits can at least be assessed indirectly by inquiring into the existence of such institutions, and the amount and period of such payments or security benefits. The same can be said of data on daily caloric intake per person, the literacy rate, and the like. Although expressed in an aggregated manner, these figures can be useful in assessing the right to an adequate standard of living and the right to education.

It is true that there is room to argue whether and to what extent these figures can adequately be used to show the degree of enjoyment of the rights of individuals. Especially, if one requires sophisticated methods and results, it would be difficult to use the economic, social and cultural indices for the assessment of human rights. Most of the existing data are collected and provided by experts and institutions dealing with economics as well as development studies, without reference to human rights experts or institutions. They are expressed in aggregated forms, and therefore cannot be directly used in assessing the enjoyment of human rights by individuals. In utilizing the data, one must avoid 'quantitative fetishism', which is often seen in the case of experts on economic or development theories and practices.⁵⁶

⁵⁶ As to problems and difficulties involved in using socio-economic data for measuring human rights, see GOLDSTEIN, loc.cit.n.48 at 38-54; the Report of the Seminar on appropriate indicators to measure achievements in the progressive realization of economic, social and cultural rights (Geneva, 25-29 January 1993), A/CONF.157/PC/73 (20 April 1993) 9 et passim, esp. 12, 17, 28-30; BARSH, loc.cit.n.46 passim; A.CHAPMAN, 'A "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights', 18 *Human Rights Quarterly* (1996) 29-36, esp.33-36. After pointing out the difficulties in using socio-economic statistical data for measuring economic, social and cultural rights, CHAPMAN proposes a "violation approach" as a more feasible method to be adopted by the UN Committee on Economic, Social and Cultural Rights (ibid. 36-66). Although his efforts should be appreciated, further efforts must be made to search a way of using statistical data for the assessment of the progressive realization of socio-economic rights in a positive, rather than a negative, manner. We should start with a modest assessment based on the combination of qualitative and quantitative methods, avoiding quantitative fetishism, and continue making efforts to improve the method.

The problem of how to objectively assess human rights conditions is not limited to economic, social and cultural rights. It is even worse with civil and political rights.⁵⁷ Yet, the existing literature has engaged in assessing the conditions of civil and political rights. HUMANA's method is seriously flawed in this respect. He assesses human rights conditions by four grades, from unqualified respect to constant violation, with triple weight ascribed to seven items, the violation of which involves physical suffering. However, he fails to provide specific criteria for the assessment of the human rights conditions according to these scales. Without such concrete criteria, arbitrary judgment is unavoidable.⁵⁸ HUMANA's selection of rights with extra weight reveals this arbitrariness. He simply relies on what he "regards as a straightforward exercise of common sense"⁵⁹ in selecting prioritized rights. There might be global agreement on giving extra weight to the rights whose violation involves physical suffering. However, it is highly doubtful whether the entire international community would agree to the seven items which HUMANA actually lists.⁶⁰

Problematic features of HUMANA's Guide are evident. Although it claims to assess 'human rights', it almost exclusively deals with civil and political rights. Its assessment is based on the subjective view of HUMANA himself, and

The most important thing at present is to have a more balanced and the most comprehensive picture of the assessment of human rights which is attainable and which reflects the existing international instruments on human rights. It would be ridiculous to tolerate crude methods in assessing civil and political rights, and to require highly sophisticated methods in assessing economic, social and cultural rights. Rectification of the existing assessments which are based on even less sophisticated methods but ignore the abundance of useful socio-economic data, should be a priority. If the Committee takes a "violation approach", this may invite a confrontational atmosphere even in the field of economic, social and cultural rights. One should remember that the purpose of assessment is not the assessment per se, but to encourage states parties to achieve a better realization of economic, social and cultural rights.

⁵⁷ GOLDSTEIN, loc.cit.n.48 at 40, 41, 43, 44.

⁵⁸ For criticism of HUMANA's arbitrariness, see also BARSH, loc.cit.n.46 at 104-5; GUPTA et al., loc. cit.n.49 at 138-40, esp.140.

⁵⁹ HUMANA, op.cit.n.50 at 6.

⁶⁰ This is particularly the case with the "freedom from capital punishment". The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, is adhered to by only 33 out of around 190 states in the present international society (as of 1 October 1998). The prohibition of the death penalty does not constitute a contemporary norm of general international law. Furthermore, from an inter-civilizational perspective the question how to judge the death penalty is a fundamental one involving one's world view and one's religious, philosophical and ontological beliefs, on which debates will continue for years to come. Whatever HUMANA's personal view may be, the "freedom from capital punishment" cannot be an objective, even less a weighted, criterion to assess contemporary human rights conditions all over the world.

Western NGOs and media institutions.⁶¹ The Westcentric narrowness is evident in the very definition of human rights. HUMANA asks "[H]uman rights--what are they?" and answers: "[H]uman rights are the laws, customs, and practices that have evolved over the centuries to protect ordinary people, minorities, groups, and races *from oppressive rulers and governments*" (emphasis added).⁶² It is true that human rights were established to protect human persons mainly from oppressive rulers and governments. Today, they are still the major violators of human rights. Yet, the human rights now globally recognized are not limited to rights characterized as protection from rulers and governments. They are the totality of economic, social, cultural, civil and political rights, which should be characterized as vital means of realizing human dignity. HUMANA lacks this contemporary international and inter-civilizational perspective, but the flaw is not limited to his work. Although not so apparent, failure to reflect the comprehensive notion of human rights embodied in the current international human rights instruments is common to the annual reports of the major human rights NGOs described above. Lack of concrete criteria for the description and assessment of human rights conditions is also common to all. None have provided sophisticated methods for the assessment of human rights conditions, which should be tested in an empirical and objective manner.

5. CONDITIONS OF INTERCIVILIZATIONAL STANDARDS AND FRAMEWORKS OF HUMAN RIGHTS

5.1. Liberation from Westcentrism

The foregoing analyses reveal the prominence of the Westcentric way of thinking in the contemporary discourse and standards of human rights. Human rights have been claimed, argued, studied, and realized in Western societies for the last two centuries. Compared with this long history, non-Western societies have been late in dealing with human rights. Moreover, not only human rights but most contemporary issues are framed, defined, and influenced by Western intellectuals and media institutions. It is thus natural that the discourse on human rights has been influenced by Westcentric approaches and perspectives.

⁶¹ HUMANA lists major human rights NGOs and mass media institutions as sources of information. This in itself should be appreciated from the perspective of transparency and accountability of the assessment. However, the institutions included in the list are almost exclusively US, British and French (op.cit.n.50 at xx). Although some of them may claim an international character, no one can deny that they are lead and financed by Western activists, capital and supporters. NGOs and media institutions in developing countries, whose population accounts for more than 80% of the world's total, and even those in developed countries other than the US, the UK and France are ignored. Lack of international and inter-civilizational legitimacy is evident. Although to a varying degree, this flaw is more or less common to other publications.

⁶² C. HUMANA, op.cit.n.50 at 4.

Non-Western intellectuals and leaders have also been responsible for the prominence of Westcentric discourse. Although many of them have criticized Western human rights discourse or diplomacy, their purpose is often the rebuttal of external criticism of human rights conditions in their own countries, and in doing so they have often resorted to the principle of non-intervention or domestic jurisdiction. Although understandable from the perspective of their humiliated past as the target of imperialistic interventions, it reveals their political motivation as well. Such politically motivated criticism reinforces, rather than diminishes, the strength of the Western claims. Moreover, despite their criticism of the West's preoccupation and biases, they themselves unconsciously share Westcentric ways of thinking because of their educational backgrounds, their tacit longing for the West, and their Westernized way of life.

When one discusses human rights within the framework of universality versus relativity or particularity, one almost always takes up an 'Asian way', 'Islam', the 'ethics of Confucianism', and the like as specific examples of particularity. One seldom refers to the 'European way' or 'Christianity' as an example of particularity. It is almost always assumed that what is universal is something Western, while particularity refers to something non-Western. This is strange given the simple fact that an overwhelming majority of the world's population is non-Western. This assumption is not limited to Westerners. When non-Western intellectuals criticize human rights diplomacy as Western universalism, defending their cultures under the name of relativism or particularism, their argument shares, and even reinforces the assumption, albeit tacitly and unconsciously. As long as one relies on this assumption, there is little room left to think that something non-Western, whether it be Asian, African, Islamic or Confucian, can be universally valid.

Arguments made by LEE KWAN YEW and others share these problematic features. They are often politically motivated, and unconsciously share the Westcentric dichotomy of 'universality vs particularity'. Yet, the emergence of East Asia as the probable center of the global economy in the twenty-first century, and accompanying controversies over 'Asian ways' or 'Asian human rights' have brought about some positive change. They have made many people realize that more inter-civilizational dialogue is needed, if ever human rights are to be actually globalized. The awareness of the fundamental conflicts underlying controversies over human rights, as described earlier,⁶³ supports this view.

Today, a large number of ideas and institutions originating in Europe are shared or used by peoples all over the world: the Christian calendar, the meridian, the metric system, the English language, the sovereign states system, and others. However, this does not mean that they are inherently universal. Rather they have become globally shared as a result of the worldwide colonial

⁶³ See *supra*, section 2.

rule and hegemony by European powers up to the middle of the twentieth century, and the economic, military, cultural and informational hegemony of the US during the postwar period. Needless to say, not all European ideas and institutions were forced on non-Europeans. Many of them, such as modern science, technology, medicine and industry, as well as the idea of democracy were voluntarily accepted by non-Europeans. The globalization of modern European ideas and institutions took place as a result of the mixture of voluntary acceptance and enforcement by external powers.⁶⁴ The idea and institution of human rights is one of those Western ideas and institutions.

When ideas or institutions are expanded from their place of origin to other regions, their original nature or characteristic features are inevitably transformed in order to be accepted by the inhabitants of the regions to which they have spread. Characteristics of Christianity changed in the process of its universalization. It originated in Palestine, and spread over Europe, Africa, Latin America and other regions. In this process, in order to be accepted by 'pagan' Europeans and others, it changed the original features it possessed when it originated in Palestine. This was also the case with Islam, Buddhism, Confucianism, Marxism and other major belief systems. Human rights are no exception. They originated in Europe for protecting individuals from the abuse of the power of states. However, they have changed themselves and have become more comprehensive, including economic, social and cultural rights as well as collective rights. They have come to protect humans not only from the power of states, but from non-state actors as well (horizontal effect or *Drittwirkung* of human rights).⁶⁵ Assuming that what is universal is always Western would deny the inevitable transformation which any idea or institution undergoes in the process of its universalization.

From the perspective of purists or rigorists, such transformation is often regarded as a regrettable degradation or apostasy. Certain theorists could not tolerate the incorporation of economic, social and cultural rights, or the right of national self-determination into the category of human rights. There have certainly been problems with regard to the expansion of human rights, relating to both 'inflation' and the 'quality' of the notion of human rights.⁶⁶ However, the very fact that large numbers of people in the Third World with diverse cultural or religious backgrounds have sought to formulate their claims or desires in terms of human rights demonstrates how attractive the formulation of human

⁶⁴ See an interesting discussion between EISENSTADT and COOMARASWAMY in S.EISENSTADT, 'Human rights in comparative civilizational perspective', in A.EIDE and B.HAGTVET (eds.), *Human rights in perspective* (Oxford, 1992) 93-112.

⁶⁵ Moreover, some experts and many developing countries have argued for the 'third generation rights' such as the right to development. In 1986, the UNGA adopted the Declaration on the Right to Development.

⁶⁶ See the concern with respect to "the haphazard, almost anarchic manner in which the expansion of human rights is being achieved", in P.ALSTON, 'Conjuring up new human rights', 78 AJIL (1984) 607.

rights is. Therefore, the incorporation of various human rights other than the original civil and political rights in the process of universalization should be viewed as a victory, rather than a degradation, of human rights.

On the other hand, while enjoying various fruits of modern civilization, today's world seriously suffers from a variety of social diseases: social ethics which cannot control the 'progress' of modern weaponry; the hegemonic US that suffers from numerous murders, rapes, narcotic offenses and the breakdown of the family; the prosperous Japan that cannot cure diseases of social alienation symbolized by *ijime* (school bullying); the 'humanitarian' Western European nations with their cases of serious attacks on, and discrimination against, foreign labourers and Muslims; and the energy-consuming life-style of 'developed' nations which, if maintained and followed by developing nations, would bring with it the ruining of the human species through the deterioration of the global environment.

From this perspective, the merits and demerits of modern civilization which are associated with the European expansion all over the world should be seriously questioned. Human rights, being a product of this civilization, cannot be an exception. Their achievements as well as flaws, especially the merits and demerits of the individualistic and legalistic approach, must be scrutinized. The mechanism of human rights is an essential tool for realizing the well-being of humanity under the modern system of sovereign states and capitalist economy. It should be adopted by all nations, irrespective of their civilizational backgrounds. Precisely because of this global significance, Westcentric biases of human rights must be overcome, and their *raison d'être* must be grounded in an intercivilizational perspective.

5.2. Liberation from liberty-centrism

One of the most serious flaws in the human rights discourse is the equation of civil and political rights with human rights in general. This is not limited to a view that 'real' or 'authentic' human rights are civil and political rights.⁶⁷ The greatest part of the human rights discourse has been founded on this implicit equation. Economic, social and cultural rights have been referred to only in passing, or as a supplement. This way of thinking can be referred to as civil and political rights-centrism, or liberty-centrism. In fact, because of the prominence of the liberal paradigm in human rights discourse, human rights have

⁶⁷ M. CRANSTON, *What are human rights* (New York, 1964); M. BOSSUYT, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels', 8 *Revue des droits de l'homme* (1975) 783-820; E. VIERDAG, 'The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights', 9 *Netherlands Yearbook of International Law* (1978) 69-105. See also R. NOZICK, *Anarchy, state, and utopia* (New York, 1974) 167-74.

often been equated with civil rights, rather than civil and political rights. The often adopted terminology 'human rights and democracy' demonstrates this tendency. In this expression, human rights represents civil rights, while political rights are expressed by 'democracy' rather than human rights.⁶⁸ This tendency is especially strong in the US, which has been reluctant to accept economic, social and cultural rights as human rights.⁶⁹

In Western societies, the spread and incorporation of human rights in positive laws went hand in hand with the secularization and liberalization of society.⁷⁰ In this process, freedom from the arbitrary power of the state was regarded as most important. Violations of human rights by non-state actors such as private firms or terrorist groups were at first not considered part of the ordinary discourse on human rights. Even when they were considered as an issue of human rights, they were regarded at most as secondary problems. They were characterized merely as a question of the indirect or third party applicability (*Drittwirkung*) of the constitutional guarantee of human rights. Distrust in the central government and optimism in the private sector has been particularly strong in the US.

According to the classical theory, formulated against this historical background, human rights are classified into two groups: civil and political rights, which are freedoms 'from' the state, and economic, social and cultural rights, which are rights 'to' the state. Whereas the former requires states merely to refrain from the arbitrary use of power, the latter requires them to take positive measures. Thus, while the former can be called legal rights, it is difficult to characterize the latter as rights *sensu stricto*. Rather, they are political programs. This view⁷¹ has been predominant both in the domestic and international discourse on human rights. An overwhelming number of publications on human rights have, either explicitly or implicitly, shared this view. The dichotomy is still strongly maintained among many experts and an even larger number of non-experts.

At the same time, even after the adoption of the major declarations on human rights such as the US Declaration of Independence and the French Declaration of the Rights of Man and of Citizens, the Western powers treated human rights in an extremely uneven manner. During the period from the eighteenth

⁶⁸ See an interesting observation by J.HABERMAS, 'Human rights and popular sovereignty', 7 *Ratio Juris* (1994) 1-13.

⁶⁹ For a critical analysis, see P.ALSTON, 'US ratification of the Covenant on Economic, Social and Cultural Rights', 84 *AJIL* (1990) 365-93. Some US experts as well as many non-US experts on human rights share this critical perspective.

⁷⁰ It is true that some developed societies are witnessing the resurgence of religion. This is mainly due to the fact that many people in modernized societies cannot play a role as expected in according to the image of 'autonomous individuals' independent from families, communities or other collectivities. They want something on which they can be dependent. Thus, the resurgence of religion in developed societies reveals problematic features of modern individual-centrism, which will be discussed later.

⁷¹ See references in n.67.

through the early twentieth century, in which they introduced human rights provisions in their constitutions, they simultaneously exploited wealth, domestically from villages and the working classes and internationally from the peoples in their colonies or from 'uncivilized' nations. Neither Western governments nor Western people in those days regarded the question of human rights as a top priority issue. Only when they became rich enough did they begin to regard human rights as an important issue, gradually making political slogans out of them. When blacks were lynched in the Southern US, and the British labour classes were suffering from the desperate working conditions described by ENGELS, there was neither Amnesty International nor Human Rights Watch to criticize these human rights violations.

However, the emergence of ex-colonies in international society and the post-war developments in human rights theory and practice mainly in Western (particularly Northern) European countries brought about, and are still bringing about, certain changes both domestically and internationally. First, the primacy of civil and political rights has been challenged by many developing countries and an increasing number of experts both in developed and developing countries. Until the first half of the twentieth century, most non-Western nations were either under colonial rule, or suffered from unequal treaties concluded with – actually, imposed by – Western powers and Japan. When they became independent, or liberated themselves from the unequal treaties, the first thing they had to do was to liberate their nations from poverty – the same as the Western powers and Japan had done in the early stage of their modernization. As was the case with the Western powers and Japan, it is difficult for the governments and the peoples at this stage of their development to regard civil and political rights as a matter of first priority. If they are interested in human rights, it is economic rights, especially the right to subsistence,⁷² that have a direct bearing on the day-to-day life of people. Many governments and intellectuals in developing countries have sought to formulate the right to development and to establish it as an internationally recognized right. Although many experts and human rights advocates are critical of a 'development first' thesis, an increasing number of experts are coming to understand the significance of economic rights for the poor, and becoming critical of excessive emphasis on civil and political rights.⁷³

⁷² See, e.g., the claim by the Chinese government in 'Human rights in China', 34 *Beijing Review* (November 4-10, 1991) 9.

⁷³ H. SHUE, *Basic rights* (Princeton, N.J., 1980) is an epoch-making study. See also R. VINCENT, *Human rights and international relations* (Cambridge, 1986); U. BAXI (ed.), *The right to be human* (New Delhi, 1987); P. MEYER-BISCH, *Le corps des droits de l'homme* (Fribourg, 1992); C. MUZAFFAR, *Human rights and the New World Order* (Penang, 1993) and studies dealing with economic, social and cultural rights, most of which are critical of liberty-centrism.

Second, recent studies by experts and practices of monitoring bodies under human rights conventions have demonstrated the relative differences between, and interdependence of, civil and political rights, and economic, social and cultural rights in various ways.⁷⁴ For states to effectively guarantee civil and political rights, a sufficient infrastructure in terms of organizations, financial resources, ethos of public devotion, as well as education and training of human resources are needed. It is only after this infrastructure is established that one can reasonably expect the protection of civil and political rights by mere restraint of state powers. For example, the realization of freedom from arbitrary arrest, torture and inhuman treatment requires states to take positive action such as giving human rights education and training to policemen, jail officers, military officers and soldiers, as well as cultivating competent lawyers. Merely restraining from the arbitrary use of power by the state is not enough.⁷⁵ The Human Rights Committee has requested the states parties to the ICCPR not only to refrain from the abuse of state power, but also to take positive measures, including affirmative action programs, to fulfill the obligation to ensure all individuals within their territory and under their jurisdiction the rights recognized in the Covenant. For example, in its General Comment No. 6 (16), the Committee said that "[t]he expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures".⁷⁶ Similar comments have been made with regard to the prohibition of torture and cruel, inhuman or degrading treatment or punishment, and other freedoms.⁷⁷

Other monitoring bodies under various human rights conventions have shown attitudes similar to that of the Human Rights Committee. For example, the European Court of Human Rights has made it clear that civil and political rights cannot be protected merely by self-restraint of state power and that their effective protection requires positive measures by the government. In its judgment in the *Marckx* case (1979), the Court reaffirmed its earlier position that the object of Article 8 of the European Convention for the Protection of Human Rights, which provides for the right to respect for [a person's] family life, is 'essentially' to protect the individual against arbitrary interference by the public authorities. However, it added that "[i]l ne se contente pourtant pas d'astreindre

⁷⁴ G.VAN HOOF, 'The legal nature of economic, social and cultural rights', in P.ALSTON and K.TOMASEVSKI (eds.), *The right to food* (Dordrecht, 1985) 97-110; M.CRAVEN, *The International Covenant on Economic, Social and Cultural Rights* (Oxford, 1995) 9-16; SHIN H., *Jinken juyaku jo no kokka no gimu* [Obligations of states under Human Rights Conventions] (Ph.D.dissertation, University of Tokyo, Faculty of Law, 1995) 11-69 et passim; M.SCHEININ, 'Economic and social rights as legal rights', in A.EIDE et al. (eds.), *Economic, Social and Cultural Rights* (Dordrecht, 1995) 41-62.

⁷⁵ For a detailed study, see SHIN, op.cit.n.74 at 29-30, 173-81, 182-83.

⁷⁶ General Comment No.6 (16) para.5 (CCPR/C/21/Rev.1, 5).

⁷⁷ General Comment No.7 (16) para.1 (CCPR/C/21/Rev.1, 6). See also General Comment No.20 (44) para.1 (CCPR/C/21/Rev.1/Add.3). See, further, SHIN, op.cit.n.74 at 71-80, 161-200, 204-8, 237-65.

l'Etat à s'abstenir de pareilles ingérences: à cet engagement plutôt négatif peuvent s'ajouter des obligations positives inhérentes à un respect effectif de la vie familiale".⁷⁸ A similar view has been repeatedly reaffirmed by subsequent judgments such as those in the *Airey* case of 1979⁷⁹ and in the case of *Johnston and Others* of 1986.⁸⁰

Third, recent constitutional practices and theories in many developed countries have demonstrated the increasing importance accorded to economic, social and cultural rights. These rights were once characterized as merely political programs or abstract rights, lacking in judicial enforceability. The classic views of CRANSTON, BOSSUYT and VIERDAG, all elaborated before and in the 1970s, reflected this state of the law. However, in order to respond to the criticism that civil and political rights exist merely on paper for those without sufficient means of living, most developed countries have taken positive measures such as land reforms, social policies, protection of labor unions and progressive income taxes, thereby realizing economic and social rights. With the development of social welfare programs during the post-war period, constitutional theories and practices have gradually accorded a certain degree of judicial enforceability to certain economic and social rights. For example, the right to an adequate standard of living requires freedom from state violation of the subsistence of the individual before a guaranteed right to positive state measures. At least to the extent of the obligation of state abstention the right can be judicially enforced.⁸¹ Similar arguments have been raised for many other economic, social and cultural rights.⁸²

This development can be seen at an international level as well. Monitoring bodies under the ICESCR, the European Social Charter, the American Convention on Human Rights and other human rights conventions, as well as the ILO have demonstrated that most economic, social and cultural rights have the above two aspects.⁸³ In particular, the 1986 Limburg Principles on the Imple-

⁷⁸ European Court of Human Rights, *Marcks* case, judgment of 13 June 1979, Ser.A No.31(1979) para.31.

⁷⁹ *Id.*, *Airey* case, judgment of 9 Oct. 1979, Ser.A No.32(1979) paras.24-26.

⁸⁰ *Id.*, case of *Johnston & Others*, judgment of 18 December 1986, Ser.A No.112 (1986) para.74.

⁸¹ A.EIDE, 'Economic, social and cultural rights as human rights', in EIDE et al. (eds.), op.cit.n.74 at 73, 37; *id.*, 'The right to an adequate standard of living including the right to food', in *ibid.* at 101-2. This view is gradually becoming shared by an increasing number of international and constitutional lawyers in many countries. Practices of domestic courts as well as international monitoring bodies of human rights show a similar tendency.

⁸² SHIN, op.cit.n.74 at 38-45.

⁸³ J.DHOMMEAUX, 'La contribution du comité des droits économiques, sociaux et culturels des nations unies à la protection des droits économiques, sociaux et culturels', 40 *Annuaire français de droit international* (1994) 637-38; SHIN, op.cit.n.74 at 17, 38-45, 88-89, 343-98; SCHEININ, loc.cit.n.74 at 53-62; M.CRAVEN, *The International Covenant on Economic, Social and Cultural Rights* (Oxford, 1995) 28-29, 110-13, 181 et passim.

mentation of the ICESCR, which provides in its paragraph 25 that "[s]tate parties are obliged, regardless of level of economic development, to ensure respect for minimum subsistence rights for all"⁸⁴ has had a great influence on the theory and practice on economic, social and cultural rights. Today, one can no longer say: whereas civil and political rights are judicially enforceable, economic, social and cultural rights are not. Such categorical classification is too simplistic to describe the present status of enforceability of human rights.

Fourth, it is now widely recognized that violations by non-state actors such as terrorist groups, anti-governmental military groups and private companies are no less serious than those by state organs.⁸⁵ Another serious problem which is now characterized as an important issue of human rights is the collective or structural deprivation of human dignity by means of the patron-clientele relationship in rural communities, discriminatory social customs and other similar social institutions and practices. Seen from these perspectives, it does not matter whether human rights are violated by state organs or by non-state actors. What is important is the obligation of states to ensure that all human persons under their jurisdiction can enjoy subsistence with human dignity. The Human Rights Committee has repeatedly demonstrated that states parties must take positive measures so that human rights can be protected not only against the power of the government, but also against the power of non-state actors.⁸⁶ The European Court, which had already tended to show this view in its judgments such as in the *Marckx* and *Airey* cases as described earlier,⁸⁷ clearly recognized in its judgment in the *Young, James and Webster* case of 1981 that states must take positive measures to protect human rights in the private sphere.⁸⁸

Fifth, doubt has been raised as to whether judicial enforcement is the most effective way to realize human rights. According to the predominant view, the judiciary is the final guarantor of human rights. Thus, whether a right in question is judicially enforceable should be the criterion for rights. However, whether the judiciary is actually the most effective organ to protect human rights depends on various conditions: whether the independence of the judiciary is guaranteed in law and in fact; whether the prevailing culture of a society allows ordinary people to appeal to a court for vindicating their rights; whether a member of a society can reasonably expect to retain a lawyer. Evidently, many of these conditions do not exist in most of the developing countries, which constitute 80% of the world population. Like many other 'general' or 'universal'

⁸⁴ E/CN.4/1987/17 (8 Jan.1987) 3.

⁸⁵ Major human rights NGOs once dealt only with violations of human rights by state authorities, and were reluctant to tackle those perpetrated by non-state actors. Gradually they have come to recognize that the latter are as serious as the former. Today, the activities of several NGOs cover human rights violations by non-state actors as well.

⁸⁶ See SHIN, *op.cit.* n.74 at 161 et passim.

⁸⁷ *Loc.cit.* Nos.78-79.

⁸⁸ In the case of *Young, James and Webster*, judgment of 13 Aug.1981, Ser.A No.44 (1981) para. 49.

ideas, theories and propositions, the idea of the judiciary as the final guarantor of human rights presupposes the conditions which exist in Western societies. When tested against non-Western societies, its validity becomes highly questionable.

It is certainly true that in some cases and/or societies, judicial enforcement can be most effective. However, there are also many cases and/or societies in which a government social policy, human rights education and publicity, supervision by domestic as well as international media and monitoring bodies, or the combination of these factors can be more effective. EIDE argues that the theoretical legalist debate on whether economic and social rights are justiciable largely misses the point because what is significant is the effective protection of the rights in question, be it through courts or through other mechanisms.⁸⁹ This perspective is of critical importance whenever we deal with human rights, not only in developed societies but in any society at this globe.⁹⁰ This perspective enables us to free ourselves from placing excessive expectations on the judiciary, and promotes more balanced discussions on the multi-faceted mechanism of realizing human rights, including the role of national governments, domestic and international human rights committees, NGOs and the media institutions.

Finally, the interdependence and indivisibility of human rights has been repeatedly reaffirmed in international human rights instruments. Until the 1970s this notion was mainly advanced by socialist and developing countries which emphasized economic and social rights or, more correctly, economic development of the nation, against the predominant civil and political rights-centrism of the Western, developed, countries. The Proclamation of Teheran of 1968 declared that "[s]ince human rights ... are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development".⁹¹ The 1977 UN General Assembly Resolution *"Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms"* provided that "[t]he realization of the new international economic order is an essential element for the effective promotion of

⁸⁹ A.EIDE, 'Future protection of economic and social rights in Europe', A.BLOED et al.(eds.), *Monitoring Human Rights in Europe* (Dordrecht, 1993) 214. See also P.MYER-BISCH, op.cit.n.73, at 165-166, 170; HIGGINS, op.cit.n.22 at 100-102 and SHIN, op.cit.n.74 at 10-15.

⁹⁰ It is true that in quite a few non-Western societies the judiciary plays an important role for the protection of human rights. India is one example. Indian judicial activism, especially its famous social action litigation, is based on modification of the predominant (=Western) theory of subjects of rights, the requirements of standing, justiciability and the like. This modification has been pursued from a perspective of the most effective way of protecting human rights in general, and thus can ease the rigid requirements on standing, etc.

⁹¹ The Proclamation of Teheran of 13 May 1968 para.13, in *Human Rights: A Compilation of International Instruments* (UN, New York, 1988) 45; also in 63 AJIL (1969) 674.

human rights and fundamental freedoms and should be accorded priority".⁹² In these contexts, indivisibility and interdependence of human rights played an ideological role justifying the evasion of the effective protection of civil and political rights by socialist and developing countries.

Since the 1980s, however, the same notion came to mean literally the *interdependence* of human rights. In 1981, SEN argued that states must protect civil rights such as freedom of expression in order to realize the right to subsistence which developing countries regarded as most important. He demonstrated that the effective protection of freedom of the press and the free flow of information is of critical importance to prevent massive famines by citing examples in India, China and other countries.⁹³ A number of experts and NGOs in developed countries have made similar arguments. For example, in 1992 Human Rights Watch, quoting the Chinese government's claim that the right to subsistence was most important,⁹⁴ made an argument based on SEN's research.⁹⁵ In this way, the interdependence of human rights has been claimed not only by governments and experts in developing countries but also by those in developed countries.

In 1993, the Vienna Declaration and Programme of Action provided that "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".⁹⁶ This formulation, which exemplifies the comprehensive notion of human rights, is of critical importance in that it is based on a consensus among nations with diverse civilizational, i.e. political, economic, social, religious and cultural, backgrounds. Naturally, in what sense we could talk of the indivisibility of human rights is a difficult question to answer. Given the limited resources on earth and the inevitable conflicts between human rights themselves, we cannot escape from prioritizing rights. However, there exists a widely shared consensus in the international community to the effect that one should avoid a one-sided emphasis on either civil or economic rights, and instead seek to realize the totality of rights in a balanced manner, paying due attention to the mutually supporting function of both categories of rights.

Together with these developments, classifications which seek to replace the traditional dichotomy between civil and political rights on one hand, and economic, social and cultural rights on the other, have been proposed by a number of experts. For example, according to VAN HOOFF and EIDE, obligations of states can be classified into four groups: obligations to respect, to protect, to

⁹² A/RES/32/120 (16 Dec.1977), UNGAOR 32th Sess., Suppl.No.45 (A/32/45) 151.

⁹³ A.SEN, *Poverty and famines* (New York,1981); A.SEN and J.DREZE (eds.), *Famine prevention* (Oxford, 1990).

⁹⁴ Information Office of the State Council, 'Human Rights in China', 34 *Beijing Review* (1991) No.44:9.

⁹⁵ *Indivisible Human Rights* (Human Rights Watch, New York, 1992).

⁹⁶ Vienna Declaration and Programme of Action, 25 June 1993, para.5 (A/CONF.157/23)

ensure, and to promote.⁹⁷ This classification enables a more elaborate analysis of human rights with regard to the relations between their objectives and their realization. Accordingly, it has been adhered to by an increasing number of experts.⁹⁸ In this way, the relative, rather than absolute, difference between civil and political rights on one hand, and economic and social rights on the other, has gradually become recognized in recent years. The classification which categorically distinguishes the two groups of human rights is a historical one corresponding to an early stage of development in Western nations. It is not a universal and suprahistorical classification applicable everywhere and at all times. This view is steadily spreading among experts on human rights.⁹⁹ One of the most important tasks today is to disseminate this comprehensive notion of human rights, and to strengthen the various means for their effective realization which are suitable for the people and the society in which the rights in question are to be realized.

5.3. Liberation from individual-centrism

In the theory and practice of human rights, the term 'human' has been assumed, imaged and understood according to the modern Western notion of the human being or human person. Other notions and images have, consciously or unconsciously, been excluded. As described earlier, this notion of a human is implicitly based on the image of a white, male and bourgeois Christian. Together with this qualification, the notion of a human has been equated with that of an individual. This equation is in fact a novelty, even in Western civilization. For a long time in pre-modern Europe, a human being was a member of a family, a village, a church, a guild or another group. It was difficult for pre-modern Europeans to think of an 'autonomous individual' independent from these social institutions. A human came to be characterized as an individual only when the sovereign state and market economy had dissolved various *corps intermédiaires*. Humans, both constrained and protected by these groups, now came to be dissociated from them and confronted the newly born Leviathan (the sovereign state) and market economy as naked individuals. The process which produced these individuals involved various forms of violence. Absolutist states fought against intermediate powers. Capitalist economy destroyed the tradi-

⁹⁷ VAN HOOF, loc.cit.n.74 at 106-8. This classification is basically based on A.EIDE, 'Study on the right to adequate food as a human right' (E/CN.4/Sub.2/1983/25).

⁹⁸ See CRAVEN, op.cit.n.74 at 109-14; SHIN, op.cit.n.74 at 32-45.

⁹⁹ See J.DONNELLY, 'Post-cold war reflections on the study of international human rights', 8 *Journal of Ethics and International Affairs* (1994) 104-10; SHIN, op.cit.n.74 at 3 et passim; ASHIBE, op.cit.n.22 at 83-4.

tional autonomous village economy. Religious powers fought against each other, as well as against secular powers.¹⁰⁰

The modernity based upon the 'autonomous individuals', established after such sacrifices, brought forth various benefits to a large number of people: liberation from religious powers, from institutions based on social standings, and from feudalistic rule of villages or guilds, and liberation of women from stringent social institutions and family constraints. On the other hand, people came to have a strong sense of belonging to a nation state, which gradually dissolved these intermediate bodies. A modern person ceased to die for his/her clan, religious or feudalistic community, but came to die willingly for his/her nation state. For most cases, an 'individual' has never existed as an abstract individual. He or she has existed, and still exists, as an individual member of a nation state.

Thus, the liberation of a human from his/her intermediate body is at the same time absorption of a human into a nation state. The establishment of the 'individual' means a transformation from a world where people identified themselves as Christians, as bourgeois and were recognized as such, to a world where people identify themselves as French and are recognized as such. A modern person can enjoy his/her life in a meaningful manner and can fully realize his/her potentiality as a member of a nation state. This is evident if one sees how modernity has alienated those who have legally or actually been denied membership of a nation state, such as stateless persons and refugees.

Membership of a nation state is, in theory, based on the self-determination of autonomous individuals. Thus, humans have come to be independent from all restrictive collectivities, including nation states, at least in theory, and in actuality from most intermediate bodies. Human rights were both a consequence and a means of bringing about such liberation. To this extent, one should see a legitimate reason for equating humans with individuals. One should also be cautious of arguments which emphasize the importance of collective rights in non-Western societies, because such arguments have often been made to rationalize violations of the rights of individuals by authoritarian governments.

However, the predominant view has thus far tended to ignore the history of 'individuals' described above, and to emphasize the essential or suprahistorical difference between the individualist West and the collectivist East. Although one cannot deny certain cultural differences between the individualist West and

¹⁰⁰ ONUMA, loc.cit.n.17 at 9. For a detailed study, see TAKAYANAGI S., 'Kindai kokka ni okeru kihonteki jinken' [Human rights in modern states], in *Kihonteki Jinken no Kenkyu* [Studies on human rights] Vol.1 (Tokyo Daigaku Shakai Kagaku Kenkyujo, Tokyo, 1968) 13-76; ONUMA YASUAKI., Chapter 3 on 'War', in id.(ed.), *A Normative Approach to War* (Oxford, 1993) at 98-121; id., Chapter 11 on 'Conclusion: Law dancing on the accompaniment of love and calculation', *ibid.* at 334-338, and literature cited therein, esp. O.BRUNNER, *Neue Wege der Verfassungs- und Sozialgeschichte* (Göttingen, 1968, trans. by ISHII S. et al., Tokyo, 1974) and P. GOUBERT, *L'Ancien régime*, Vol. 2 (Paris, 1973).

the collectivist East, it would be wrong to explain the emphasis on collective rights by Afro-Asian intellectuals solely from [a] cultural perspective.¹⁰¹ Even the sketchy history of Europe with regard to individuals described above reveals that the image of the individualistic West is too simplistic and one-sided. Emphasis on collectivity by some non-Western leaders and intellectuals often represents a reaction to an excessive emphasis on individuality by some proponents of human rights who have equated individuals with humans in general.

The prevailing individual-centric view has also given the impression that 'autonomous individuals' can exist independent of nation states. Proponents of this view have not responded convincingly to the legitimate concern that excessive individual-centrism in Western societies is a major cause of the social diseases of these societies such as high crime rates and the degradation of family units and social ethics. Given the fact that this concern is widely shared even in Western societies, it is only natural that the sole emphasis on the importance of the individual cannot be persuasive. The simplistic equation of humans with individuals has worked against dealing with the suppression and cruel treatment of various categories of people within the framework of human rights. People under colonial rule, various kinds of minorities, and the collective or structural deprivation of human dignity of women, the poor, the peasants and other discriminated people have been neglected for a long time. One of the reasons why developing countries have emphasized the importance of collective rights, including the right of self-determination, is their sense of alienation in the earlier discourse on human rights. Had the notion of human rights not taken up the issue of collective deprivation of the rights of those under colonial rule, it would have been of little value to them.

A variety of factors are responsible for restricting humans to a framework of individuals for the purposes of the human rights discourse. As described earlier, the human rights mechanism was established in the process of dissolution of intermediate bodies. It was believed that the more 'liberated' from families, communities and firms, the more effectively one's human rights would be realized. The memory of the abuse of the international protection of minorities by Nazi Germany was another reason for excessive individual-centrism in human rights during the postwar period. Furthermore, the stubborn attitude of developing countries which asserted the importance of collective rights without providing theoretically solid arguments may be responsible for the consolidation of individual-centrism among Western intellectuals. It is, however, the obsession of equating humans with individuals that was, and still is, a major reason why such important issues have been barred from the mainstream treatment of human rights.

It was only after the late 1960s that international society began to pay some attention to the collective and structural deprivation of human rights. The Tehe-

¹⁰¹ ONUMA, *loc.cit.*n.17 at 1-3, 8-9.

ran Proclamation of 1968 was symbolic. Also significant in this respect was the UN General Assembly Resolution of 16 December 1977 "Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms".¹⁰² Although these resolutions were characterized by one-sided assertions of the developing countries in the late 1960s and 1970s, it cannot be denied that they shed light on the structural aspect of human rights, which had been ignored by the equation of a human with an individual. Further, since the 1970s the worldwide feminist movement and the movement to protect the rights of indigenous peoples have been conspicuous. The 1979 Convention on the Elimination of All Forms of Discrimination against Women was symbolic. However, the equation of humans with individuals is still deeply rooted in human rights discourse today.

As suggested earlier, there has been a tendency to regard individuals independent from families, local communities, various social institutions, and other collectivities, and to treat this separation as progressive and desirable *per se*. One of the serious consequences of this excessive individual-centrism is the isolation and alienation of humans now evident in many developed societies. Criticism of the notion of the unencumbered self by C. TAYLOR, A. MACINTYRE, R. BELLAH, M. GLENDON and M. SANDEL in North America is well-known. In France, another nation which has long cherished the notion of independent and autonomous individuals, the identification of humans with individuals or the emphasis upon the notion of the Cartesian self has been criticized from various perspectives.¹⁰³ A call for the reconstruction of families and communities, as well as a resurgence of various kinds of religions, raise a serious question as to whether humans are strong enough to be so independent as individual-centrists claim them to be.

So long as humans are considered solely as individuals in the theory of human rights, it is difficult to deal with these questions. Moreover, movements which have achieved some success in the history of human rights are those which unite people by some particular ties: ethnicity, gender, religion, language or class. In other words, humans can effectively formulate and express their aspirations for spiritual and material well-being when they have a strong sense of belonging to some collectivity. Even in the realization of human rights, which has been understood in individualist terms, their actual aspirations and movements have taken a collective or group form. This fact must be appreciated and fully developed in the theory of human rights.

¹⁰² Loc.cit.n.92.

¹⁰³ See, e.g., B.BARRET-KRIEGEL, *Les droits de l'homme et le droit naturel* (Paris, 1989); M.ROULAND, 'Fondements anthropologiques des droits de l'homme' (Institut International des Droits de L'Homme, vingt-quatrième session d'enseignement, Strasbourg, 2 Juillet-30 Juillet 1993), *Recueil des Cours* (Strasbourg, 1993).

6. A SEARCH FOR INTERCIVILIZATIONAL HUMAN RIGHTS

6.1. Universalization of human rights as seen from a historical perspective

Intercivilizational criticism of the Westcentric view of human rights does not mean endorsing the arguments of some political leaders in developing countries. Most developing countries are now in the midst of modernization. Once they had various mechanisms which, albeit insufficiently from today's perspective, could check the arbitrary use of power by rulers, such as institutionalized community member meetings and authoritative advice from elderly wise men. Modernization has substantively undermined these mechanisms, in the same way as it dissolved intermediate bodies which, to a certain extent, had checked the power of rulers in pre-modern Europe. Today, political leaders in developing countries monopolize the means of violence and can exercise it with no restraint either from pre-modern mechanisms, which have been undermined, or from modern ones, which have not yet been sufficiently established. Opposition leaders of diverse ethnic groups, clans, and linguistic or religious groups are struggling in pursuit of this almost unrestrained power. What follows are civil wars, terrorist activities and other forms of violence, with thousands of civilian casualties. This is what we have witnessed and are still witnessing in many developing countries.

The mechanism of human rights is the counterpart of the institution of modern sovereign states. It has proven to be the most effective means to protect the vital values of humans within the modern system of sovereign nation states and the capitalist economy.¹⁰⁴ To accept the mechanism of a sovereign state, a product of modernity, and to reject that of human rights, a counter-product, is an arbitrary and convenient selection of modernity, merely pleasing power elites. If developing countries adopt the institution of sovereign states, they must also accept the mechanism of human rights. Nor can they reject human rights simply because their cultures, religions, traditions, ethics or social customs are different from those of the West. Religions and cultures in a nation change over time. Even if a nation maintains a certain religion or social ethics for a long period of time, their interpretation changes. Many cultures in non-Western societies have already changed their character in the process of adopting modern Western ideas and institutions, such as sovereign statehood, a market economy, and an 'American way of life'. Some changes are desirable and others are not. Most are nonetheless unavoidable. Furthermore, human rights which are stipulated in major international instruments such as the ICESCR, the ICCPR and the Vienna Declaration are no longer pure Western products. They have been produced through elaborate processes whereby voices from various

¹⁰⁴ See also DONNELLY, *op.cit.*n.22 at 62-65.

nations with diverse civilizational backgrounds have been introduced, criticized, modified and amalgamated. In fact, it is the developing countries that have worked hard to introduce economic, social and cultural rights in international human rights instruments.

Developing countries emphasize the importance of human rights, particularly economic rights, on many occasions. However, these claims are often ideologies which conceal the neglect and violations of civil and political rights. Although developing countries are eager for economic development, many of them are reluctant to achieve it in the form of the realization of economic and social rights. For example, although the 1991 document *Human Rights in China* repeatedly claims that China regards the right to subsistence and other economic and social rights as highly significant, it mainly reiterates overall economic development, and fails to demonstrate that individuals enjoy such development as of right in an elaborate manner.¹⁰⁵ Particularly in the area of work-related rights, the developing countries have various problems: compulsory labor in hard-labor camps, as well as in the form of debt bondage, child labor, abuse of rights to organize and collective bargaining, dishonest hiring practices, and many others. It is therefore necessary to strengthen the existing mechanisms for the implementation of economic, social and cultural rights such as the Committee on Economic, Social and Cultural Rights, and the ILO. It is also necessary to establish international and intercivilizational standards for the evaluation of human rights, including economic, social and cultural rights. By these measures, it would become possible to judge whether a certain country's claim to emphasize the importance of economic and social rights is merely an ideology concealing violations of civil and political rights, or is accompanied with sincere efforts to realize economic and social rights.

During the last few decades, many developing countries have resorted to the principle of non-intervention and claimed that human rights fall within the domain of domestic jurisdiction. It is true that the principle of non-intervention constitutes one of the fundamental principles of international law in the postwar period. According to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States of 1970, "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law".¹⁰⁶ It is also true that until the 1950s, when the international mechanism for the protection of human rights was still immature, most nations including the US regarded the problem of human rights as a domestic question.

¹⁰⁵ Loc. cit. n.94 at 8-12, 17-21.

¹⁰⁶ A/RES/2625 (XXV), GAOR 25th Sess., Suppl.No.28 (A/8028) [1970].

However, as the PCIJ stated in its advisory opinion on the *Tunisian and Moroccan Nationality Decrees* case of 1923, the question of whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question. The answer depends on the development of international relations.¹⁰⁷ Even if the question of human rights once was in the domestic jurisdiction of a state, nations and international organizations reflecting the normative consciousness of people over the world have changed the issue from a domestic question to a matter of international concern. The UN attitude against South Africa since the 1960s, the practice of human rights committees and human rights courts based on human rights conventions and UN resolutions, beginning with the European Convention for the Protection of Human Rights of 1950, and the UN attitude toward massive human rights violations in the former Yugoslavia, Somalia, Uganda and Haiti in the 1990s are some of the notable examples of this development. In 1993, the Vienna Declaration and Programme of Action explicitly stated that "the promotion and protection of all human rights is a legitimate concern of the international community".¹⁰⁸ This formulation reflects the global consensus at the end of the twentieth century.

6.2. Human rights as an effective means of realizing the spiritual and material well-being of humanity

The intercivilizational approach to human rights seeks to analyze, understand and characterize human rights in a historical perspective, where ideas and institutions originate, develop, spread, are criticized, improved, modified and substituted. It sees in the contemporary world the simultaneous process of modernization on the part of developing nations, and a quest for post-modernity on the part of developed nations.¹⁰⁹ Based on this understanding, the intercivilizational approach to human rights shares an aim with the universalist approach: human rights should be enjoyed by people all over the world. Since the intercivilizational approach sees human rights from historical and instrumentalist perspectives, it fully admits and appreciates the historical achievement of the mechanism of human rights under the modern system of sovereign nation states and capitalist economy.

Since the time modern people created a mechanism of capitalist economy which maximizes the human desire for material well-being under the sovereign state system, they have tried various mechanisms to control these two powerful mechanisms: socialism, Marx-Lenism, anarchism, Islamism, various communes of religious believers, world federalism, and others. Some have suc-

¹⁰⁷ PCIJ Series B 1923: 24.

¹⁰⁸ Vienna Declaration and Programme of Action para.4,4, loc.cit.n.96.

¹⁰⁹ ONUMA, op.cit.n.6 at 192-204.

ceeded in part, or, even though not successful in themselves, played a certain role in mitigating the hardship of capitalism and the sovereign state system. None has been so successful as human rights in protecting essential values and profits of humanity which may be threatened by the two systems. As I wrote elsewhere, the reason why human rights, although a particular product of modern Europe, should be universally adopted, is simple: "because we have not yet found a better alternative".¹¹⁰ The intercivilizational approach therefore urges existing governments, especially those in the developing countries, to make every effort to promote and protect human rights. It is critical of the plea of domestic jurisdiction and the defence of sovereign discretion of human rights based on the particularity of culture. It differs from the universalist approach on the ways and conditions to achieve this end. Whereas the universalists assume some commonality of values to be achieved, as well as a belief in a legalistic mechanism through which such values are to be realized, the intercivilizational approach does not. Rather, it assumes the plural existence of value systems and views of humans, and seeks to integrate these differences in a discursive and dialectical manner. In sum, it is a constant quest for commonness. The intercivilizational approach characterizes human rights as a means—an extremely important means—of realizing the spiritual and material well-being of humanity. It does not regard them as an end in itself. Accordingly it is critical of the absolutism or fetishism of human rights sometimes held by human rights activists and even by academics.

The historical perspective of the intercivilizational approach also sets an important condition for the universalization of human rights. As long as the merits of the mechanism of human rights outweigh its demerits, human rights should be appreciated. Since this mechanism is a means and not an end, its usefulness and flaws must be constantly scrutinized, and its role must be complemented and substituted whenever necessary. In fact, there are various ways to direct human behaviour and to realize the well-being of humanity: the stimulation and satisfaction of material desires by the market mechanism, the threat of sanctions based on criminal and civil law, the administrative guidance, social ethics and normative consciousness based on school and family education, etc. The mechanism of human rights is one of these means.

If almost every pursuit of well-being is characterized as a human right, it would on one hand weaken the normative nature of human rights and, on the other hand, lead to a kind of absolutism of human rights. First, it would weaken the normative nature of human rights, because not all pursuits of well-being can appropriately be characterized as rights nor be realized by legal mechanisms. Some values such as basic knowledge for a societal life are more adequately realized by education. Other values or benefits, such as material profits, may be more effectively realized by the market mechanism. Still other values, such as affection for others, may be better attained through religion,

¹¹⁰ ONUMA, *loc.cit.*n.17 at 9.

family education, and the promotion of social ethics of communities. Pursuit of these values is not consistent with recourse to legal mechanisms.

If nonetheless such pursuit is characterized as a human right, this would not only invite doubt and criticism of the normative character of such new 'rights', but also weaken the normative nature of other existing rights for being all placed in the same category. Thus, the normativity of the entire group of human rights may be threatened. Such criticism was first raised when economic, social and cultural rights were characterized as human rights. The criticism became stronger when the notion of national self-determination was characterized as a human right, and now is directed at the notion of third generation rights. However, the reconceptualization of human rights through the incorporation of these rights on the whole has been successful. The merits of this reconceptualization are strengthening the normativity of the pursuit of economic, social and cultural well-being, as well as formulating essential aspirations of the overwhelming majority of human beings, i.e. people in the South, in terms of human rights such as the right of self-determination. These merits far exceed the demerits of weakening their normativity.

Still, the inflation of human rights raises a more serious problem: the absolutism or fetishism of human rights. The more a pursuit of well-being is characterized as a human right, the more we rely on a legalistic mechanism to realize various values and virtues. Here we must recall that the whole discourse and mechanism of human rights is a particular formulation of many ways to pursue the well-being of humanity. As such, it has its own historical and cultural qualifications. Seen from a comparative civilizational perspective, the formulation of human rights is premised on, and supported by, among other things, two major factors which are distinctively modern Western: (1) the notion of rights of independent and aggressive individuals suspicious of state authority; and (2) the adversary and legalistic system for settling social disputes, controlling state mechanisms, and realizing the interests and values of humanity. Although the significance of these factors cannot be exaggerated in protecting vital values and the interests of humans in the modern era, they also tend to produce an excessively confrontational and angular social culture. This confrontational culture is one of the major factors hampering a more harmonious and mutually trustful relationship among society members in many developed countries.¹¹¹

Developing countries have been aggressive in characterizing various pursuits of their well-being as human rights. Given their underprivileged status in international society and the power of the formulation of human rights to realize aspirational values, this strategy is understandable. Furthermore, they have

¹¹¹ See Glendon, op.cit.n.16; A.MACINTYRE, *After virtue* (Notre Dame, 1981); M.SANDEL, *Liberalism and the limits of justice* (Cambridge, 1982); R.BELLAH et al., *Habits of the heart* (Berkeley, 1985).

been fairly successful in reconceptualizing human rights. A rigidly individualistic and legalistic character of human rights has been mitigated. Yet, so long as one characterizes the pursuit of well-being in terms of human rights, one unconsciously tends to think and behave within the framework of Westcentric modern civilization. This would hamper the many possibilities of finding an alternative or at least a complementary mechanism of human rights for pursuing various values and virtues, which is desperately needed to break the deadlock of our Westcentric modern civilization.

6.3. Various religions and cultures could form a ground for human rights

6.3.1. *A need for reinterpretation of religions and cultures*

The major reason for the criticism of the Westcentric universalism of human rights by non-Western, especially East Asian, nations is political, or even emotional, opposition to the self-righteous human rights diplomacy and advocacy of the West. As such, the politicized controversies over the universality versus relativity of human rights in the early 1990s were rather futile from a theoretical perspective. Yet, they played a significant role. They provided an opportunity to a larger number of people both in the North and in the South to realize that sincere intercivilizational dialogues are needed, if ever human rights are to be globalized. Furthermore, there has been an increasing amount of research dealing with diverse religions, cultures and social customs in relation to human rights, such as cross-cultural perspectives of human rights, non-Western cultural, religious or ethical bases of human rights, and the like.¹¹² Intercivilizational frameworks of human rights may well be established in the process of such endeavors.

However, previous studies dealing with tensions between religions or cultures on one hand, and human rights on the other, have a problematic feature: a tendency to focus on non-Western religions or cultures. They seek 'cultural bases' of human rights in non-Western cultures, or 'enlightened interpretations'¹¹³ of non-Western religions, so that they can be construed as compatible with the existing standards of human rights. A. AN-NA'IM's *Human Rights in Cross-Cultural Perspectives* is a leading example. In this excellent book, he deals with the problem of compatibility between the prohibition of cruel, inhu-

¹¹² See, e.g., the works cited in n.20 and in ONUMA, loc.cit.n.17, at 14 ns. 9, 10. See also S.KOTHARI and H.SETHI, *Rethinking human rights* (Delhi, 1989); M.DAVIS (ed.), *Human rights and Chinese values* (Hong Kong etc., 1995); W.DE BARRY and TU W.(eds.), *Confucianism and human rights* (New York, 1998).

¹¹³ See, e.g., A.AN-NA'IM, 'Toward a cross-cultural approach to defining international standards of human rights', and other papers, by W.ALFORD on China, J.ZION on North American Indians, A.MCCHESNEY on Canadian aboriginal peoples, H.FRUEHLING on Latin America, M.CARNERIO da CUNHA on Brazilian Indians, etc., in: AN-NA'IM, (ed.), op.cit.n.20.

man or degrading treatment or punishment and punishments mandated by the Sharia. He argues that while it is impossible to abolish punishments such as the amputation of the right hand for theft, which appears cruel and inhuman to non-Muslims, it is possible to restrict its implementation in practice by resorting to an enlightened interpretation of the Sharia. By resorting to such reinterpretations of cultural values and norms, Muslim nations which give the impression that their religions and cultures are incompatible with international human rights norms can accept them.¹¹⁴ Similar efforts have been made by certain governments, experts and judiciaries in some non-Western countries such as India and Egypt.¹¹⁵

It has been argued by a number of experts that the prevalent image of 'individualistic West versus collectivist East' is groundless. In their view, therefore, the argument based on this image that Eastern civilization is not compatible with human rights is wrong. For example, Confucianism is flexible enough to allow a liberal interpretation such as W. DE BARRY's.¹¹⁶ Buddhism, which has many sects or denominations, also allows for an individualistic interpretation. Japan, often regarded as a typical example of a nation of collectivism, cherished an individualistic bourgeois culture between the Muromachi and Edo periods.¹¹⁷

Religions and cultures in many non-Western, developing countries have been used by authoritarian governments to rationalize human rights violations, including cruel punishments, inhuman treatments and discriminatory practices. Therefore, it is understandable that earlier attempts to find religious or cultural bases of human rights have focused on the problem of the compatibility between non-Western religions or cultures and human rights. From the intercivilizational perspective, however, such an attitude is problematic. It assumes that only non-Western cultures or religions must be reinterpreted to ground human rights. In other words, it is implicitly assumed that Western cultures or religions have no problem in their compatibility with human rights. Even in AN-NA'IM's book, referred to earlier, the overall emphasis is on finding out the cultural or religious basis of human rights in the non-Western world, although VIRGINIA LEARY¹¹⁸ and a few others seek internal discourse within Western cultures. When one looks at the prevalent understanding of human rights in some Western nations, one will notice that the above assumption must be re-

¹¹⁴ AN-NA'IM, loc.cit.n.113 at 37-38.

¹¹⁵ E.COTRAN and A.O.SHERIF (eds.), *The role of the judiciary in the protection of human rights* (London, 1997).

¹¹⁶ W.DE BARRY, *The liberal tradition in China* (Hong Kong, 1983). See also W.DE BARRY and TU W. (eds.), op.cit.n.111.

¹¹⁷ YAMAZAKI M., *Nihonbunka tokojinshugi* [Japanese culture and individualism] (Tokyo, 1990).

¹¹⁸ V.LEARY, 'Postliberal strands in Western human rights theory', in: AN-NA'IM, op.cit.n.20 at 107.

considered. For example, the US has been reluctant to embrace economic, social and cultural rights within the domain of human rights. It was not only the Republican administration of the 1980s that was hostile to treating the economic, social and cultural rights as human rights. Even NGOs and the academic community have not been so interested in them. Many people in the US have regarded them either as a socialist ideology or incompatible with civil and political rights.¹¹⁹ This peculiar understanding is not shared by the overwhelming majority of nations, including developed countries. While most developed countries as well as many developing countries have ratified the ICESCR, the US has not.

Reluctance in accepting international standards of human rights is not limited to the field of economic, social and cultural rights. The US was extremely late in ratifying the ICCPR. When it finally ratified it as late as 1992 (the last except for Switzerland among major developed countries), it almost nullified the Covenant as a legal instrument by attaching a package of reservations, understandings and declarations.¹²⁰ Among the approximately 190 countries in international society, the US is one of the very rare countries (another conspicuous example is Somalia) which have not ratified the Convention on the Rights of the Child. Furthermore, the US does not control the possession of guns by ordinary citizens, which has resulted in a huge number of homicides as well as the killing of many criminal suspects by [the] police.¹²¹

Some of these problems may be explained in terms of opposing political ideologies or vested interests of powerful interest groups. However, cultural or religious factors are also to be held responsible. For example, 'American individualism' has often been resorted to as an important reason for the Americans to be against the idea of economic, social and cultural rights. Also, it would be difficult to understand why the US is so reluctant to control the possession of guns without taking into consideration US people's deeply-rooted belief in autonomous, independent, self-reliant and self-protective individuals.¹²² Thus, it is evident that we need to scrutinize these problems from a perspective of how compatible a local dominant culture is with human rights. As in Muslim nations, what is critically important is an enlightened interpretation of the dominant culture or religion which allows American people to accept the interna-

¹¹⁹ See critical analyses by P. ALSTON, *loc. cit.* n.69, at 368-84. See also references in n.29.

¹²⁰ For a critical analysis by an eminent US lawyer, see L. HENKIN, 'US ratification of human rights conventions', 89 *AJIL* (1995) 341-50.

¹²¹ See *supra* n.12 and the accompanying text.

¹²² See the hostile opinions based on individualism and liberty-centrism cited in ALSTON, *loc. cit.* n.69 at 373-74, 378, 381-84.

tionally established comprehensive notion of human rights.¹²³ Such scrutiny of the tension between predominant local cultures, religions or ethics and human rights is needed in other developed countries as well.

6.3.2. Legitimation of human rights by 'living' religions and cultures

The attempts to ground human rights in various non-Western religions and cultures hold another problem: a tendency to revert to the original or traditional teachings of these religions and cultures. When one seeks to ground human rights in local cultures or religions, one should not explore merely traditional cultures or the original religious teachings. Cultures and religions change over time. Because of transnational economic and informational activities, no nation today preserves its religion or culture in its traditional or original form. Although Confucian culture is still an important factor in explaining the ways of thinking and behavior of Chinese, Koreans and Japanese, they are different from each other and from the original teaching of Confucius. One must explore cultures or religions which are actually 'living' in people's ordinary life.

Any major religion, including Christianity, has both pro-human rights and anti-human rights teachings in its original or traditional form. One could find certain ideas or expressions similar to those of human rights in almost all religious teachings or traditional cultures. As I claimed earlier in the context of the theory of universal origin, merely pointing out particular religious teachings or particular forms of culture as compatible with, similar to, or even an origin of particular human rights, makes little sense.¹²⁴ Such sporadic references do not constitute a basis for human rights as a whole. We must explore the specific status and functions of such similar norms in comprehensive normative and societal settings. As PANIKKAR put it,¹²⁵ a perspective of the homeomorphic, or existential functional, equivalent to the concept of human rights is important.

We must also seek to identify sources and methods to explore local cultures, religions and ethics to ground human rights. In the contemporary world, there are thousands of cultures and religions, ranging from world religions to cults shared by a small number of believers. What are the criteria by which we are to select important or relevant cultures, religions or ethics, and what proce-

¹²³ Another problematic feature of contemporary American culture is its universalism. To many Americans what is good for Americans must be adopted all over the world. Although I highly regard the efforts of US human rights advocates and experts to criticize and try to improve human rights conditions in their own country (see, e.g., American Civil Liberties Union & Human Rights Watch, *Human Rights Violations in the United States* (New York/Washington, D.C., 1993)), it seems that some of this criticism itself is not immune from implicit US universalism.

¹²⁴ See supra ns.32-36 and accompanying text.

¹²⁵ PANIKKAR, loc.cit.n.36 at 77-78.

dures are to be followed? Is the notion of unforced consensus¹²⁶ a useful tool for this purpose? Can we induce some substantive criteria from the numerous cultures, religions or ethics, such as the principle of retribution tied to proportionality?¹²⁷ Is the notion of civilization, as shared by plural nations within a region for a certain period of time, a useful tool to limit the number of those to be selected? These questions must be explored and answered. To answer them, some people prefer to regard a certain theory as universally valid and seek to find out its view of human rights. Thus it is sometimes argued that RAWLS' theory of justice can comprehend today's fundamental normative ideas all over the world and, consequently, can claim transnational and intercivilizational legitimacy in grounding human rights which must universally be adopted. Candidates for such a privileged status could include the theories of RAWLS, DWORKIN, HABERMAS, SEN and other leading figures. I do not believe that we could succeed in grounding human rights on a global scale by opting for one single theory of these great theorists. However capable and respected they may be, they cannot claim transnational and intercivilizational legitimacy by themselves.¹²⁸ Their theories can be useful only as a means to interpret, analyze, qualify, complement and modify the existing expressions of transnational and intercivilizational human rights, i.e., existing norms in international human rights instruments.

6.4. International human rights norms and their modification by intercivilizational perspectives

6.4.1. Significance of international human rights norms

In international law, which legally obligates states to protect and promote human rights, the international perspective is predominant. It is not so easy to find an expression of intercivilizational perspective in treaties or customary international law, the interpretation of which is often provided by judgments and advisory opinions of the ICJ. However, they are merely the sources of the rules to be applied by the ICJ (*Entscheidungsnorm*). If one pays attention to social norms or *Handlungsregel*, then one could notice an intercivilizational perspective. For example, when the UN General Assembly and the Security Council elect the members of the ICJ, the norm that "the electors shall bear in mind ... that the representation of the main forms of civilization and the principal legal systems of the world should be assured"¹²⁹ has almost always been operative.

¹²⁶ See C.TAYLOR, 'Conditions of unforced consensus on human rights', in: D.BELL and J.BAUER (eds.), *East Asian challenges for human rights* (Cambridge, forthcoming).

¹²⁷ A.RENTELN, *International human rights* (Newbury Park, 1990) 14, 88-137.

¹²⁸ Among the authors I refer to in the text, only AMARTYA SEN has a certain degree of intercivilizational legitimacy because of his multi-civilizational background, knowledge and concern.

¹²⁹ ICJ Statute Art. 9.

In practice, because the ideology of civilization prevailing at the time of the original adoption of this provision has been rejected, the election of the members of the ICJ – as well as the election of the members of the Security Council – has been accomplished by an equitable geographical distribution: three from Asia, three from Africa, five from Western Europe and others, two from Latin America, and two from Eastern Europe. Although there may be some disagreement whether the current geographical distribution is really equitable, there is a wide consensus that the election of the members in accordance with an equitable distribution is needed for such organs as the ICJ and the Security Council in order to satisfy the requirement of global legitimacy. This distribution, although characterized as geographical, is not based on purely geographical considerations. For example, the European continent is divided into East and West, the latter including North America. The concept of geographical distribution connotes political, economic, social and cultural considerations such as political and economic systems, cultures and the like. The expected role of the concept is to assure the global legitimacy of these two organs from international as well as intercivilizational perspective.

The intercivilizational perspective has played an important role in organizing an action which must appeal to people all over the world, have a high degree of its legitimacy, and be effective in its execution. For example, the military operation by the multinational forces against Iraq in 1991 enjoyed a high degree of legitimacy on a global as well as regional scale. A major reason for this success was that the US made serious efforts to persuade Arab-Muslim governments and succeeded in obtaining support transcending not only national boundaries but also civilizational boundaries. Had the support been limited to non-Muslim nations, the operation would not have had such a high degree of legitimacy and could hardly have been so successful.

In this way, although in an implicit manner, decision makers take an intercivilizational perspective whenever they take actions which must be perceived and accepted as legitimate on a global scale. This means that we could assume intercivilizational perspectives in various international behaviors and instruments. In the field of human rights, a clue to identifying intercivilizational human rights can be found in the provisions of the major international instruments on human rights to which the overwhelming majority of nations have committed themselves. The most important among these instruments constitute the so-called International Bill of Human Rights: the Universal Declaration of 1948, the ICESCR and the ICCPR. The Vienna Declaration of 1993 is also an important instrument because it embodies an international consensus on human rights at the end of the twentieth century.

From the viewpoint of international law, the multilateral human rights conventions are more important than the declarations or resolutions, because while the former formally binds contracting parties, the latter generally has only recommendatory force. Although RENTELN is right in saying that one should not easily cite ratification of human rights conventions as a basis of authority for

human rights¹³⁰, the ratification of the conventions is still extremely important in that the states which have ratified are normatively barred from making a contradicting argument against what is provided in the conventions. On the other hand, an increasing number of international lawyers hold that at least some provisions of the Universal Declaration embody norms of general international law on human rights.¹³¹ The Vienna Declaration is a product of heated negotiations tackling not only differences in foreign policies, but also conflicts involving the diverse religious, cultural and ethical views held by the participating states, representing almost all member nations of the international society. Unlike the Universal Declaration, which was adopted in the pre-decolonization era, when many Afro-Asian nations were still excluded from participation, the inter-civilizational legitimacy of the Vienna Declaration is much greater.¹³² Even compared with the ICESCR and the ICCPR, which have 137 and 140 contracting parties respectively (as of 1 October 1998) among which only a limited number of Asian, Muslim and Oceanian nations are included, the Vienna Declaration enjoys a higher degree of global legitimacy through its endorsement by 171 nations, including that of many Asian, Muslim and Oceanian nations.

The Vienna Declaration "reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights". "The universal nature of these rights and freedoms is beyond question." "Human rights ... are the birthright of all human beings." These characterizations reaffirm the universal and inherent nature of human rights. "All peoples have the right of self-determination." The right of self-determination, once doubted to be a human right because of its collectivist nature, is definitely characterized as a human right. In the framework of the purposes and principles of the UN, "the promotion and protection of all human rights is a legitimate concern of the international community". This sentence substantively denies the plea of domestic jurisdiction in the domain of human rights. "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While

¹³⁰ A.RENTELN, 'The unanswered challenge of relativism and the consequences for human rights,' 17 *Human Rights Quarterly* (1985) 517.

¹³¹ Many US experts and court decisions since the *Filaritiga* case, as well as the *Restatement* seek to characterize at least certain provisions of the Universal Declaration as embodying customary rules of international law and, therefore, binding on domestic courts (See articles in 25 *Georgia Journal of International and Comparative Law* (1995)). Some other experts, while questioning such reasoning, recognize that certain provisions can be characterized as embodying rules of general international law. See P.ALSTON and B.SIMMA, 'The sources of human rights: custom, jus cogens, and general principles', 12 *Australian Year Book of International Law* (1992) 105-6. See further HIGGINS, op.cit.n.22 at 18-28, 105.

¹³² Some Asian leaders, such as MAHATHIR of Malaysia and LI PENG of China have even suggested a critical reappraisal of the Universal Declaration because it lacks global legitimacy (*Yomiuri Newspaper*, 23 Aug.1997).

the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States... to promote and protect all human rights." These sentences exemplify the comprehensive notion of human rights, although their literal implementation is not without doubt. The Declaration also reaffirms that "the right to development is a universal and inalienable right and an integral part of fundamental human right. The human person is the central subject of development".¹³³

The ICESCR, the ICCPR, the Vienna Declaration and other major instruments on human rights promulgated after the 1960s are no longer Western products. They are the products of long discussions, controversies and negotiations of various nations with different civilizational backgrounds. The Universal Declaration has been explicitly accepted or implicitly acquiesced by an overwhelming majority of nations since its inception. One can see behind these international instruments certain expressions of contemporary intercivilizational agreement on human rights. Whatever political motivations national governments may have had in voting for, ratifying, or acquiescing in them, these instruments now represent common normative standards based on the widest attainable consensus among nations with diverse perspectives of civilizations.

This is particularly the case with the Vienna Declaration, which was adopted by the consensus of 171 nations coming from an international community composed of independent nations representing an overwhelming majority of the human species, and adopted in a setting where some 1500 NGOs were watching and lobbying. However, it is composed of principles and does not contain specific provisions as do the Universal Declaration, the ICESCR and the ICCPR. Thus, the Vienna Declaration should be taken as containing the most authoritative – in the sense of internationally, transnationally and intercivilyationally legitimate – standards and guiding principles in interpreting, qualifying and modifying specific rules of human rights. In other words, unless the Vienna Declaration is used as the authoritative principle of interpretation, qualification and modification of the existing international human rights instruments, one cannot rebut effectively the criticism characterizing the Universal Declaration of 1948 as an expression of cultural imperialism.

6.4.2. A need for comprehensive standards of human rights

As described earlier, in order to carry out global human rights policies with the limited resources of our international society, we must establish human rights standards which are legitimate from international, transnational and intercivilizational perspectives, and tackle various human rights problems not on the basis of political considerations or sporadic concerns, but on priorities in terms of seriousness and urgency of the problem. Although there have been

¹³³ The Vienna Declaration and Programme of Action, loc.cit.n.96, 3-5.

attempts to evaluate the conditions of civil and political rights on a global scale, few attempts have been made with regard to economic, social and cultural rights. The assessment conducted by Freedom House lacks international as well as intercivilizational legitimacy. Far more comprehensive and globally legitimate standards for the assessment of human rights must be established. In this respect, the systematic data presented by the UNDP in its annual *Human Development Reports* are a promising starting point.

The analyses in sections 4 and 5 have revealed that the task requires liberation from our unconscious liberty-centrism in human rights. Many data related to socio-economic rights are already available in objective figures: life expectancy, daily calory supply, infant mortality rate maternal mortality rate, female-male gaps in life expectancy, parliament seats and managerial staffs, GDP per capita, income share of lowest 20% and highest 20% of households, literacy, mean years of schooling, primary and secondary school enrollment, and the like. They can basically be used in the assessment of how successfully nations realize economic, social and cultural rights.¹³⁴ Why then, have these figures not been used thus far as relevant data in assessing human rights? One reason is theoretical or methodological difficulties in establishing reliable methods for assessing the realization of socio-economic rights through these data.¹³⁵ Although such a task needs a combination of expertise in the area of human rights and in the area of development studies, economics and statistics, these areas have been studied and practiced separately from each other. It is also necessary to avoid an overestimation of quantitative methods. We need conceptual clarity of concrete economic, social and cultural rights, and disaggregate socio-economic data for each right. One must further distinguish between factors which can be overcome by efforts of the government and those which are basically beyond the reach of human endeavors. There are other theoretical and technical problems to overcome as well.

A more critical reason for the failure seems to be the deep-rooted liberty-centrism in our thinking on human rights. We have not yet developed sophisticated methods to assess the respect for and ensurance of civil and political rights. Yet, we have been accustomed to assessing them either qualitatively, as is implicitly done in the overwhelming number of cases of human rights discourse, or quantitatively, as in the case of *Freedom in the World* by Freedom House or *World Human Rights Guide* by HUMANA. It is true that a number of experts have criticized the arbitrary nature of existing assessments of human rights including these two, and have warned of the illusion of objectivity of

¹³⁴ See *supra*, ns.53-62 and accompanying text.

¹³⁵ There are many studies demonstrating these difficulties. See references in n.56.

quantitative methods.¹³⁶ As those critiques argue we must be extremely careful in using socio-economic data as indices for measuring human rights.

On the other hand, we must avoid the trap of perfectionism. What is critically important today is to assess human rights conditions according to internationally legitimate standards with an awareness of their limitations. From this perspective, the previous discourse on this issue shares the flaws of liberty-centrism. Even though people have discussed civil and political rights conditions by using unsophisticated methods, they have not discussed economic, social and cultural rights conditions by similar standards. On the other hand, when experts discuss the question of measuring the realization of economic, social and cultural rights, they tend to point out theoretical difficulties in assessing the realization of economic, social and cultural rights, and take negative attitudes in the use of socio-economic data for assessment.¹³⁷ One of the serious consequences of such a state of affairs is the continuation of many arbitrary assessments of civil and political rights under the name of assessing human rights in general. If we wait to find a flawless method for assessing economic, social and cultural rights, it will hardly be possible for us to overcome the predominance of arbitrary assessment of civil and political rights under the name of human rights in general.

The failure to acknowledge socio-economic figures as important data in assessing human rights has been evident in many instances. For example, when the UNDP tried to use data in the *World Human Rights Guide* as indices of human freedom, they thought that they had failed to take up the problem of human rights in their previous Reports. The *Human Development Report 1993* cited the criticism of the earlier human development index by stating that "[a]s a measure of *human* [emphasis in original] development, it is quite incomplete; *it is oblivious of what is commonplace to call human rights* [emphasis added]", and that "[t]he 1991 Report made an effort to remedy *this omission* [emphasis added] by constructing a human freedom index (HFI) based on the work of Charles Humana (1986)".¹³⁸ It is true that the previous Reports did not include civil or political freedom indexes. However, this does not mean that they were oblivious of human rights. The relevant data on human rights had already been included. The UNDP had merely failed to *characterize* them as indices indicating – however indirectly – the realization of economic, social and cultural rights, which constitute an integral part of human rights. This failure is shared by an overwhelming majority of publications dealing with, measuring and evaluating human rights conditions. They concentrate their concern on civil and

¹³⁶ See, e.g., the criticism of the arbitrariness of the assessment by Freedom House, HUMANA and even by experts such as GOLDSTEIN (loc.cit.n.48), and BARSH (loc.cit.n.46 at 90-114). They are especially critical of the illusion these assessments have created that one can rate civil and political rights conditions without any solid basis.

¹³⁷ See e.g. the report of the seminar referred to in n.56.

¹³⁸ *Human Development Report 1993* (New York/Oxford, 1993) 105.

political rights, and ignore the available data relevant to economic, social and cultural rights. Thus far, controversies over the objectivity of human rights measurement have been most actively conducted in the US, where the issue has been closely linked with US human rights diplomacy. This is one of the reasons why the previous discourse had a tendency to focus on civil and political rights: the US has been most reluctant to recognize economic, social and cultural rights as human rights.

The existing international instruments on human rights represented by the ICESCR, the ICCPR, the Universal Declaration on Human Rights and the Vienna Declaration are no more than a first clue to identifying transnational and inter-civilizational human rights. They are essentially political products, generally taking the form of normative consensus among national governments. Yet, we have no other choice but to accept them as today's most authoritative expression of the normative consciousness of the global community on human rights. No other instruments, whether they be the statement by the US or Chinese government, claims of leading human rights NGOs, or views of leading scholars, can claim that they represent the global consensus more legitimately. Although we need to refine our methods in dealing with those instruments, we still have to start with them. Thus, we must operationalize the norms in these instruments in order to assess human rights conditions in all nations as today's global standard.¹³⁹ If these instruments provide a comprehensive notion of human rights comprising economic, social, cultural, civil and political rights, then the standard of assessment must reflect this comprehensiveness. The same can be said of the prioritization of rights. Prioritization of human rights is an enormously difficult task, which a number of experts have discussed and yet they are far from agreeing with each other. We could, however, point out at least some perspectives that we must take into consideration when dealing with this problem. We must look into the existing international instruments on human rights, and identify the juridical significance of the right in question from the following perspectives: (1) how many states are parties to the instruments which provide for the right in question?; (2) are states parties to the conventions allowed to derogate from the protection of the right in question?; (3) is the right to be protected by states as an obligation *erga omnes*?; (4) is the right

¹³⁹ In a sense, the argument employed by the Chinese government in 'Human rights in China', loc.cit.n.94, is an attempt to assess human rights conditions in a comprehensive manner, i.e. including economic, social and cultural rights. However, it was not elaborate nor sophisticated, and used aggregated data without qualifications for assessing human rights.

construed to be a peremptory norm?; (5) is the violation of the right characterized as an international crime?¹⁴⁰

The first perspective is concerned with the question whether the right should be construed as a rule of general international law.¹⁴¹ If the right in question is contained in resolutions or declarations of international organizations or conferences, how many nations have adopted it in domestic law, judgments of the court and other juridical forms? By answering these questions, one could assess how deeply and widely the right is established as a rule of general international law or a general principle of law. With regard to the second perspective, not all non-derogable rights are considered important. Some of them, such as the right of the family and the right to a name, are characterized as non-derogable because it is not necessary to derogate from them even in the case of emergency. Other ones, however, such as the right to life, freedom from slavery, freedom from torture and freedom from ex post punishment, which are non-derogable in the ICCPR, the European Convention for the Protection of Human Rights and the American Convention on Human Rights, are generally construed as the most basic or core human rights.¹⁴² The third and fourth perspectives are generally considered to be indicative of the prioritization of norms. Thus, for example, freedom from genocide and freedom from slavery are generally regarded as more important human rights than ordinary rights.¹⁴³

6.4.3. *A need for critical transnational and intercivilizational perspectives*

Although one should appreciate the significance of the existing international human rights instruments, it would be too naive to ignore the political aspects of these instruments. They are products of political and diplomatic struggles and compromises between states rather than intercivilizational dialogues. For

¹⁴⁰ As to the question of priority among human rights, see T.MERON, 'On a hierarchy of international human rights', 80 AJIL (1986) 1-23. See also S.MARKS, 'Les principes et normes des droits de l'homme applicables en period d'exception', in K.VASAK (ed.), *Les dimensions internationales des droits de l'homme* (Paris, 1978) 318; F.SUDRE, *Droit international et européen des droit de l'homme* (1989) 118; P.MEYER-BISCH, *Le corps des droits de l'homme* (Fribourg, 1992) 263-91; TERAYA K., *Kokusai Jinken no Itsudatsu Hukanosei* [The non-derogability of international human rights], Research Associate dissertation (University of Tokyo, Faculty of Law, 1997).

¹⁴¹ For example, although Professor SCHACHTER is critical of a hasty characterization of provisions of the Universal Declaration as norms of customary international law, he argues that some basic rights such as freedom from slavery, torture, mass murders, prolonged arbitrary imprisonment and systematic racial discrimination constitute part of customary international law. O.SCHACHTER, *International law in theory and practice* (Dordrecht, 1985) 335-36. Today, the general tendency is even more favourable to such a view, or an even more positive characterization of the Universal Declaration. See references in n.131.

¹⁴² TERAYA, op.cit.n.140 at 85-125.

¹⁴³ See references in n.140.

example, among the four major instruments it cannot be denied that the Universal Declaration is relatively Westcentric, reflecting the international power structures existing in 1948, when many Afro-Asian nations were still under colonial rule. Since the attainment of independence, these Afro-Asian nations have emphasized the importance of collective rights and duties under the name of their traditions and cultures. Consequently, there have been references to this effect in many international human rights instruments. The right of self-determination of peoples in the common Article 1 of the ICESCR and the ICCPR, as well as repeated references to peoples' rights and duties of individuals in the African Charter on Human and Peoples' Rights of 1981 are notable examples.

However, the very dichotomy of 'individual versus collective' itself is a modern construct. Pre-modern people were not so concerned with this dichotomous way of thinking as we are today. It is also doubtful that pre-modern people in Asia and Africa thought so highly of the idea of duty as many Afro-Asian leaders claim today. At least, the idea of legal obligation as an idea opposite to right did not occupy such a central place in East Asia as is often claimed today. For example, within the relatively less legalistic framework of Japanese culture the very way of thinking in terms of legal rights and obligations has not been predominant. It would be a fallacy to characterize 'traditional Japanese culture' as based on the concept of duties.¹⁴⁴

The transnational and intercivilizational approaches seek to overcome the interstate or intergovernmental nature which 'international' undertakings often have, whether they are treaties, declarations or even controversies. From this perspective, existing international instruments on human rights are no more than a first clue to identify transnational and intercivilizational human rights. Scrutiny of these instruments from critical perspectives are needed. Although we should not idealize human rights NGOs, which tend to be self-righteous and Westcentric even in the non-Western world, their views can provide critical transnational perspectives. For example, the NGOs that participated in the final plenary of NGOs at the Vienna World Conference on Human Rights on 25 June 1993 put forward the *Initial Response of Non-Governmental Organizations to the Draft Vienna Declaration*.¹⁴⁵ In it they expressed appreciation for the achievements of the World Conference such as the confirmation of human rights as a legitimate concern of the international community, the recognition of universality, indivisibility and the interdependence of human rights, the acknowledgment by the governments of the essential role of NGOs in the promotion and protection of human rights, the recognition of the rights of children and the disabled, and the reaffirmation of the right to development as a univer-

¹⁴⁴ ONUMA, loc.cit.n.17 at 3, 4, 14 n.13 and literature cited therein.

¹⁴⁵ Initial Response of Non-Governmental Organizations to the Draft Vienna Declaration, World Conference on Human Rights, Vienna, 25 June 1993.

sal and inalienable human right.¹⁴⁶ On the other hand, they were critical of the Declaration on many accounts: the refusal of the governments to address the inequality between the north and the south; the refusal of the governments to commit themselves to universal ratification of the relevant human rights conventions and the lifting of reservations by an agreed time; the insistence that the primary responsibility for standard setting lies with the states; the refusal to make a positive link between development assistance and human rights; the refusal to provide international protection against 'disappearances'; the lack of commitment to an enabling mechanism for the ICESCR; the failure to get support for the proposal to commit 0.5% of ODA to human rights; and the like.¹⁴⁷

When Asian governments gathered and adopted the Bangkok Declaration of 2 April 1993, which expressed the "aspirations and commitments of the Asian region",¹⁴⁸ 110 Asian NGOs gathered and adopted the Bangkok NGO Declaration on Human Rights of 27 March 1993.¹⁴⁹ The former expressed a relativist or particularist perspective of human rights, stressing the respect for national sovereignty and the need to avoid double standards in the implementation of human rights, as well as the recognition of national and regional particularities and various historical, cultural and religious backgrounds. The latter, in contrast, expressed a universalist perspective, stressing the importance of women's rights, democratization of the development process and demilitarization. Thus, it is a notable example of how we might hear different opinions voiced by NGOs. The representative nature of the Bangkok Declaration must be scrutinized, and at least to a certain extent qualified by the Bangkok NGO Declaration, which commands a certain degree of transnational legitimacy.

The current international human rights instruments do not necessarily embody intercivilizational consensus based on dialogues between different civilizations. Major factors defining these instruments are those which national governments regard as national interests. Admittedly, political considerations are part of civilizations too. Even if the current international human rights instruments are a result of political compromise, they still express the agreement between nations with diverse civilizations. To this extent, they embody a global consensus which, relatively speaking, can claim not only international legitimacy but also intercivilizational legitimacy. No other view, whether it be a claim of the only super power the US, the notion of human rights held by a leading NGO such as Amnesty International, or an assertion by the Chinese government which is supported by many governments in developing countries, can claim that their view is more intercivilizationally legitimate. On the other hand, major views which embody different civilizational perspectives are im-

¹⁴⁶ *Ibid.*, 1-2.

¹⁴⁷ *Ibid.*, 2-3.

¹⁴⁸ Preamble of the Bangkok Declaration of 2 April 1993, A/CONF.157/PC/59, 14 *Human Rights Law Journal* (1993) 370.

¹⁴⁹ Bangkok NGO Declaration on Human Rights, 27 March 1993, A/CONF.157/ASRM/8.

portant for revising and supplementing the intercivilizational views embodied in international human rights instruments. It is here that theories of prominent experts or philosophers play an important role. These theories do not have in themselves intercivilizational legitimacy. However, they provide significant theoretical means with which we can analyze, construe, supplement and reformulate views expressed in the international human rights instruments from an intercivilizational perspective. For example, the concept of an overlapping consensus given by RAWLS,¹⁵⁰ or the concept of an unforced consensus suggested by TAYLOR,¹⁵¹ might provide a theoretical framework with which we could clarify the nature and meaning of consensus in the instruments. On the other hand, we should always bear in mind that these great figures have often unconsciously created their theories within Westcentric frameworks.

The inter-civilizational perspective is based on the idea that international perspectives are not enough to understand global issues. A person with rich international perspectives does not necessarily grasp global issues because his/her 'international' perspectives may be limited to a certain civilization. For example, even if one understands English, French, German and Spanish cultures and/or languages, and has [a] deep knowledge OF PLATO, ARISTOTLE, THOMAS AQUINAS, HOBBS, LOCK, ROUSSEAU, ADAM SMITH, MAX WEBER AND KARL MARX, one may lack even an elementary knowledge of Islam, East Asian or South Asian civilization including Sharia, Buddhism, Confucianism and Hinduism. The intercivilizational approach seeks to overcome such narrowness.¹⁵²

When we consider the problem of human rights from an inter-civilizational perspective, we must ask whether the right in question is prescribed in, endorsed by, or at least construed to be compatible with, the precepts of today's major religions,¹⁵³ and whether we can find an equivalent norm among major legal systems or social ethics transcending civilizational boundaries. It is certainly wrong to claim that a nation cannot accept human rights simply because they are incompatible with national culture. Cultures change over time. However, this argument is also valid in the universalist or liberty-centrist view of human rights. If culture changes over time, then the notion of human rights changes as well. It is self-contradictory for a universalist to criticize a relativist's argument based on national culture, by arguing that cultures change, and yet stick to a narrow, liberty-centric notion of human rights. Such a notion may

¹⁵⁰ J. RAWLS, *Political liberalism* (New York, 1993).

¹⁵¹ TAYLOR, loc.cit.n.126.

¹⁵² ONUMA, op.cit.n.6 at 20-49. See also ONUMA, loc.cit.n.21.

¹⁵³ The Cairo Declaration on Human Rights in Islam, adopted 5 August 1990 in Cairo, is primarily an international instrument based on the agreement of Muslim states, i.e. Muslim governments. This Declaration should be considered as an important source for the pursuit of an inter-civilizationally legitimate notion of human rights. Similar instruments based on agreement among Christians, Buddhists and adherents of other major religions should also be taken into consideration.

have been valid in the past, but it is evident that the notion of human rights does change. One would fool oneself if one were to assert that only the notion of human rights is unchangeable. Consequently, the intercivilizational approach requires us to see the problem of human rights from the perspective of the plurality of current civilizations as well as their changeability.

The constant scrutiny and reconceptualization of the notion of human rights as exemplified by the incorporation and substantiation of economic, social and cultural rights, the right of self-determination of peoples, and the right to development should liberate us from liberty-centrism as a persistent form of Westcentrism, as well as from the fetishism of human rights. At the same time, the reconceptualization of human rights will help persuade developing countries to accept human rights in their countries, because the reconceptualization of human rights is possible only on the basis of the agreement of an overwhelming majority of the global community, including developing countries. This double function of liberating human rights discourse from predominant Westcentrism, and spreading human rights on a global scale, is what the intercivilizational approach searches for. By accumulating similar efforts, it can contribute to grounding human rights in more diverse societies, as well as qualifying human rights discourse in its proper range. This is why we need the intercivilizational approach in this diverse and changing world of modernity and post-modernity.¹⁵⁴

¹⁵⁴ For a detailed study, see ONUMA, *op.cit.* n.13 at 279-335.

THE SECESSION OF BANGLADESH IN INTERNATIONAL LAW: SETTING NEW STANDARDS?

J. Castellino*

1. INTRODUCTION

In the aftermath of the Second World War the victorious Allied Powers decided to set up a new system which was not built on indiscriminate use of force but, instead, encompassed values of peace and security that would bring order¹ to a world racked by two World Wars in a time span of thirty years. This system, with the United Nations at its centre, has endured and today forms the basis of international law, governing the relations between states. Like the preceding League of Nations system, it has had to cope with numerous challenges which threatened its very foundations, but nevertheless its legitimacy has grown. In outlining the emergence of the state of Bangladesh as a crisis in the field of self-determination that challenged the rules of international law, this paper seeks to analyse how its resolution could be extrapolated as a stage in the development of the international law of self-determination. The relevance of this discourse to present-day issues is obvious. According to Thomas Franck we are faced with the phenomenon of 'post-modern tribalism'² in an era of increasingly complex allegiances and choices of identity.³ Coping with the problem of self-determination, however broadly defined, is paramount to simultaneously maintaining the international legal order as well as fulfilling norms relating to human rights which are inspired by notions of justice.⁴ In a bid to fully understand the underlying issues at stake, it will be necessary to look at three other areas of international law affected by the crisis, besides the prime topic of secession. Accordingly this paper will also deal with other issues which are finely interwoven with, and inter-related to the issue of self-determination in the creation of Bangladesh, viz. the use of force, statehood and sovereignty, and recognition.

* University of Wolverhampton, England.

¹ See H.BULL, *The anarchical society: a study of order in international politics* (1995), especially chapter four.

² T.FRANCK, "Post-modern tribalism and the right to secession", in C.BROLMANN et al. (eds.), *Peoples and minorities in international law* (1993) at 3.

³ T.FRANCK, "Clan and super clan: loyalty, identity and community in law and practice", 90 *AJIL* (1996) 359.

⁴ For a discussion about order versus justice, see A.MAZRUI, *Cultural forces in world politics* (1975).

Our prime focus in this paper is on the questions raised by the secession of Bangladesh from the state of Pakistan, originally consisting of East Pakistan (Bengal) and West Pakistan (with the provinces of Punjab, Sindh, Baluchistan and the North West Frontier Province). The main hypothesis put forth is that secession can in some cases be considered a legitimate option within international law, particularly in the face of alleged genocide. The argument for preserving order is not thereby suddenly overturned. We shall rather try to demonstrate that preservation of an unjust order is sometimes not in the longer term interests of international peace and security. The Bangladesh case is also remarkable for the arguments it provides against the conceptualization of self-determination as limited to the salt-water⁵ type that held a central place in the decolonization process. It needs to be remembered that the Bangla nationalist movement repeatedly claimed that Bengal was being treated as a colony of Pakistan and that, therefore, it had a right to self-determination, distinct from the traditional form of emancipation of peoples from colonial rule. The relevance of these issues is obvious in view of the recent creation of a separate status for East Timor, as well as in light of other separatist movements currently fighting to achieve statehood.⁶

2. SELF-DETERMINATION⁷

2.1. An evolving norm

As mentioned elsewhere⁸ the self-determination movement gained momentum after the formulation of the UN Charter,⁹ with the active support of the Soviet Union.¹⁰ The United Nations Charter mentions the right of self-

⁵ F.CAPOTORTI, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (1977, UN Sales No.E.91.XIV.2); see also P.THORNBERRY, "Self-determination, minorities, human rights: a review of international instruments", 38 ICLQ (1989) 867 – 889.

⁶ See A.HERACLIDES, "Secessionist minorities and external involvement", 44 *International Organization* (1990) 341-378.

⁷ For general reading, see I.BROWNLIE, *Principles of public international law* (1995); C.TOMUSCHAT, *Modern law of self-determination* (1994); D.J.HARRIS, *Cases and materials on international law* (1998); A.BUCHANAN, "Self-determination and the right to secede", 45 *Journal of International Affairs* (1992) 347; M. KOSKENNIEMI, "National self-determination today: problems of legal theory and practice", 43 ICLQ (1994) 241.

⁸ See, *inter alia*, R.SUREDA, *Evolution of the right to self-determination* (1973); H.HANNUM, *Autonomy, sovereignty and self-determination* (1990); D.McGOLDRICK, *The Human Rights Committee: its role in the development of the International Covenant for Civil and Political Rights* (1991).

⁹ In the modern context, self-determination traces its roots back to Roosevelt's Atlantic Charter of 1941. See S.P.SINHA, "Is self-determination passé?", 12 *Col.JTr.L* (1973) 260; see also A.WHELAN, "Wilsonian self-determination and the Versailles settlement", 43 ICLQ (1990) 94; R.S.BAKER and W.E.DODDS (eds.), *The public papers of Woodrow Wilson* (6 vols., 1925-27).

¹⁰ See A.CASSESE, "Right to self-determination", in L.HENKIN (ed.), *The International Bill of*

determination among its objectives.¹¹ As colonial regimes began to unravel, a norm of international law on the subject evolved that effectively put paid to colonial empires. It became the foundation for the development of the international law of human rights,¹² based on the belief that, unless people had the freedom to determine their own political future, 'human rights' would be meaningless. By 1971, at the time of the Bangladesh crisis, the norm had developed into full-fledged international law¹³ in the strict context of the liberation of subjugated peoples from foreign domination. 'Foreign' was not defined, but in the United Nations context it referred specifically to the mechanism by which colonial peoples were to be freed from the white colonial domination. This had brought about the independence¹⁴ of India in 1947, despite the fact that its partition into Pakistan and India was not in keeping with another generally followed rule in the decolonization process thus far, that of *uti possidetis*.¹⁵ The international climate was also tempered by the failed Biafra secession from Nigeria, which had led to fierce armed response while the international community held its breath and waited for the outcome of a civil war¹⁶, unable to pierce the veil of domestic jurisdiction guaranteed by Article 2 paragraph 7 of the United Nations Charter.

The problematic nature of self-determination was highlighted in the Biafran case by the clash of the conflicting norms on self-determination and territorial integrity.¹⁷ Since self-determination outside the colonial context would undoubtedly lead to disintegration, its application necessarily had to be restricted by the endorsement of values of international peace and security.¹⁸ The abortive Biafran secession strengthened the view that self-determination was to be strictly interpreted and applied only in the colonial context.¹⁹ The creation of numerous new states through the decolonization process was already a revolu-

Rights: The Covenant for Civil and Political Rights (1981). See also V.LENIN, *Rights of nations* (1947 edn).

¹¹ Article 1(2): "...to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples....".

¹² Article 1 of the International Bill of Human Rights (1966)

¹³ See R.HIGGINS, "UN and law making: political organs", 64 AJIL (1970) 43; also see R.EMERSON, "Self determination", in 65 AJIL (1971) 459; K.M.G.NAYAR, "Self-determination beyond the colonial context: Biafra in retrospect", in 10 Tex.IJL (1975) 321.

¹⁴ This term is used to mean the freeing of Indian domestic affairs from the British Crown.

¹⁵ The norm of *uti possidetis*. See, generally, M.SHAW, "The heritage of states: the principle of *uti possidetis juris* today", 67 BYIL (1996) 75; also see S.RATNER, "Drawing a better line: *uti possidetis* and the borders of new states", 90 AJIL (1996) 590; K.H.KAIKOBAD, "Some observations on the doctrine of continuity and finality of boundaries", 49 BYIL (1983) 119.

¹⁶ Biafra 1967-1970. See, generally, K.W.J.POST, "Is there a case for Biafra?", 44 *International Affairs* (1968) 26; see also NAYAR, loc.cit.n.13.

¹⁷ See L.BRILMAYER, "Secession and self-determination: a territorial interpretation", 16 Yale JIL (1991) 177.

¹⁸ For the conflict between territorial integrity and self determination, see R.HIGGINS, "Judge Dillard and the Western Sahara case", 23 Virg.JIL (1983) 187.

¹⁹ NAYAR, loc.cit.n.13.

tionary development in the international community of states and further fragmentation was not considered beneficial to international order.²⁰ The creation of Bangladesh was, therefore, a direct challenge to international law. But the tide was strong enough for it to carry away some of the prevailing norms.²¹ We shall attempt to examine the impact of the case of Bangladesh on the law on self-determination.

2.2. Bangla claim to statehood²²

Fear of Hindu domination among the Muslim population of India forced the partition of the country. Backed by the two most densely populated Muslim areas of the subcontinent, the Muslim League expressed this sentiment as early as 1940²³ by calling for the creation of a federal state with two 'separate and autonomous' wings at either end of the subcontinent. This dream was fulfilled in 1947 when India was divided with the two wings constituting themselves as a separate state of Pakistan, flanking the Indian state. The partition was against the grain of the *uti possidetis*²⁴ principle according to which "to modify an established frontier would be quite unjustified",²⁵ and, consequently, boundaries should not be changed on the departure of the colonial power. The norm was disregarded in the belief that the division into two major communities would be a safeguard for stability and order on the subcontinent, despite the problematic employment of religion as a criterion for the determination of statehood. The partition left various issues of Muslim-dominated communities such as Hyderabad, Kutch²⁶ and Kashmir unresolved,²⁷ but it went ahead, arguably in the in-

²⁰ ICJ in *Burkina Faso v. Mali*, where the importance of order was reiterated. ICJ Rep.1986: 633.

²¹ See also the 1970 Declaration on Principles of International Law Concerning Friendly Relations among States in Accordance with the Charter of the UN [UNGA res.2625 (XXV)], passed unanimously less than a year before the Bangladesh crisis.

²² For a general reading see V.NANDA, "Self determination in international law: the tragic tale of two cities", 66 AJIL (1972) 321.

²³ Lahore resolution. See SISSON and ROSE, *War and secession: Pakistan, India and the creation of Bangladesh* (1990).

²⁴ See, generally, J.S.REEVES, "International boundaries", 38 AJIL (1944) 533; see also J.CASTELLINO, "Territory and identity in international law: the struggle for self-determination in the Western Sahara", 28 *Millennium Journal of International Studies* (1999) 523.

²⁵ *Burkina Faso v. Mali*, ICJ Rep.1986: 633.

²⁶ See *Rann of Kutch* case, 50 ILR 520.

²⁷ While the former two have been resolved, the issue of Kashmir remains a constant bugbear between the two states and has continued to negatively affect relations between them. It also needs to be borne in mind that the crisis arose in the decolonization period when state practice suggested that the norm of "nation-building" that KARL DEUTSCH spoke of (K.DEUTSCH and W.J.FOLTZ, *Nation-Building*, 1963) was paramount to the stability of the post-colonial state. The idea of division on grounds of religion or ethnicity may also have been abhorrent to the Allied Powers with their new plans for an international system, in light of the Nazi genocide of

terest of the preservation of order and the regional peace and security on the Indian subcontinent and the surrounding parts of South Asia.

Another issue of note is that the salt-water model of self-determination was a once for all act. For India (and Pakistan), by expressing their will to be emancipated from British rule exercised and, in that process, also exhausted their right to self-determination. For the people of East Pakistan and other peoples of the Subcontinent²⁸, however, it was merely one phase of self-determination. East Bengal had long felt treated like a colony of West Pakistan – a captive market for poor quality goods and a resource hot-bed for raw materials and foreign exchange.²⁹ Besides, there had never been a fair representation of Easterners in the affairs of the Pakistani state, inducing them to re-examine their rights within the Union. With martial law lifted and elections called on the basis of universal suffrage,³⁰ Easterners hoped that their superior numbers would at last come to bear on the affairs of the state.³¹ But this hope remained unfulfilled, and the argument in most of the literature suggests that it was the high-handedness of General Yahya Khan and the West Pakistani politicians, followed by the punitive action of the Pakistan army, which prompted the call for outright independence³².

2.3. The merits of the Bangladeshi case³³

In light of the call for independence it is interesting to examine the claim of the Banglas to separate statehood and their right to self-determination. This will help illustrate the kinds of norms that have been used in state practice in the pursuit of statehood.

The Banglas have arguably always constituted a people 'different' from the West Pakistanis. Separated geographically by thousands of kilometres of Indian territory, the only features common to the two wings of Pakistan was Islam and the fear of being submerged by Hindu supremacy.³⁴ Geographic, historic, social and cultural factors suggest that the Banglas constitute a separate people³⁵ within the meaning required for self-determination. As the rift between the two wings widened, and with victory in the general elections added to economic

Jews and other atrocities committed during World War Two.

²⁸ Notably peoples in Punjab, Kashmir, Hyderabad, Nagaland and Assam, and the Tamils and others in India and the Baluchis, Sindhis, Pukhtuns in Pakistan.

²⁹ From the jute trade. For a further elaboration of the economic factors see SISSON and ROSE, *op.cit.*n.23; T. FELDMAN, *The end and the beginning* (1975).

³⁰ SISSON and ROSE, *op.cit.*n.23 at 62.

³¹ At the time of the 1970 elections East Pakistanis represented 56% of the total population.

³² See A.MASCARENHAS, *The rape of Bangladesh* (1971).

³³ See NANDA, *loc.cit.*n.22.

³⁴ ROSE and SISSON, *op.cit.*n.23 at 46.

³⁵ See NANDA, *loc.cit.*n.22 at 328.

exploitation by West Pakistan, calls for autonomy gave way to demands for outright independence based on self-determination.

The geographic factor in the determination of the Banglas' separate peoplehood is of course highly significant. These factors have largely been ignored in the drawing of international boundaries in Africa, particularly in sub-Saharan Africa,³⁶ but even there no state has been constituted with parts of its territory separated from each other by miles of foreign land. It could even be argued that Pakistan geographically resembled the old colonial empires in that its territory, while under one centre of control, consisted of several parts which were not attached to each other. The idea of labelling West Pakistan as the metropolitan state and East Pakistan as its overseas territory³⁷, however, would of course be highly controversial since these terms had been used in relation to salt-water colonialism. Nonetheless authors writing about the secession of Bangladesh seem to suggest that this was the de facto situation.³⁸

Other factors that need to be taken into account include historic, cultural and linguistic differences, all of which seem favourable towards the grant of peoplehood in international law to the Banglas, with a corresponding right to self-determination, apart from that exercised on their behalf by undivided India in achieving freedom from the British Crown. As far as the history of the region is concerned, East Bengal has never been linked in any way to what later became West Pakistan, except under British rule.³⁹ Perhaps the issue that did clinch the matter for the Banglas was the linguistic differences which had the effect of mobilizing the population in their call for autonomy. This in spite of the fact that institutionalizing linguistic differences in the sub-continent is a dangerous undertaking due to the presence of nearly 200 different languages, besides dialects. It was a move which would predictably be resisted fiercely in the name of order.

That brings us to the action of the Pakistani army in curbing the separatist movement, which was labelled by some authors as 'genocide'⁴⁰ and which added to the resolve for self-determination and secession.

Besides challenging the norm of self-determination with respect to its scope, the act of secession was an affront to Pakistani sovereignty. Article 2(7) of the UN Charter gave the state of Pakistan the right to conduct its domestic affairs in a manner it saw fit without undue interference from the international community. The crisis in the eastern part of the country was an internal affair. This belief was bolstered by the events of the earlier Biafran crisis where the Nigerian army was allowed a free reign in asserting Nigerian sovereignty over

³⁶ See R.JACKSON, "Juridical statehood in sub-Saharan Africa", 46 *Journal of International Affairs* (1992) 1.

³⁷ Concepts used in UNGA res.1541 (XV) and SUREDA, op.cit.n.8.

³⁸ Notably ROSE and SISSON, op.cit.n.23, and MASCARENHAS, op.cit.n.32.

³⁹ See J.CASTELLINO, "Liberty, fraternity & equality: the dubious fruits of 'National Self-determination in International Law'", 1 *Tuku Law Journal* (1999) No.1: 1.

⁴⁰ Mascarenhas, op.cit.n.32, and SISSON and ROSE, op.cit.n.23.

the break-away region of Biafra by way of a 'police action'. The international community was powerless to act, as it was in the Bangladesh case, as a result of the impasse in the Security Council due to the Cold War.⁴¹ However, unlike the Biafra insurgency, the Bangladesh crisis was decisively influenced by outside forces. In contravention of the basic norms of the UN Charter,⁴² India employed military force to assist in the creation of the state of Bangladesh. What transpired in East Pakistan was plain third party intervention against a sovereign nation by aiding a separatist movement that sought to challenge the authority of the state to which it belonged. The fact that India and Pakistan did not enjoy a friendly relationship is a clear indication that political factors were most probably the prime motivators for the Indian action. We shall return to this theme later when dealing with the legitimacy of the Indian action in favour of self-determination.

2.4. Evolution of the norm of self-determination after Bangladesh⁴³

Although the right of the Banglas to independence is arguably justified, its achievement by armed intervention of a third state clearly challenges the foundations of international law. Should the law on self-determination be crystalized in accordance with the Bangladesh case, then several other cases would qualify for a solution that would definitely not be to the liking of certain actors of the international community. A typical example would be Kashmir, which has been the cause of two major wars⁴⁴ and numerous skirmishes,⁴⁵ and where a resolution along the lines of the Bangladesh case would see a reversal of the roles of the two main powers of the Subcontinent. The Kashmiri claim to independence is at least as strong as the Bangla one, the only notable difference being the geographic factors. In addition, the backing of Kashmiri 'terrorists' by Pakistani arms, ammunition and training, as alleged by India, are comparable to the overt and covert Indian logistic support for the separatist forces in 1971.⁴⁶ If Bangladesh could be legally established with Indian intervention, then Kashmir too could be formed with Pakistani intervention. This is perhaps the main reason why the international community as a whole, but particularly multi-ethnic states, are apprehensive about the self-determination principle. It

⁴¹ For a discussion on the Security Council debates and arguments during the Bangladesh crisis, see HARRIS, *op.cit.*n.7 at 112.

⁴² Namely Art.2(4), which reads: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." See also Art.2(5).

⁴³ See BRILMAYER, *loc.cit.*n.17.

⁴⁴ In 1948 and 1962 (besides the escalation of the 1971 war).

⁴⁵ Most recently in spring 1999, at Kargill. See <http://www.india-web.com/goif.htm> and <http://www.pak.gov.pk/> for conflicting views on Kashmir.

⁴⁶ *Mukhti Bahini* and *Mukhti Fauj*, the two sections of the 'rebel' forces which gained Bangladesh its freedom with the aid of Indian arms and forces.

would directly challenge the very foundation of the international system and undermine the maintenance of order which is among its prime aims.

The creation of Bangladesh demonstrates also the central problem in relation to secession – the question of exactly which entities deserve the right to self-determination⁴⁷ and where the line can be appropriately drawn – a case in point in view of the Chittagong Hill Tribes' agitation seeking autonomy from Bangladesh. Inherent contradictions are unavoidably part of international law since no two situations are exactly similar and each case must be treated on its own merit. There is a reflection of this diversity in the Statute of the International Court of Justice and its Article 38 which lists the sources of international law that are available to the Court in determining on a dispute. Although there has been much debate within the academic community⁴⁸ on the question as to whether these sources are to be explored in a hierarchical order, the fact that previous court rulings are listed in Article 38(1)(d) is a clear indication of the acceptance by the drafters of the diversity of situations. Besides, Article 59 of the Statute states that "The decision of the Court has no binding force except between the parties and in respect of that particular case".

Nevertheless, international law does seek to set out a system of rules by which international order can be maintained. These rules need to stand up to various situations, keeping in mind the existing diversity but at the same time acknowledging the possible similarities between these situations. In principle, therefore, if the constitution of the state of Bangladesh with the aid of Indian force is viewed as a case of self-determination, then the Kashmir issue might qualify for 'resolution' by similar actions by Pakistan.

3. ARMED INTERVENTION BY A THIRD PARTY

For the question about the legality of the Indian action in East Pakistan, it is necessary to start by examining customary law and state practice existing at the time leading up to the Bangla crisis. We shall briefly refer to the developments of the law of war and the attempts to ban the use of force prior to the UN Charter. This will be followed by a brief analysis of the situation under the Charter including its exceptional legitimation of the use of force in international relations. In analyzing the effect of these laws in the Bangladesh crisis we shall also examine the provisions of the Friendly Relations Declaration of 1970⁴⁹ before attempting to identify the precedent, if any, that the Indian action has set.

⁴⁷ This dilemma was first enunciated by ROBERT LANSING, Secretary of State to WILSON in April, 1921. See I. JENNINGS, *The approach to self-governance* (1956) 55-56.

⁴⁸ See M. AKEHURST, "The hierarchy of the sources of international law", 47 BYIL (1974-5) 273.

⁴⁹ UNGA res.2625(XXV).

3.1. The use of force prior to Bangladesh⁵⁰

The norms against the use of force have developed over the last few centuries⁵¹ to a point where use of force to settle disputes is virtually outlawed today. Never before had an international framework been built around concepts of non-violence, since the right to wage war had always been considered a central right of the sovereign state. The concept of 'just war' traces its roots back to St. Augustine of Hippo and encompasses such figures as St. Thomas of Aquinas and others.⁵² Efforts in the aftermath of World War I to ban the use of force were resisted by the states who viewed war as an expression of their sovereignty.⁵³ The system set up under the League was primarily based on the assumption that World War I had been a blunder and was stumbled upon rather than planned. While the system tried to outlaw the use of force it remained subject to the ultimate "right to take such action as they shall consider necessary for the maintenance of right and justice" in Article XV of the Covenant.⁵⁴ Though the Briand-Kellogg Pact of 1928⁵⁵ banned resort to force in relations between states, the major actors were able to find exceptions where they believed they could resort to force. The attempts failed to acknowledge reality as proved by the outbreak of yet another World War within fifteen years. The termination of that war and the creation of the UN and the Charter system saw the prohibition of the use of force begin to take on a more definitive shape.

The language of the two relevant Articles 2(4) and 51 of the UN Charter concerning the use of force⁵⁶ has been debated amongst scholars with respect to questions such as whether there exists a right to anticipatory self-defence,⁵⁷ and what constitutes 'action' by the Security Council. Yet, the crux of the issue is that the use of force is clearly outlawed with the sole exception of its exercise in self-defence. This was the law at the time leading up to the Bangladesh crisis. In reality states continued to resort to violence in pursuit of national interests,⁵⁸ though justifying their actions with reference to Article 51. One of the loopholes with the self-defence argument is that the notion of 'aggression' has

⁵⁰ For general reading on the use of force: I.BROWNIE, *International law and the use of force by states* (1963).

⁵¹ See I.BROWNIE, "Use of force in self defence", 38 BYIL (1961).

⁵² See H.MCCOUBREY and N.WHITE, *International law and armed conflict* (1992).

⁵³ See J.ELSHTAIN, "Sovereignty, identity and sacrifice", 20 *Millennium Journal of International Studies* (1991) 395.

⁵⁴ Art.XV para. 7.

⁵⁵ General Treaty for the Renunciation of War, Paris 27 Aug.1928, 94 LNTS 57.

⁵⁶ The former calls on member states to refrain from the threat or use of force in their international relations while the latter acknowledges the right of self-defence – either individual or collective in the event of an 'armed attack'.

⁵⁷ As claimed by Israel for geo-strategic reasons. See T.FARER, "Israel's unlawful occupation", 82 *Foreign Affairs* (1991) 37.

⁵⁸ E.g. the UK in the Suez crisis. See D.FARNIE, *East and West of the Suez: the Suez in history 1854-1956* (1969). As to the US in Haiti, see J.MORRIS, "Collective security and individual rights", in: *Security issues in the post Cold War World* (1996).

never been satisfactorily defined so that judging the self-defence response always proves problematic. The UN Special Committee that met in 1973 to address the 'Question of Defining Aggression'⁵⁹ did so after the Bangladesh crisis and their definition was, moreover, never endorsed anyway due to its inherently problematic nature.

3.2. Use of force and self-determination: the 1970 Declaration

As mentioned earlier the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the UN Charter is highly significant since its statements are considered to express norms of customary international law. The Declaration states, *inter alia*, that "[e]very State has the duty to promote through joint and separate action, realisation of the principle of equal rights and self-determination of peoples ...".⁶⁰ It also declares that every state must refrain from forcible action that deprives peoples of their right to self-determination, which is precisely how the Pakistani military action against the Banglas was viewed by India. However, while the 1970 Declaration is generally favourable to the Indian argument for intervention, this intervention was still in violation of the UN Charter which outlaws the use of force and interference in the domestic affairs of another state.⁶¹

We remain left with the question of the limits of the right to self-determination and the right to the use of force by third parties in support of self-determination movements. In recent years the term 'humanitarian intervention' has been increasingly used to justify (usually Security Council) action for the sake of international peace and security. In fact the UN practice of the early 1990s arguably poses a strong case in favour of collective intervention. Irrespective of the political nature of these interventions, the fact remains that they took place under the auspices of the Security Council (with the exception of the action in Kosovo in 1999) which has the right to take such action under the UN Charter. Thus whenever the Security Council intervenes in a self-determination struggle it is arguably legal if it takes place by way of enforcement action under Chapter VII. This in spite of the domestic sovereignty clause – Article 2(7) – since this particular article explicitly exempts Security Council action from its application. The question we deal with in the Bangladesh case, however, concerns action by a third party without a Security Council mandate. The Indian action was unilateral and went ahead despite attempts by the Secu-

⁵⁹ B.FERENCZ, "Defining aggression – the last mile", 12 Col.JTr.L (1973), see also G.FITZMAURICE, "The definition of aggression", 1 ICLQ (1952).

⁶⁰ Loc.cit.n.49.

⁶¹ It is to be noted that the Declaration has a saving clause to the effect that nothing in it should be taken as contrary to the provisions of the Charter (see General Part, sec.2 para.2).

rity Council to block it.⁶² In light of the Charter-based system, it must be stated emphatically that the action was illegal. There is little justification in international law for a neighbouring country to forcefully determine the outcome of a domestic issue of a sovereign State.

This otherwise clear-cut norm became confused by the development, in the years immediately following the signing of the Charter, of the concept of human rights⁶³ which began to erode the principle of domestic jurisdiction and to make the legitimacy of many state acts more questionable than before.⁶⁴ Another factor that may have influenced the legality of the Indian action is the signing of the Genocide Convention in 1948.⁶⁵ In recognition of its abhorrent nature, genocide was declared to be a crime against humanity and states were obliged to prevent and punish it. While that is clear enough and would warrant some form of intervention, what remains unclear is whether the police action mounted by Pakistan and carried out by the Pakistani army, actually amounted to genocide within the meaning of the Convention.

3.3. Indian action as self-defence

The above arguments, though admittedly not indisputably tenable at the time of the crisis, were not referred to by the Indian government, who classified its use of force instead as an action of self-defence and, therefore, justified under Article 51 of the Charter. This article remains the favoured ground for states to justify the use of force beyond their international boundaries. India argued that the flow of refugees placed unbearable financial strains on the already impoverished regional economy of the Indian state of West Bengal. On this basis India claimed the right to take action in defence of its sovereignty to remedy the situation. Despite Indian attempts to bring the crisis under international attention,⁶⁶ the international community was not prepared to become involved in the crisis and kept allowing Pakistan protection under the domestic affairs clause. The Indians had urged the international community to work towards a peaceful political solution by creating pre-conditions for the return of the refugees.⁶⁷ Failure to heed this request was taken by India as leaving it no choice but to take unilateral action to safeguard its own security. Hence the Indian action in East Bengal was alleged to be taken in 'self-defence'⁶⁸ al-

⁶² See HARRIS, *op.cit.*n.7 at 112. No resolution was passed due to the Soviet defence of the Indian action. By using its veto power, the Soviet Union managed to stave off a Security Council resolution long enough for the Indian army to complete its action, thereby further highlighting the utility of the use of force.

⁶³ As strongly evidenced by the growth in human rights treaties, conventions and declarations.

⁶⁴ See B.SIMMA, *The Charter of the United Nations. A Commentary* (1994).

⁶⁵ The Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

⁶⁶ See SISSON and ROSE, *op.cit.*n.23.

⁶⁷ See Mrs GANDHI's address to Parliament, 11 *International Legal Materials* (1972) 121.

⁶⁸ UN Charter Art.51.

though, strictly legally speaking, no 'armed attack' had occurred that immediately threatened the Indian frontiers. The idea of economic threats giving rise to a right to self-defence was arguably not included in the Charter, casting serious doubt upon India's choice of this reason to justify its action.

On the other hand, if the spirit of the Charter is to be invoked it may be argued that the people of East Bengal had a right to self-defence which it exercised with the aid of the Indians. This argument would rest primarily on two grounds. First, Pakistan was legally constituted as a 'federal' state with two autonomous wings according to the 1940 Lahore Resolution. Without going into the intricacies of federalism, it does suggest that the eastern part of the country was to have a degree of autonomy which included an inherent right to self-defence of its own. This is a contentious statement but is backed up to some extent by Malcolm Shaw who argues that internal boundaries are non-violable in case of dismemberment of a sovereign state.⁶⁹ Its implication in the case of Bangladesh would suggest that the principle of *uti possidetis* translates into the creation of the new state within its original federal boundaries. Secondly, the UN Charter arguably recognizes a right to self-determination of all 'peoples',⁷⁰ and is opposed to genocide (as a crime directed toward a people) and to the use or threat of force within the international community – a point we shall return to later in this paper. The Pakistani use of force, though technically within the boundaries of the state, was nonetheless significant enough to affect the international community in terms of concern for humanitarian matters. These included the flow of refugees and the alleged commission of genocide, although the latter remains problematic as the question of whether the police action by the Pakistani military amounted to genocide is not generally accepted.⁷¹ However, if there were a risk of annihilation by an army intent on gaining control of a territory, there would need to be a right of self-defence for the threatened entity concerned under any form of law. What this paper seeks to suggest is that if we can protect the right of an individual to self-defence under municipal law and that of a State under international law, we ought to be able to justify also the right of a people to self-defence.

⁶⁹ M.N. SHAW "Self determination, autonomy and international boundaries", conference paper at the Symposium on Autonomy and Self Determination: Theories and Applications, held by the International and European Law Unit, University of Liverpool, and jointly organized by the Israel Colloquium and the S.P.T.L. International Law Group on the 27th of May, 1997. See also SHAW, *loc. cit.* n.15.

⁷⁰ UN Charter Art.1 para.2.

⁷¹ Contrast, *inter alia*, SISSON and ROSE, *op. cit.* n.23, who do not admit the action as genocide despite pointing out its monstrosities, to MASCARENHAS, *op. cit.* n.32.

3.4. Precedents set⁷²

The Indian army violated the territorial sovereignty of its neighbour in aiding a secessionist movement, raising the question of whether a state is allowed under international law to aid a self-determination movement against another state by direct use of force. This question is even more interesting if examined in light of the Biafran crisis that preceded events in Bangladesh, and in light of the current climate of UN-sponsored intervention on humanitarian grounds. It is true that the 1970 Declaration calls on UN member states to help peoples to realize their right to self-determination, but this was arguably aimed specifically at peoples subjugated to white colonial rule. This limitation, however, would be tenuous as it suggests different sets of rules to apply to similar situations.

The Bangladeshi argued that East Pakistan was a colony of West Pakistan.⁷³ This, coupled with legitimate autonomy demands drowned out, legally held elections annulled and a genocide-like campaign launched, arguably provided the Easterners the right to defend themselves by force. In order to succeed they enlisted the help and logistics of a foreign state. Thus the Indian aid would be justified and legitimized.

The (paradoxical) problem with this line of argument is that it could be held true for every self-determination movement irrespective of its merits. Separatist forces are as a rule at a disadvantage in fighting state mechanisms like armies and will, therefore, need aid from sympathetic states in their quest. Acceptance of such actions, however, would be contrary to the Charter-based values endorsed by the international community which is far more representative today than it was in 1945.⁷⁴ Therefore, taking Bangladesh as a precedent-setting event would go against the will of that community.

4. BANGLADESH AND STATE SOVEREIGNTY⁷⁵

4.1. Internal matter of Pakistan – Applicability of Article 2(7) of the Charter

State sovereignty is one of the basic pillars of the United Nations Charter-based system.⁷⁶ The founders of the UN were wary of creating a form of world

⁷² See J.CRAWFORD, "Criteria for statehood in international law", 48 BYIL (1976-77) 93 at 170.

⁷³ MASCARENHAS, *op.cit.*n.32, and NANDA, *loc.cit.*n.22.

⁷⁴ In terms of the sheer numbers of member states of the UN.

⁷⁵ See generally J.CAMILLERI and R.FALK (eds.), *The end of sovereignty? The politics of a shrinking and fragmenting world* (1992); C.CONSTANTINOU, "Before the summit: representations of sovereignty on the Himalayas", 27 *Millennium Journal of International Studies* (1998) 1; R.LAPIDOTH, "Sovereignty in transition", 45 *Journal of International Affairs* (1992) 325.

⁷⁶ See Preamble of the UN Charter.

government that would supersede the state since it would not provide as good a form of system of representation as is provided by the state today. Besides, there was no proof that the international polity of states in fact desired a form of supra-national government, especially in light of its implications for state sovereignty. Instead, they created a system of international relations that recognized the overriding position of the states, regulating their behaviour in the international arena through a complex framework of rules centred around Article 2(7) of the Charter. This article is one of the vital cogs of the system and perhaps the most important of all the clauses of the United Nations Charter, laying down the right of a State to exercise exclusive sovereignty over its domestic affairs. It may be argued that without Article 2(7) few states would have endorsed the Charter since it would have allowed outside forces to decide on policy concerning issues within the states' jurisdiction, thereby putting smaller, less influential states at a significant disadvantage.

In the Bangladesh case the Pakistani government argued that the events leading up to the deployment of the army in East Pakistan were matters strictly within the internal jurisdiction of the Pakistani state and, consequently, it condemned the Indian attempts at internationalizing the matter as 'interference' and, therefore, illegal. The international community endorsed this view as the problem had basically arisen out of the 1970 elections and concerned a domestic political issue. The Pakistani government argued that the Bangladeshi were trying to secede from the state of Pakistan with the help of India and that the victory of Mujib-Ur-Rehman in the 1970 elections was influenced by India. This claim, if proved, would place India on very weak ground in international law, since it would be up against Article 2(7), a clause that India herself had used many times in a bid to curb super-power interference.⁷⁷

4.2. Affecting 'international' peace and security

One more angle that needs to be explored is whether the issue affected international peace and security since, if it did, the justification for outside 'interference/intervention' becomes stronger. From the Pakistani point of view, internationalization of the issue was the work of a hostile neighbour. What was at stake was a struggle for a constitutional system in the domestic politics of Pakistan without direct international implications. However, once the Pakistani army moved in to quell the separatist forces, and refugees fled across the frontier into India, the issue moved out of the realm of domestic politics, since it arguably pushed the unwanted population of Pakistan into Indian territory, thereby violating India's right to territorial sovereignty. However, it needs to be stressed that India did not have to accept the refugees. Pakistani sources argued that India in fact encouraged the refugee flow and then provided them

⁷⁷ See, for similar situations, *Nicaragua v. US*, ICJ Rep.1984; C.G.FENWICK, "Dominican Republic: international and collective self defence", 60 AJIL (1966) 64.

with arms to fight against the sovereign Pakistani state. The facts indeed suggest that India does not always accept refugees. For example, it refused to take in fleeing Nepalese from Bhutan. Thus it was plausible that, in accepting refugees, India violated Article 2(7) by harbouring separatist forces that were out to destroy the foundations of a sovereign UN member state. This argument, however, breaks down when it comes to the refugee question in general, since it would suggest that all refugees are disruptive to the State from where they flee. This would go against the way in which international law has evolved with regard to the protection of refugees, in the pre- as well as in the post-Bangladesh period. Nevertheless, it does highlight the difficult nature of important questions such as where 'humanitarian aid' ends and where 'interference in domestic affairs' begins. Arguably, by the time the refugee flow thickened to nearly 10 million, the case was definitely affecting regional (especially India's), if not international, peace and security. It conferred an international dimension to the issue and pulled it away from the ambit of Article 2(7).⁷⁸

4.3. Right to police action

When a peaceful settlement of the domestic conflict failed to materialize the Pakistani government decided to resort to force to curb the separatists. This was a sovereign act and cannot really be questioned within the sphere of international law since it concerned essentially a matter of domestic politics. After all, even an 'imagined community'⁷⁹ such as a state has an inherent right to protection under international law. Sending the army into certain parts of a state is not without precedent and has been used on numerous occasions by most countries in the world to quell domestic violence and protest.⁸⁰ While in some cases the international community became outraged, the actions have always been considered as falling within the scope of Article 2(7) and, therefore, technically beyond the reach of international law per se. This was definitely true in Pakistan until, perhaps, the refugee flow began to affect the peace and security of India. It is instructive to view these developments through a post-Kosovar lens since the international community did 'pierce the veil' of Yugoslav sovereignty even without a Security Council mandate, in the name of human rights. This was, arguably, in contravention of international law since the action did not have the explicit permission of the sovereign state in question while affecting events within its territory. It may be argued that, apparently, a new norm is developing that sees the rights protected by Article 2(7) as being

⁷⁸ For a detailed analysis of how the flow began, see T.FELDMAN, *The end and the beginning* (1975).

⁷⁹ In the sense of B.Anderson, *Imagined communities: reflections on the origin and spread of nationalism* (1983).

⁸⁰ E.g. the Royal Ulster Constabulary in Northern Ireland, the Chinese security forces at Tianamen Square in Beijing, the Russian action in Chechnya.

significantly weaker than in the past. But, while this might be true in Kosovo, it remains questionable in Chechnya.

To sum up, the international system is based on the premise that states are sovereign. The UN Charter protects the right of states to their sovereignty by separating their domestic and international affairs by way of a veil. Since the primary role and function of the United Nations as conceived at the time of the signing of the San Francisco Charter was the promotion of international peace and security, neither the UN nor any of its member states is allowed to interfere in the domestic affairs of any state unless by authority of a Security Council decision under Chapter VII of the UN Charter. However, once the veil is pierced as a result of the escalation of a domestic conflict beyond the boundaries of the state, the validity of Article 2(7) is limited. If the Charter would have functioned as it was meant to, India would have been able to request the Security Council for action in collective self-defence. Unhinged due to Cold War politics, however, the Security Council was unable to act. In this restricted light the actual Indian action was arguably lawful as an act of self-defence under Article 51 – as it was facing a threat to its peace and security. However, broadening the scenario by including the use of force by India and its instigation of the refugee flow for the purpose of destabilizing a hostile neighbour brings the case in direct confrontation with Article 2(7). It may thus be argued that classifying the Bangladesh incident, or even the recent action in Kosovo, as precedent-setting could sound the death knell for the system of states' inherent right to sovereignty over its domestic affairs. This would not only leave the state unprotected against separatist forces, but also vulnerable to (whether desirable or undesirable) forces from other states bent on influencing events to suit their national interests.

5. RECOGNITION OF THE SOVEREIGN STATE OF BANGLADESH

5.1. Effects of recognition⁸¹

India was the first country to recognize Bangladesh in December 1971, paving the way for further Indian assistance. The act of recognition was vital since it transformed the Awami League from a separatist movement to an aspiring international actor. Other states followed suit and within a year Bangladesh was accepted as a full-fledged international entity.⁸² Pakistani recognition of Bangladesh in 1976 and UN membership finally confirmed Bangladesh's status as a sovereign state.

The recognition of Bangladesh raised several interesting questions in the

⁸¹ See J.DUGARD, *Recognition and the United Nations* (1987); H.LAUTERPACHT, *Recognition in international law* (1947); S.TALMON, *Recognition of governments in international law* (1997).

⁸² By the end of February 1972, 31 countries had recognized the state of Bangladesh as a sovereign state.

international legal discourse. Prime amongst these was whether the recognition of a state wipes out the issue of lawfulness of acts relating to its creation, or, in other words: does the fact of Bangladesh having become an undisputed actor at the international plane automatically render questions about the legality of its creation irrelevant? Or, does it simply mean that any contested claim attains legality as long as it is victorious. This question would perhaps ruefully be answered in the affirmative by Biafrans, but that would reduce the international system once more to one where the outcome of international conflict is primarily determined by the effectiveness of force.⁸³

Another question that needs to be addressed relates to the point at which a struggle for secession becomes a cause that may be supported by another State. More specifically, what level of assistance is a UN member state entitled to provide against the sovereignty of another member state? Does recognition *de facto* confer legality upon a fledgling State?⁸⁴ These issues are extremely problematic and there are no clear answers forthcoming.

Next, there are two other important issues that need to be discussed with regard to the recognition of Bangladesh. First, the relevance of the Indian recognition to the unfolding of the crisis, and second, the impact of the timing of the recognition. As to the first issue the answer will have to be that the Indian recognition was a significant step in the emergence of the fledgling state. Gaining a strong supporter like India who was willing, after long covert support,⁸⁵ to overtly endorse the cause of the new state in the international arena, undoubtedly facilitated the latter's further emancipation. Within a month of the Indian recognition Bhutan followed suit⁸⁶ and by February 1972 thirty-one countries had recognized the state of Bangladesh. As for the second issue, early Indian recognition would most probably have been denounced by the international community. As has happened with the so-called Turkish Republic of Northern Cyprus,⁸⁷ the international community usually avoids hasty recognition since it compromises the domestic jurisdiction of the state from which the entity in question is seceding.⁸⁸ Early recognition of Bangladesh would definitely have been judged as undue interference in the internal affairs of Pakistan within the scope of Article 2(7). By early March, prior to the military action, the Awami League was the *de facto* government in the territory,⁸⁹ demonstrating its effective control by a high-visibility, successful, civil disobedience

⁸³ See CRAWFORD, *loc.cit.*n.72 at 93.

⁸⁴ *Ibid.* at 99.

⁸⁵ See FELDMAN, *op.cit.*n.78 at 165.

⁸⁶ Bhutan at the time was an associate state of India. Therefore, the Bhutanese support for Bangladesh was possibly influenced by Indian policy rather than inspired by any firm belief in the Bangla cause.

⁸⁷ See K.Chrysostomides, *The Republic of Cyprus: a study in international law* (2000); Z.M.NECATIGIL, *Our republic in perspective* (1985).

⁸⁸ See, however, the effect of early recognition of Croatia in 1991: S.STOJANOVIS, "The destruction of Yugoslavia", 19 *Fordham Journal of International Law* (1995) 337.

⁸⁹ See MASCARENHAS, *op.cit.*n.32.

movement. Yet recognition at that stage may still have been considered premature. Had the international community recognized the fact that at the time the reigns of government were already in the hands of the Awami League, exercising effective de facto control over the territory, it would have saved at least 3 million lives and prevented what was the worst refugee crisis of the time. However, the states were helpless owing to the veil of Article 2(7) that was still firmly in place. It appears legitimate to ask why 3 million people needed to be killed and a further 10 million displaced before the situation of mid-March re-occurred, this time to the satisfaction of an 'international community' with its limited will to see its resolution. The answer seems to be that in the interest of international order, peace and security it was the only way forward. The Biafra experience of only a few months earlier had reiterated the Hegelian concept of the nature of sovereignty: a nation can only mature into political manhood if it can successfully mobilize its people in its defence.⁹⁰ Similarly, recent history suggests that, in general and notwithstanding exceptional cases like the international action in Kosovo, a separatist movement must defend itself successfully against adverse force, if it is to stake a claim to recognition as a state.

5.2. Difference from Biafra

The Biafran civil war remained a civil war for the prime reason that the Nigerian government was strong enough to subjugate the forces of separatism. This leads inevitably to the question of whether this in itself constitutes the defeat of the international system based on the outlawing of violence. The Biafran crisis was unique for the extent of indifference it drew from international institutions such as the Organization of African Unity (OAU) and the UN, with both entities merely watching nervously as the struggle unfolded.⁹¹ In the end, the superior arms of the Nigerian army prevailed and the Biafrans were shelved in history. This would suggest that there is a prima facie case for interference in independence struggles since without the aid of a strong enough army there seems to be little hope of victory. If recognition only comes after a 'successful' war of a nationalist liberation movement, then hopes of pacific settlement of disputes as well as humanitarian norms of representation and self-determination will be significantly compromised.

It has been argued that another important difference between Biafra and Bangladesh lay in the fact that the loss of East Pakistan did not really compromise the Pakistani state, while the loss of Biafra would have drained Nigeria of important resources.⁹² This is, at best, a problematic argument since according

⁹⁰ See ELSHTAIN, loc.cit.n.53 at 403.

⁹¹ See H.HERACLIDES, *Self-determination of minorities in international politics* (1991) 1-60.

⁹² This argument has also been advanced in the case of the Katanga secession from Congo. See G.J.LIBOIS, *Katanga secession* (1966).

to the International Bill of Rights⁹³ the right to self-determination encompasses the right of peoples to freely dispose of their wealth and natural resources. Besides, the argument is questionable also because there is no unanimity about the independence of West Pakistan from East Pakistani resources.⁹⁴ Other arguments put forth have to do with geographic factors and issues of cultural proximity. Yet, all these factors pale in the face of the one decisive fact – Bangladesh won the war of secession, while Biafra failed. This renders the international system's supposed values of anti-violence and pro-peace and security mere rhetoric.

6. CONCLUSIONS

After having examined the issues relating to the creation of the sovereign state of Bangladesh we are left with more questions than answers. One of these questions is whether the case constitutes a watershed in international law and international relations or whether it is merely an exception to the continued validity of a certain set of rules. Also pertinent is the question whether the case sets out a precedent for the legality of a state to assist break-away factions in another state in the name of self-determination. On the other hand, it must be acknowledged that special circumstances were involved in the Bangladeshi case and that the norm on self-determination is to be exercised restrictively so as not to allow every separatist movement take advantage at the cost of international order and peace and security.

A question that needs to be asked in light of the Bangladesh case is whether secession is lawful. This is a highly relevant question today in the face of an increasing number of instances of secessionist conflict. If the international legal system is to cope with these challenges, it will have to address this and other, subsidiary, questions. These would include the determination of the exact parameters of state sovereignty *vis-à-vis* the jurisdiction of international organizations and other collective security alliances such as NATO. There is also the much needed clarity with regard to the notion of 'humanitarian intervention' and its ability to pierce the veil of Article 2(7). The discourse would also need an answer to the question whether recognition as a new state erases the illegality involved in its creation and whether international approval should be the basis for the existence of a sovereign state. Finally, with regard to the comparison made between Biafra and Bangladesh and, more recently, between Chechnya and Kosovo, clear paradigms need to be established to enable identification of the exact nature of the conflict and to maintain consistency in deciding on whether or not to take international action.

In view of the available evidence, it is suggested that adopting Bangladesh as precedent-setting would upset the balance of the international system and

⁹³ See the joint Art. 1 of the International Bill of Rights (ICCPR & ICESCR) 1966.

⁹⁴ MASCARENHAS, *op.cit.*n.32, clearly sets out this argument.

render the standards of peace, security and order difficult to maintain. Admittedly this raises the question of whether it is legally permissible to adopt rules without consistent applicability. Of course doubts like these can be resolved by an analysis of the political interests involved, but this arguably takes the issue out of the legal realm.

The above issues serve to highlight the complexities of international law, and demonstrate clearly the fallacy of incorporating simplistic 'realist' models into the realm of international law and politics that will not succumb to such straightjackets.⁹⁵ We shall try to answer some of the questions raised, on the basis of the Bangladesh case, and thereby ascertain to what extent the international law of self-determination has been strengthened by the Bangladeshi secession.

First, it needs to be reiterated that Bangladesh is clearly an exception to the prevailing rule of self-determination. Under no circumstances could it be construed that the international community would generally allow states to be dismembered in the way that the formerly united Pakistan was. In framing a modern law of self-determination the need for order, being an inherent part of the UN Charter, will be an essential factor. On the other hand, our case study has very clearly demonstrated the inherent problems of rigid norms. A strong case can be made on the basis of evidence presented by some authors⁹⁶ that the Bangla people were in many ways colonized by their counterparts in the western part of Pakistan. It was equally clear that they had very strong credentials for existence as a separate people, not only on the basis of linguistic, racial and cultural factors but also in terms of geography. Thus Bangladesh was clearly an exceptional case.

Second, it would be fallacious to extend this hypothesis and suggest that it would now be legal to assist breakaway factions in another state in the name of aiding self-determination. The Indian action in Bangladesh was clearly illegal in that it compromised Pakistani sovereignty. However, since this sovereignty was in dispute at the time by the Bangla claim to self-determination, the question of legality was clouded over. Although the case is not unique, nonetheless any suggestion according to which all separatist movements have a right to receive help from hostile third parties would, as pointed out earlier, lead to a breakdown in the Charter-based system. What isolates Bangladesh from other cases of secession is the fact that the Bangla people faced a Pakistani army that was allegedly indulging in genocide. On the sole account of the character of genocide as an international crime against humanity, it is argued here, could the Indian action be regarded legally justified. The Indian argument that the flow of refugees was affecting peace and security in the region, while valid as such, may be of limited value in that India had to obtain a Security Council mandate for their action which was in essence a pre-emptive first strike. Instead, what

⁹⁵ See M.KOSKENNIEMI, "International law in a post-realist era", 16 *Australian Year Book of International Law* (1995) 1.

⁹⁶ Notably MASCARENHAS, op.cit.n.32, and SISSON and ROSE, op.cit.n.23.

actually transpired was a successful blockade of the Security Council option by India's ally – the Soviet Union – whilst the Indian army swiftly decided the argument by the use of force. There is little doubt to suggest that this was not how the drafters intended the system to work.

Third, arguments of economic colonialism would open up questions of international law that are even less defined than the areas examined in this paper. Undoubtedly, looking at these issues requires a holistic approach, including the inherent danger of generalizing the problem to an extent of escaping any kind of cogent symbiosis. Economic colonization, according to many developing world economists, is arguably exercised by the strong, western, states by exploiting the low technology and natural products produced by the poorer states.⁹⁷ To consider this sufficient ground for violent self-determination and secession may be over-stretching the argument. Besides, within countries there will always be disparities in wealth distribution among different regions. While this is an avenue that is outside the scope of this paper, the Katanga secession would be an interesting case to look into these issues in more depth, as it had its causes to a large extent in the mineral wealth of the seceding region. The right to self-determination arguably – according to Article 1(3) of both International Human Rights Covenants – includes the right of peoples to freely dispose of their own natural wealth.

Fourth, there is the increasing trend towards further institutionalization of the factors contributing to peoplehood. During the decolonization period, peoplehood was easily granted to all communities that came under the guise of victims of white colonial rule. The parameters of the new post-colonial state were thus set by the colonial powers, including poorly drawn boundaries, and these thus became one of the first sources of differences among the new states. On the Indian subcontinent the process was almost immediately aggravated by the claim that religion too could be a constituting factor to statehood. The variety of factors taken as a ground to mount challenges against existing constitutional structures has steadily grown. The Katanga secession attempted to bring in natural resources as a means for legitimizing separatist claims, while Bangladesh was constituted by reference to linguistic differences. The Eritrean secession was achieved by mobilizing people along colonial historic grounds, and more recent separatist conflicts have been motivated by ethnic identity.

In an international system still geared towards the preservation of order, the increasing scope of controversies severely threatens the integrity of the system. But as can be seen from the Dayton Peace Agreement, it may be said that international law has acquiesced in trying to establish short-term order in the former Yugoslavia by re-constituting it along ethnic lines.

The main conclusion that we can draw from the case of Bangladesh is that in certain situations secession is a right under international law, functioning under the umbrella of self-defence as a general principle of law.⁹⁸ The special

⁹⁷ See, generally, P. KENNEDY, *Preparing for the twenty-first century* (1992).

⁹⁸ As referred to in Art. 38 para. 1 item (c) of the Statute of the International Court of Justice.

circumstance in the case was the alleged occurrence of genocide, and the creation of a new state as the only way available to stop it and to ensure the survival of the genus.

RESERVATION TO TREATIES AND SOME PRACTICAL ISSUES

Su Wei*

The modern law on reservations to treaties is now embodied in the 1969 Vienna Convention on the Law of Treaties (VCLT), which provides the basic guidance for state practice. Generally speaking the flexible approach adopted by the VCLT has operated quite satisfactorily.¹ However, this does not mean that the system is free from problems or deficiencies in its application. The present paper is designed to analyse the operation of the VCLT rules and the problems associated therewith in the light of relevant state practice, with a view to clarifying some of the issues involved.

1. INTRODUCTION

Reservation to treaties is one of the complex and difficult issues in the law of treaties and in the state practice with respect to treaties. The concept is deeply rooted in the basis of international law itself, namely the consent of states. The essence of a reservation is to attach certain conditions to the consent expressed by a state to be bound by a treaty. There are two aspects that need clarification. One is that a reservation, in order to be admissible and effective *vis-à-vis* other parties to the treaty, has to be accepted by them. The other is that no international obligation can be imposed upon a state without its acceptance, either explicitly or implicitly. It follows that a state can withhold the application of certain provisions in a treaty by way of a reservation, like the persistent objector state in the formation of customary rules of international law. The development of the rules on reservations to treaties witnesses a changing emphasis from the former to the latter aspect in responding to the reality of international relations and the corresponding political and legal requirements.

* Counsellor and Legal Adviser, Permanent Mission of China to the United Nations. This article is developed on the basis of a thesis submitted by the author as partial fulfilment of the requirements for the LLM degree at the University of Cambridge. The views expressed are those of the author in his personal capacity.

¹ Professor BROWNIE concludes that “[i]n practice, for extraneous reasons, the flexible system is working fairly well”. I. BROWNIE, *Principles of public international law*, 4th ed. (1990) 611.

Theoretically, reservations may be made to any treaty, bilateral and multilateral. Reservations to bilateral treaties, however, seem to have little practical meaning because in that case they would amount to lack of agreement on the issue at point.² It is also contended that reservations to bilateral treaties do not present any problems³. As the International Law Commission (ILC) stated, “[a] reservation to a bilateral treaty presents no problems, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement – either adopting or rejecting the reservation – the treaty will be concluded; if not, it will fall to the ground”.⁴ The present paper will be confined to examining issues relating to reservations to multilateral treaties.

The traditional rules on reservations to multilateral treaties were developed upon the perception that a treaty resembles a contract in the municipal legal order where, once the terms have been agreed upon, the contract can only be modified with the consent of the parties. So a reservation made by a state can be assimilated to an offer which must be accepted by all the contracting parties to the treaty, in order for it to produce legal effect. Any objection to a reservation would have as its consequence that either the reserving State withdraws its reservation and becomes a party without the reservation, or insists on its position and does not become a party. The actual veto power of one objecting party would preclude a reserving State from becoming a party to the treaty, no matter how minor the reservation is or even if it might seem acceptable to most other parties. This is where the question whether half a loaf would not, after all, be better than no bread⁵ comes in.

The need to ensure the widest possible participation in multilateral treaties, especially those of a normative and humanitarian nature, coupled with the prevailing reality of international relations including the new procedures for the adoption of the text of a treaty prompted the International Court of Justice (ICJ)

² R.JENNINGS and A.WATTS, *Oppenheim's International Law*, Volume 1, 9th edn.(1992) 1242; P.REUTER, *Introduction to the law of treaties*, 2nd English edition (1995) 78. Occasionally, but rarely, one of the parties to a bilateral treaty makes a reservation when expressing its consent to be bound by the treaty. The legal consequences arising therefrom may be resolved either by interpreting it to the effect that no agreement has in fact been reached on the subject matter, or by applying the unanimity rule of acceptance. If not accepted, no treaty relations between the parties are deemed established. It is not quite clear whether the VCLT rules apply to reservations to bilateral treaties. It remains even more questionable whether tacit acceptance can be assumed when the other party that has been previously notified of the reservation proceeds to the exchange of instruments of ratification without raising any explicit objection to the said reservation. The question might partly be answered by reference to Art.20(2) of the VCLT if the term “limited number of negotiating states” can be interpreted as to cover also the case of bilateral treaties. For further discussion, see F.HORN, *Reservations and interpretative declarations to multilateral treaties* (1988) at 4 and 7.

³ D.P.O'CONNELL, *International law*, 2nd ed.(1970) 232; HORN, *supra* n.2 at 4.

⁴ YILC 1966-II at 203.

⁵ G.FITZMAURICE, *Law and procedure of the International Court of Justice*, Vol.1 (1986) 411.

to reject the traditional unanimity rule on reservations in its advisory opinion on Reservations to the Genocide Convention.⁶ The Court stated:⁷

“[I]t has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto. It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law.”

In the same opinion, the Court adopted a more flexible approach based on the consensual conception of international law. It said that

“[i]t follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.”⁸

As to the effect of a reservation and an objection thereto, the Court decided

“that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.”⁹

Despite criticism from many quarters and especially the reluctance on the part of the ILC to follow such an approach in its earlier reports on the law of treaties, the flexible approach as pronounced by the ICJ has been followed by the UN Secretary-General in his depository practice and was later incorporated in the ILC Draft Articles on the Law of Treaties and finally adopted in the VCLT.

⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep.1951:15.

⁷ *Ibid.* at 24.

⁸ *Ibid.* at 24.

⁹ *Ibid.* at 15.

2. THE MODERN LAW AND ASSOCIATED PROBLEMS

The modern law of reservations is now contained in Article 2(1)(d) and Articles 19-23 of the VCLT, the result of both codification and progressive development of international law. The bulk of the rules is based on the flexible approach, but remnants of the unanimity system are easily discernible, e.g. in the provisions of Article 20(2) and (3) of the VCLT. In the *Anglo-French Continental Shelf Arbitration* case, the Tribunal made reference to Article 2(1)(d) in determining the status of French declarations and in effect applied Article 21(3) in deciding on the legal effect of an objection to a reservation in circumstances where the objecting State had not opposed the entry into force of the treaty between itself and the reserving State.¹⁰ In the *Temeltasch* and *Belilos* cases, the European Commission and the European Court of Human Rights applied Article 2(1)(d) of the VCLT¹¹. Although it might be too bold to assert that the Convention regime represents in its entirety codification rather than progressive development¹² of international law, the subsequent state practice certainly raises the impression that the VCLT rules are evolving as customary rules of international law.¹³

2.1. Definition of a reservation

Although the practice of reservations to treaties can be traced back as far as the end of the 18th century¹⁴, it was not until 1969 that an authoritative definition of a reservation crystallised in the VCLT. In Article 2(1)(d) of the Convention, a reservation is defined as

“a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”

¹⁰ *Anglo-French Continental Shelf Arbitration*, 54 ILR 50-52; I.SINCLAIR, *The Vienna Convention on the Law of Treaties*, 2nd ed.(1984) at 26.

¹¹ European Commission in *Temeltasch v. Switzerland* (1982), 88 ILR 627; European Commission and Court in *Belilos v. Switzerland* (1988), 88 ILR 640 and 663.

¹² SINCLAIR noted that Articles 19-23, at least to some measure, represent progressive development rather than codification. He is very cautious in judging whether they have evolved into customary law. See SINCLAIR, *op.cit.*n.10 at 12-13.

¹³ L.LIJZAAD, *Reservations to human rights treaties: ratify and ruin?* (1995) at 76. Professor PELLET concludes that “even if the Vienna Convention was an exercise in progressive development with regard to reservations, the rules established by article 2, paragraph 1 (d), and articles 19 to 23 have now acquired customary force.” See A.PELLET, *First Report on the Law and Practice relating to Reservations to Treaties* (1995), UN Doc. A/CN.4/470, p.71. But Professor GREIG expresses doubts on this point. See D.W.GREIG, “Reservations: equity as a balancing factor?”, 16 *Austral.YIL* (1995) 21.

¹⁴ HORN, *supra* n.2 at 7.

Three elements are essential in this definition: form, time and distinctive character. In terms of form, a reservation is a 'unilateral statement'. Clearly it is external to the treaty provisions and is made by a state on its own. It is unilateral in the sense that it is made *vis-à-vis* other parties to the treaty. This would also cover the case of a statement jointly formulated by more than one party. The fact that it is presented jointly by a group of like-minded States does not change the *unilateral* character of the statement as long as it is intended not to have effect on their relations *inter se*,¹⁵ but on their relations with parties other than themselves. It is the one-sided initiative of the reserving State(s) that is essential here.¹⁶ The unilateral statement is only the first step in the reservation process. It only produces legal effect when it is accepted, one way or another, by another party to the treaty in question.¹⁷

The next element is the temporal requirement of a reservation. Although a unilateral statement could be made at any time during the negotiations of a treaty or after its conclusion, it will only have the character of a reservation when it is made by the state at the time of expressing its consent to be bound by the treaty, i.e. when "signing, ratifying, accepting, approving or acceding to a treaty". Where signing is subject to ratification or approval, the statement has to be confirmed by the state when it definitely expresses its consent to be bound. This temporal requirement may be considered as a default rule. It is open to the parties to a treaty to devise different temporal limitations in a specific treaty. International law basically being of a consensual nature, rules and procedures may also be created by explicit or tacit consent or acquiescence. There are examples of reservations made far exceeding the specific temporal restrictions of the treaty.¹⁸ They have exceptionally been tolerated by the parties to the treaties in question as a matter of expediency and out of pragmatic considerations, from which no *opinio juris* may be deduced. Such a pragmatic approach is mainly intended to simplify the normal procedure of withdrawing from a treaty and then rejoining the treaty with a reservation made at the time of becoming a party. However, it is doubtful whether such exception could be made in case of a treaty which is silent on the possibility of denunciation and

¹⁵ If the statement is solely directed toward altering treaty relations *inter se*, it would not constitute a reservation but might produce an effect as meant by Art.32 item (b) as a tool for interpretation, or Art.41(1) as a device for modification. See GREIG, *supra* n.13 at 26-27.

¹⁶ LIJNZAAD, *supra* n.13 at 32.

¹⁷ SINCLAIR, *supra* n.10 at 51; J.M.RUDA, "Reservations to Treaties", 146 Hague Recueil (1975-III) 105.

¹⁸ France made a reservation to the Convention Providing for a Uniform Law for Cheques of 1931 more than 40 years after it acceded to the treaty. The UN Secretary-General as depositary communicated the reservation to the states concerned. In the absence of objections within 90 days, the reservation took effect. The argument was that the parties to a treaty may, by unanimous decision, amend the provisions of the treaty or take appropriate measures with respect to its application and implementation. See *United Nations Juridical Yearbook 1978* at 199-200; HORN, *supra* n.2 at 42-43; GREIG, *supra* n.13 at 28 fn.35. If the French approach had met with just one objection, the matter would be much more complicated. The most likely solution would be for France first to withdraw from the treaty and then rejoin it with the intended reservation.

where neither the intention of the parties nor the nature of the treaty would allow the withdrawal from it.¹⁹

Finally, the essence of a reservation lies not in its wording or nomenclature, but in the effect it intends to produce. The phrase “however phrased or named” indicates that the form or name of the statement is irrelevant and that its content and substance are decisive. In the structure of the definition, the phrase serves as a qualifier to ‘statement’ and provides a logical link with the ‘purport ...’ phrase. It should be noted that the phrase is important in defining the concept of reservation, but when applying the definition to a specific situation the words should not be given an ‘overriding effect’²⁰ without due consideration of other relevant specific factors and the reasonableness of the end result.²¹

The key element in establishing a statement as a reservation is contained in the clause “whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. The words ‘purport’ and ‘exclude or modify the legal effect’ provide two clues for the application of the test. For ‘purport’, the subjective aspect of the statement has to be looked into, implying an investigation into the intentions of the author of the statement. As to whether the statement would, if applied, have the result ‘to exclude or to modify the legal effect’ of provisions of the treaty, an objective assessment is required, consisting of comparing the effect of application of the statement with that of the application of the treaty provisions as such.

The fact that states often append statements of various kinds and sometimes of a mixed or ambiguous nature to their signatures or to instruments of ratification makes it extremely difficult to determine categorically what amounts to a reservation *stricto sensu*. In its commentary of 1966, the ILC pointed out that states not infrequently make declarations as to their understanding of some matter or their interpretation of a particular provision and that “[s]uch a declaration may be a mere clarification of the State’s position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted”.²² It is not easy to draw a clear line between the two, especially where a statement says how a State would understand or propose to interpret or apply a particular provision of a treaty. (see *infra*, section 3.1)

To clarify the matter, it should be emphasized that a reservation to and the interpretation of treaties are two different legal issues regulated by different articles of the VCLT. The definition of a reservation as contained in Article 2(1)(d), if looked at in isolation from other parts of the treaty text, appears to include statements on interpretation, particularly by the words “however

¹⁹ VCLT Arts. 54 and 56.

²⁰ GREIG, *loc. cit.* n. 13 at 27.

²¹ The issue is to be further dealt with when discussing the distinction between interpretative statements and reservations in Section 3.1 below.

²² YILC 1966-II 190.

phrased or named” and “whereby it purports to exclude or to modify the legal effect”. Some writers suggest that “an interpretative statement is a reservation if the interpretation specified in the statement is imposed as a condition of the acceptance of the treaty by the State issuing the statement”²³ or if “a State makes its ratification or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty”²⁴. Such a proposition confuses the distinct legal rules clearly set forth in different parts of the VCLT. It is doubtful that under the VCLT unilateral interpretation could be imposed on other parties. Article 31 of the Convention states that a treaty shall be interpreted in good faith. The function of interpretation is to ascertain the legal effect of the provisions of a treaty as it is intended by the parties according to the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose and, where necessary and appropriate, with recourse to subsidiary means of interpretation. In good faith, a unilateral interpretation cannot purport to ‘exclude or modify’ the legal effect of a treaty provision. This may provide a perspective from which a reservation and an interpretative declaration could be distinguished from one another.

2.2. Formulation of reservations: admissibility

Article 19 of the Convention follows a permissive approach to the right to formulate reservations. It provides that “[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation ...”. This first half of the Article sets out in clear terms the right to formulate a reservation as a matter of general principle. But as indicated in another part of the Article, the right is circumscribed by three exceptions:

- “(a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

The scope of Article 19(a) and (b) is obvious. The prohibition referred to in Article 19(a) can be a general prohibition of any reservation (sometimes with the exception of those which are expressly permitted) or a specific prohibition of certain kinds of reservations or reservations to certain articles. As to Article 19(b), its scope was very much narrowed after the introduction of a Polish amendment inserting the word ‘only’ before ‘specified reservations’. If a treaty contains a provision merely permitting certain specific reservations, this does not by itself preclude a state from formulating other reservations. The original

²³ GREIG, *loc.cit.*n.13 at 30.

²⁴ D.M.McRAE, “The legal effect of interpretative declarations”, 49 BYIL (1978) 160.

presumption of the ILC that a provision permitting certain reservations would prohibit all others was changed into a formula prohibiting all other reservations except those exclusively permitted (in fact, an implicit prohibition). In this sense, Article 19(a) and (b) can be seen as one single exception to the right to formulate a reservation, i.e. if the reservation is prohibited by the treaty either explicitly or implicitly.

The limitations on the right to formulate reservations as set forth in the Article are objective criteria, but they are not 'self-executing' by the mere fact that they are included in the Convention. They have to be applied, primarily and first and foremost, by the state contemplating and proposing a reservation.

Article 19(a) and (b) are stated in rather clear terms and do not need much subjective assessment. When a reservation is formulated, the confronted states will apply the criteria in assessing whether the reservation so formulated is consistent with Article 19(a) and (b). Up to this stage, the rules are applied internally by both the reserving and confronted states. In a next stage, if the confronted state considers the reservation to be not admissible, it may respond accordingly and thereby rely on a reservation clause in the treaty concerned under which the reservation is prohibited explicitly or implicitly. It may then take the view that the reservation is a breach of the treaty and devoid of legal effects as a consequence of *ex injuria jus non oritur*. If, on the other hand, it finds the reservation not in contravention with the criteria of Article 19(a) and (b), it can respond in accordance with Article 20.

The VCLT adopted the flexible system for reservations as pronounced by the ICJ in the *Reservations* case. Compatibility with object and purpose of the treaty applies to both reservations and objections raised against them. In earlier drafts of the ILC there was a reference to the compatibility criterion with respect to objections. The reference was dropped in the final draft which was presented to the Diplomatic Conference because it was thought that very often objections to reservations were made not on the ground that the reservation was incompatible with the object and purpose of the treaty, but on other grounds²⁵. This does not, however, in any way diminish the fact that the compatibility in question is subject to the assessment by the confronted states, and that it is not a mandatory ground for objection to the reservation, although the objecting state is not obliged to state the reasons or grounds of its objection.

Article 19(c), though it can be seen as an objective criterion, contains subjective elements as the object and purpose of a treaty is an abstract concept, the identification of which requires much subjective interpretation. on the part of the confronted state. The compatibility of a reservation with object and purpose of the treaty is thus to be established in light of the responses (including silence) of the confronted states. In the absence of any objective mechanism or competent judicial organ to assess the compatibility in question, the test must be made by each state individually from its own perspective. When the reservation fails the object and purpose test, the state concerned will draw the legal conse-

²⁵ YILC 1966-II: 207.

quences as it sees fit. It could consider the reservation as invalid because it does not meet the requirement of Article 19(c). Consequently, it may explicitly exclude its entry into treaty relations with the reserving state. However, if it judges such treaty relations to be in its best interests, it can enter such relations according to its own free will. Anyhow, its conclusion as to the incompatibility of the reservation cannot override a different conclusion of other parties and invalidate the reservation with *erga omnes* effect. Only if all other parties consider the reservation incompatible with the object and purpose of the treaty would the reservation be of absolute invalidity *ab initio*.

The operations of Articles 19(c) and 20 are intermingled. The application of the criteria in Article 19(c) can only take place through the responses of other parties in accordance with Article 20. As the ILC stated:²⁶

“The admissibility or otherwise of a reservation under paragraph (c), on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States; and this paragraph has, therefore, to be read in close conjunction with the provisions of article 17 [VCLT Art.20] regarding the acceptance of and objection to reservations.”

Article 19(c) is a criterion guiding the formulation of a reservation. It essentially contains a limitation of the right to formulate the reservation. Such a limitation primarily to be ‘self-applied’ by the formulating state: the latter shall make sure that the reservation to be proposed is not incompatible with the object and purpose of the treaty. In the 1962 ILC draft, the (then) Article 17(2)(a) clearly indicated that “[w]hen formulating a reservation ..., a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty”.²⁷ Support for such a perception of Article 19(c) can be drawn from the ICJ advisory opinion in the *Reservations* case, where it was stated:²⁸

“The object and purpose of the Convention ... limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must *furnish the criterion for the attitude of a State in making the reservation* ... as well as for the appraisal by a State in objecting to the reservation.” [emphasis added]

The formulation of a reservation is a unilateral act. There is a presumption that a state exercises its right to formulate reservations in good faith and that it does not make any reservation that will *prima facie* be contrary to the limitations of Article 19. As it was pointed out by Mr. DE SARAM, “it also seemed reasonable to assume that Governments ... would not wish to disengage themselves from the central core obligations within a treaty... referred to in an advi-

²⁶ Ibid.

²⁷ YILC 1962-II: 60.

²⁸ ICJ Rep.1951: 24.

sory opinion of ICJ as the object and purpose of a treaty” and “there was no statistical or other basis for assuming that reserving States acted in bad faith”.²⁹

The ‘objective’ criterion of the ‘object and purpose’ test referred to in Article 19(c) is thus very dependent on the ‘subjective’ application by individual parties and their conclusions. The ICJ emphasized that the appraisal of the validity of reservations and the response to them are rights exercised individually by states from their individual point of view. It stated that “each State objecting to [the reservation] will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose ...”³⁰ An objective determination is only possible in exceptional cases where there is a judicial body empowered to that effect. The ICJ in its opinion referred to such possibility, but this was not relevant in the case at hand as it was precisely the reservation to such judicial function that had led to the application for the advisory opinion. Under some regional human rights conventions, however, the parties have indeed vested monitoring bodies with the power to rule on issues relating to the interpretation and implementation of the conventions including the validity of the reservations made thereto.

Different perceptions of the limitations to the right to formulate reservations have led to the development of two different doctrinal views on the nature and function of these limitations, resulting in quite different modes of application of the rules. According to the ‘permissibility school’, the issue of ‘permissibility’ is the preliminary issue that must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether “... other parties find the reservation acceptable or not”³¹. In contrast, for the “opposability school”, “the validity of a reservation depends solely on the acceptance of the reservation by another contracting State”, and “not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty”.³² The criterion in Article 19(c) is considered to be “a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that”.³³ The arguments of both schools of thought have their merits. Both schools recognize that all three items (a), (b) and (c) of Article 19 constitute conditions for the formulation of reservations. But they adopt different approaches as to how such conditions function. One school lays much emphasis on the theoretical aspect of the conditions, while the other stresses their practical application. Pushed to their extremes, they further complicate rather than help clear the inherent ambiguities. A line of thinking should be explored to bridge the doctrinal differences between the two schools while maintaining the

²⁹ J.DE SARAM, in YILC 1995-I:167.

³⁰ ICJ Rep.1951:26.

³¹ D.W.BOWETT, “Reservations to Non-Restricted Multilateral Treaties”, 48 BYIL (1976-7) 88.

³² RUDA, loc.cit.n.17 at 190.

³³ RUDA, *ibid.*

large measure of commonality in their practical application. There seem to be no major differences regarding Article 19(a) and (b). As to the problem that arises under Article 19(c), the permissibility school is right from a theoretical point of view, but such a theory can hardly be practicable due to the lack of objective determination at the jurisdictional plane. It is the pragmatic and practical scenario offered by the opposability school that seems to be prevailing, and the state practice is more or less in line with it.

2.3. Acceptance of and objections to reservations: opposability

The VCLT rules dealing with reservation are based on two balanced considerations: the freedom of states to formulate reservations (subject to the three exceptions of Article 19) and the freedom of parties to a treaty to accept or object to reservations. The principle underlying the whole system is that no obligation can be binding upon a State without its consent. It has been firmly stated by the ICJ in the Reservations case that “[i]t is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto”.³⁴ In order to be opposable, a reservation has to be accepted by the other parties to the treaty. Acceptance can be explicit or implicit (or tacit). The system of the VCLT with respect to the acceptance of reservations consists of a combination of the traditional unanimity rule and the flexible approach. Article 20 encompasses three acceptance rules: unanimity, collective decision and individual response. It is generally recognized that individual response is the basic rule while the other two are to be seen as *lex specialis*.³⁵ In temporal terms, there are two ways envisaged in Article 20: a reservation can be accepted, either in advance, as in the case of reservations ‘expressly authorized’ by the treaty, or subsequently (Art.20(1) VCLT). In terms of the actors whose response is required, the acceptance by the competent organ of an international organization is required if the treaty in question is the constituent instrument of that organization (Art.20(3)), whereas in all other cases acceptance is to be obtained from the other parties to the treaty.

2.3.1. *Opposability by acceptance in advance*

In Article 19 reference is made to the formulation of a reservation (‘to formulate a reservation’) and its making (‘may be made’). These point to different implications for the application of Article 20. A reservation formulated in contravention of Article 19(a) or (c) will not have any legal effect before the other parties to the treaty have responded to it, whereas a specific reservation

³⁴ ICJ Rep.1951:21.

³⁵ Ruda, *loc.cit* n.17 at 188.

authorized by a treaty as covered by Article 19(b) can be validly made without the need of any subsequent acceptance by parties to the treaty. This may be seen as an acceptance in advance and follows from Article 20(1) which refers to “a reservation expressly authorized by a treaty” which “does not require any subsequent acceptance by the other contracting States unless the treaty so provides”. The requirement of “expressly authorized by a treaty” is quite stringent, and cases of reservations made under such authorization are in fact rather rare in practice.³⁶ The criteria used in Article 19(b), according to which “only specified reservations ... may be made” seems to meet the requirement. If, however, a treaty in a general way allows reservations or reservations to certain articles of the treaty, it only means that reservations may be made but does not include an obligation to accept on the part of the other parties. Reservations made under such entitlement would still be subject to subsequent response by the other parties who are free to accept or object. For example, the 1958 Geneva Convention on the Continental Shelf states in its Article 12 that “any State may make reservations to Articles of the Convention other than to Articles 1 to 3 inclusive”. In the *Anglo-French Continental Shelf* case, the Court concluded with regard to the French reservation and the UK objection thereto that:³⁷

“the Court considers that the view expressed by both Parties that Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 to be clearly correct. Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance. But this is not the case with Article 12, which authorises the making of reservations to articles other than Article 1 to 3 in quite general terms.”

Here the Court drew a clear distinction between cases where reservations were specified and cases where the reservation clause merely indicated the range of articles to which reservations may be made. In contrast to this ruling, the Inter-American Court of Human Rights applied the rule of Article 20(1) quite liberally in its advisory opinion on the *Effects of Reservations on the Entry into Force of the American Convention (ACHR)*. The Court interpreted the reference in Article 75 to reservations “in conformity with the provisions” of the VCLT in such a way that it only related to Article 19(c) thereof, and that the compatibility with the object and purpose of the treaty would suffice to meet the requirements for the acceptance in advance of any reservations made in accordance with Article 75. This interpretation was based on the belief that a more flexible rule was envisaged in drafting the ACHR. The underlying presumption was that reservations made under Article 75 were permissible. But

³⁶ GREIG, *loc.cit.*n.13 at 119. For examples, see HORN, *op.cit.*n.2 at 113.

³⁷ 54 ILR 43.

such an interpretation of Article 20(1) of the VCLT is far from plausible. The impact of the opinion on state practice is yet to be awaited.

2.3.2 *Opposability by unanimous acceptance*

The traditional unanimity rule still plays a role in the VCLT in respect of the so-called restrictive multilateral treaties. Article 20(2) states that

“[w]hen it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.”

There are two factors that dictate the application of the requirement of unanimous acceptance of reservations. The first one is the limited number of negotiating States. The second one is the intention of the states concerned that the integrity of the treaty is essential for their individual consent to be bound by that treaty. Such intention can be deduced from the object and purpose of the treaty. These two factors taken together constitute the conditions under which the unanimity rule operates. One writer has pointed out that in such a special situation the acceptance by ‘all parties’ should be understood as the acceptance by all ‘States entitled to become parties’³⁸. This assertion can be seen as a pragmatic stand rather than a plain interpretation of the rule. In fact, the traditional unanimity rule requires that a reservation should be accepted by all the contracting parties.³⁹ Although ‘contracting parties’ here does not necessarily mean parties that have definitely expressed their consent to be bound by the treaty, it seems not possible to extend its scope beyond the ‘negotiating States’ and signatories.

2.3.3 *Opposability by collective acceptance*

Since the VCLT applies to treaties concluded between states, the response to reservations is to come from the states parties to the treaty. But the VCLT makes an exception to this general rule by stipulating in Article 20(3) that in the case of a treaty being the constituent instrument of an international organization, “unless [the treaty] otherwise provides, a reservation requires the acceptance of the competent organ of that organization”. The Convention does not elaborate further on the way in which this provision operates. It has been left to the organization in question to decide which is its competent organ and what is the applicable procedure for granting the said acceptance in accordance with the provisions of its constitution and its rules of procedure. In most cases, the competent organ is a decision-making body representing the member states.

³⁸ RUDA, loc.cit.n.17 at 186.

³⁹ SINCLAIR, op.cit.n.10 at 53-54; HORN, op.cit.n.2 at 15-16.

The acceptance usually is the result of a collective decision. Assuming that the decision is taken by a majority vote of the member states, what is the scope and the effect of this decision of acceptance? Is the decision binding upon a member state who voted against it? No clear answer can be found in the VCLT. As a general rule, a state cannot be subjected to any obligation without its consent, nor can it impose its will on other States without their consent. The acceptance by the competent organ would, consequently, not deprive a state of its right to individually object to the reservation, and such an objection would prevent the opposability of the reservation against that state. An alternative interpretation would be that the acceptance referred to in Article 20(3) is meant to be an additional requirement for the validity of a reservation to the constituent instrument, which is applied simultaneously with the normal response requirements. However, a textual reading of the chapeau of Article 20(4)⁴⁰ appears to exclude such an interpretation.

2.3.4. *Opposability by individual acceptance*

The opposability of a reservation being established by individual acceptance is the general rule governing the acceptance of reservations. According to VCLT Article 20 paragraph 4, it applies to cases not falling under what have been discussed in the foregoing, and is of a residual nature as it applies “unless the treaty otherwise provides”. Opposability by individual acceptance is the essence of the ‘flexible regime’. The flexibility lies in the fact that the acceptance by all parties is not required for the validity of a reservation. As a result of this flexibility, coupled with the effect of an opposable reservation, a multi-lateral treaty could be ‘bilateralized’, breaking down as it were into several bilateral treaties. Article 20(4) provides in (a) that “acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States” and in (c) that “an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation”. The opposability of a reservation is established if it is (expressly or tacitly) accepted by another party. Such opposability has two important functions. One is to establish treaty relations between the reserving and the accepting states (Art.20(4)(a)). The other function is to establish the status of the reserving State as a party to the treaty. The combined effect of Article 20(4)(a) and (c) makes the status as party to the treaty an objective one. While Article 20(4)(a) confines that status to a bilateral context, Article 20(4)(c) confirms the act expressing consent to be bound as a fact with legal effect not only in bilateral context but *erga omnes*. As such the act counts for the determination of the numbers necessary to bring the treaty into force.

⁴⁰ “In cases not falling under the preceding paragraphs and unless the treaty otherwise provides: ...”

2.3.5. *Objection to a reservation*

The objection to a reservation is designed to counter-balance the right to formulate a reservation, with which it shares the legal presumption that a State cannot be subjected to any obligation without its consent. Both are based on the consensual conception of international law. Under the traditional reservation system, objection would have an absolute effect tantamount to 'a virtual veto' of a single state to keep out another state despite the fact that the latter's participation could be valuable even on a reduced basis.⁴¹ Even a writer who was very critical of the flexible approach adopted by the ICJ pointed out the need to mitigate the unanimous consent rule somewhat so as to permit states to participate with a reservation, provided this reservation is accepted, or not objected to, by the great majority of the other states parties.⁴² Under the VCLT the general rule is that an objection will not have the effect of precluding treaty relations unless the objecting state so indicates. The ILC draft articles gave more weight to an objection by granting it a default effect and precluding the effectuation of treaty relations between the objecting and the reserving states. This was reversed at the Vienna Conference so that the Convention now puts the onus on the objecting state by leaving to it the competence to decide whether its objection has the effect of precluding the treaty to enter into force between the reserving and objecting state.⁴³ In that connection, Sir HUMPHREY WALDOCK commented at the Conference:⁴⁴

"[T]he problem was merely that of formulating a rule one way or the other. The essential aim was to have a stated rule as a guide to the conduct of States, and from the point of view of substance it was doubtful if there was any very great consideration in favour of stating the rule in one way rather than the other, provided it was perfectly clear."

As a result the objection has become a lesser sanction against a reservation. The combined effect of the reversed rule on objection and tacit acceptance has made it easier for a reserving state to become a party to the treaty. Noticeably, with the onus on the objecting state to publicly declare that it does not intend to have treaty relations with the reserving State, it would be difficult for a small State to do so when the reserving State is a powerful one.⁴⁵

It is very doubtful that an objection in the context of the VCLT system could be considered to contribute, in a passive manner, to the opposability of a reservation. An objection would normally, unless otherwise declared by the objecting state, not preclude the establishment of treaty relations between the

⁴¹ FITZMAURICE, *op.cit.*n.5 at 441.

⁴² *Ibid.*

⁴³ SINCLAIR, *op.cit.*n.10 at 62.

⁴⁴ United Nations Conference on the Law of Treaties, Second Session, *Official Records*, Plenary Meetings, pp.30-35, cited in SINCLAIR, *op.cit.*n.10 at 62-63.

⁴⁵ SINCLAIR, *op.cit.*n.10 at 63.

reserving and objecting states. However, this is rather different from stating that such an objection alone would cause the reserving State become a party to the treaty, in a similar way as does an acceptance of a reservation under Article 20(4)(a). It is admittedly a question of theoretical hypothesis rather than one of practical significance. Even if a 'non-precluding' objection has been raised before the time of presumed tacit acceptance under Article 20(5) (*see infra*), such objection can hardly be considered as having the effect of expressing consent of the objecting state to be bound by the treaty together with the reserving state.

As a compensation for the limited effect of an objection, no substantial limitation is imposed upon the right to object to a reservation. An objection can be employed for the rejection of an impermissible reservation under Article 19(c). It can also be used for the rejection of a permissible reservation, unless the latter has been accepted in advance as referred to in Article 20(1). The objecting state is indeed not obliged to publicize the grounds of its attitude.

2.3.6. *Tacit acceptance of a reservation*

Failure to object to a reservation is presumed to be a tacit acceptance. It is the most significant feature of the international practice regarding reservations.⁴⁶ Article 20(5) provides that

“[f]or the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”

Tacit acceptance is common to both the traditional unanimity rule and the present flexible system. By the terms of its introductory phrase, the rule on tacit acceptance as set forth in Article 20(5) applies to Article 20(2) and (4) which, respectively, represent the traditional system and the flexible system. This excludes its application to reservations to the constituent instrument of an international organization as referred to in Article 20(3) and to cases where a treaty requires express acceptance.

Article 20(5) deals with two cases of tacit acceptance. In the case of an existing party to the treaty, *non-reaction* to a reservation within a certain period of time is to be construed, *sub silentio*, as tacit acceptance. This has been referred to by some writers as 'tacit acceptance proper'.⁴⁷ On the other hand, there is the case of silence on a pre-existing reservation on the part of a state at the time of expressing its consent to be bound by the treaty, which implies the acceptance of the reservation, and which is referred to by the term 'implied acceptance'.⁴⁸

⁴⁶ RUDA, loc.cit.n.17 at 184; see also SINCLAIR, op.cit.n.10 at 63.

⁴⁷ HORN, op.cit.n.2 at 126.

⁴⁸ RUDA, loc.cit.n.17 at 185.

A matter of significance is the temporal factor in the process of tacit consent, viz. the period of time after which acceptance can be inferred from non-reaction. In the traditional unanimity system where consent or non-objection to a reservation by all contracting states is required, this time factor plays a most important role as it is essential for determining whether or not acceptance of a reservation can be deemed to exist. It can be said that there is a rule of customary international law requiring states to make their objections known within a reasonable time of being notified of a reservation.⁴⁹ But the length of this 'reasonable time' is not settled as a matter of customary law. Its determination would largely depend on the circumstances of the case. Article 20(5) refers to 'twelve months' after which silence is 'considered' to be acceptance. The less emphatic and more presumptive language employed in the sub-paragraph would indicate that the 12-month period is not reflecting an existing norm at the time of the conclusion of the Convention. Nor can subsequent state practice be assessed as being consistent and containing a strong conviction of the existence of a legal rule (*opinio juris*) to that effect. One writer⁵⁰ has suggested an operating framework for the concept of tacit acceptance in which two situations are distinguished: one in which consent to a reservation is essential to the reserving state's participation in a treaty and where the objecting and reserving states have relatively close contacts, and another where there are few or no contacts between the parties concerned. In the former case, the presumption that non-objection constitutes tacit acceptance is the strongest, while in the latter a failure to object within a relatively short period would not necessarily be considered to amount to acceptance when an objection is raised much later. Since there is no certainty about the existence of a customary rule prescribing specific time limits, the foregoing suggestion may be a reasonable assessment of the situation. But as a matter of treaty law the VCLT's 12-month rule is to apply strictly. Non-reaction within this period is deemed to be an acceptance. Objections beyond the period are null and void as they are in breach of the treaty which "is binding upon the parties to it and must be performed by them in good faith".⁵¹

2.3.7. *Relationship between permissibility and opposability*

Permissibility governs the formulation of reservations. 'Formulation' is a quite neutral word, and the formulation of a reservation should in no way prejudice that a reservation has in fact been made or proposed. Sir GERALD FITZMAURICE emphasizes the distinction between a completed reservation and a proposal for a reservation.⁵² Under the VCLT, Article 19 should be broadly understood to govern the issue of formulation of a reservation.

⁴⁹ GREIG, loc.cit.n.13 at 123.

⁵⁰ Ibid. at 132-133.

⁵¹ VCLT Art.27.

⁵² FITZMAURICE, op.cit.n.5 at 409-411.

As a matter of fact, the application of the permissibility criteria mostly take place *ex post facto*⁵³: the permissibility or otherwise of a reservation can only be assessed after it has been put forward. Before that, the criteria are employed internally by a state in considering the desirability of making a reservation. As Article 19(a) and (b) are objective in nature and self-evident, they appear to be less subject to (subjective) interpretation by the individual parties. Article 19(c), however, concerning the compatibility with the object and purpose of a treaty, is not at all that clear and self-evident, and is liable to different interpretations and a subjective appreciation of the parties, in the absence of an objective determination process.

It is obvious that a reservation can be accepted in advance. But can it also be objected to in advance? To a certain extent, the permissibility criteria of Article 19(a) and (b) could be seen as instances of objection to a reservation in advance. From that perspective the proposition could be made that reservations always require a response either in advance or subsequently. The consequences of the responses, however, are not provided in Article 19 but are addressed in Article 20(4) and (5). This provides a logical link between the two articles and makes the permissibility criteria and the opposability effects operating in one single process. Whilst permissibility and opposability may represent two different stages in the process, their application are not mutually exclusive, but rather complementary.

The responses under Article 20 would have a dual function. On the one hand, it is to make a reservation opposable to the reacting party. On the other hand, it is to spell out an assessment of the permissibility of a reservation. The compatibility with the object and purpose of a treaty as referred to in Article 19(c) cannot by itself establish the permissibility or otherwise of a reservation. Permissibility will be established in a combined process of operation of Articles 19(c) and 20(4) and (5). The reaction concerning incompatibility together with an expressed preclusion of the entry into treaty relations would finally complete the operating process of the permissibility test. In the absence of judicial determination, unless all other parties reach the same conclusion as to the incompatibility of a reservation through the above process, the impermissibility outcome of one state party in itself would not have any effect on the treaty relations that become established between the reserving State and other parties to the treaty.

⁵³ SINCLAIR, *op. cit.* n.10 at 81 fn.78.

2.4. Legal effect of a reservation

2.4.1. *Effect of a reservation on other parties inter se*

A valid reservation produces legal effects upon the treaty relations between the parties to the treaty. Under the unanimous acceptance rule a reservation, when accepted, would only have effect on the relationship between the reserving and each accepting party bilaterally. The reservation would have no effect on the relationship between such other parties *inter se*. This general rule is incorporated in VCLT Article 21(2). As the VCLT has adopted a flexible approach to reservations whereby the opposability of a reservation is, with exception of those under Article 20(2) and (3), established by individual (express or tacit) acceptance, the reservation so accepted is first and foremost operative in the relationship between the reserving State and those accepting the reservation. A reservation falling under Article 20(2) and (3), once established, would have the same effect.

2.4.2. *Relationship between a reserving and an accepting party*

The effect of a valid reservation, as it is established with regard to another party in accordance with Articles 19, 20 and 23, operates reciprocally, *viz.* modifies, for the reserving state in its relations with the other party, the provisions of the treaty to which the reservation relates to the extent of the reservation and modifies those provisions to the same extent for that other party in its relations with the reserving state. The operating rule is that of reciprocity of reservations. The reserving state can invoke its reservation in its own favour *vis-à-vis* the accepting state and vice versa. Theoretically, general application of this reciprocity rule can be presumed, but in practical terms its application has to take account of other operating factors in the interpretation and application of treaties. The reciprocity rule can be easily applied to treaties or provisions of treaties that are of a reciprocal character as most cases might be. But in the case of a treaty or a treaty provision which is not of a reciprocal character or the reciprocal application of which would lead to a breach of other provisions of the treaty or to an absurd result, the effect of the reservation thereto upon the relationship between the reserving and accepting states need to be reassessed in the light of the specific circumstances. As it has been observed by one writer,⁵⁴ “whether it can be applied in a particular situation is a matter of interpretation, of seeking to ascertain the intentions of the parties in drafting the treaty, and of the reserving State in so far as that can be gathered by the other parties from the wording of the reservation in light of the circumstances in which it was made”. The reciprocity rule of reservations does not limit the right of an accepting party to invoke the reservation *vis-à-vis* the reserving party. But the exercise of such a right may be circumscribed by other obligations undertaken

⁵⁴ GREIG, *loc.cit.*n.13 at 141.

otherwise by the accepting party, such as good faith in its performance and application of the binding treaty. It might be appropriate to distinguish between the entitlement to reciprocally invoke a reservation and its actual use.

2.4.3. Relationship between a reserving and an objecting party

Under the traditional unanimity rule, a reservation would be struck down by an objection. The reserving state could not become a party to the treaty unless it does so without the reservation. Under the more flexible approach as adopted in the VCLT, the opposability of a reservation is established by individual acceptance (with specified exceptions), and an objection will not affect such opposability *vis-à-vis* accepting states, nor even preclude relations under the treaty between the objecting and the reserving party unless the objection expresses otherwise. So, the need arises for a rule governing the relationship between a reserving and an objecting party.

The basic rule as defined in VCLT Article 21(3) is that in case of an objection not precluding treaty relations with the reserving party, the provision to which the reservation relates does not apply between the two states to the extent of the reservation. In the case of a reservation that excludes the application of a treaty provision the result is the same as that in the relationship between a reserving and an accepting party. The result is different when the reservation is meant to modify the application of a provision. In the case of an acceptance, the provision to which the reservation relates will be applied as modified by the reservation, and in the case of an objection the provision in question will not be applied to the extent of the reservation.

It is not clear what is meant by the phrase “to the extent of the reservation” in Article 21(3). It may imply that the provision is not inapplicable *in toto*, but still applies to some extent. This was exactly the question in the *Anglo-French Continental Shelf Arbitration* case. Whereas France contended that its reservations to Article 6 of the 1958 Geneva Convention on the Continental Shelf and the objection to them raised by the United Kingdom would make the said article inapplicable, the United Kingdom argued that the effect of its rejection of the French reservations was to render them wholly unopposable and, even if they were opposable, the French reservations could not render Article 6 inapplicable *in toto*, but at the most “to the extent of the reservations”.⁵⁵ The Tribunal concluded:⁵⁶

“Thus, the combined effect of the French reservations and their rejection by the United Kingdom is neither to render Article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and

⁵⁵ 54 ILR 51.

⁵⁶ *Ibid.* at 52.

this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.”

The decision thus clarifies some of the uncertainties around the phrase “to the extent of the reservation”.

2.5. Withdrawal of reservations and of objections

Reservations and objections can be withdrawn at any time unless the treaty in question otherwise provides. Such withdrawal is a unilateral act which could affect the bilateral relationship between the reserving and the accepting States or between the reserving and the objecting states. The VCLT does not specify the effect of withdrawal of reservations and of objections, probably because the effect would be self-evident or can be easily inferred from the underlying principles of the reservation system. The effect of a withdrawal of a reservation would be to restore the applicability of the original provision to which the reservation relates. As for an objecting state which has excluded treaty relations with the reserving state, there is no reason why it would not be prepared to enter into treaty relations with the latter state now that the obstacle to the treaty relationship no longer exists.

In the case of withdrawal of a reservation, neither the consent of the parties that have accepted the reservation nor that of the objecting state is required. It has been suggested that a valid reservation constitutes a contractual stipulation which may not be varied without the consent of the other state.⁵⁷ Since a reservation is to modify or exclude a provision of a treaty for the benefit of the reserving state and to the detriment of the integrity of the treaty, the withdrawal of the reservation which will restore the integrity of the treaty would be very much in line with the interests of the originally accepting party, and thus its consent should not be required. It would be absurd to assume that the accepting state might be opposed to the restoration of the integrity of the treaty. It should, on the contrary, be presumed that the parties to a treaty would wish a reserving state to abandon its reservations. In fact, it is on this theory of freedom of withdrawal of reservations on a unilateral basis that Article 22(1) is formulated⁵⁸:

“A withdrawal will take effect in relation to another party only when the notification thereof has been received by the relevant parties, in the case of reservations by another party, and in the case of objections by the reserving State.”

⁵⁷ CERETTI, cited in RUDA, *loc.cit.*n.17 at 201.

⁵⁸ RUDA, *ibid.*

2.6. Procedure regarding reservations

Article 23 of the VCLT sets out procedural requirements for the formulation of reservations, the express acceptance, the raising of objections, and the withdrawal of reservations and objections. One requirement is that all these acts should be in writing. A reservation made at the time of signing a treaty which is subject to ratification, acceptance or approval, must be formally confirmed at the time of expressing consent to be bound and is considered to be made on the date of such confirmation. On the other hand, an acceptance or objection does not need any confirmation. Clearly only express acceptance need be given in writing. As tacit acceptance is presumed from non-reaction or silence, it will certainly not be required to be in writing or in any form at all.

Although procedural requirements or formality rules at first glance seem to play no essential role in assessing the validity of a reservation, there are occasions when such requirements are given a substantive weight. In the *Belilos* case, the European Court of Human Rights relied on the requirements of Article 64 of the Convention to evaluate the validity of a Swiss reservation to Article 6. Article 64 allows reservations “in respect of any particular provision of the Convention to the extent that any law then in force in the territory, is not in conformity with the provision”. It requires that a reservation shall not be of a general character and be accompanied by a “brief statement of the law concerned”. The Court ruled that the reservation did not satisfy the two requirements because the reservation was couched in terms that were too vague or broad for it to be possible to determine their exact meaning and scope, and that a brief statement of the law concerned is not a purely formal requirement but a condition of substance. Thus, the Swiss reservation was held to be invalid.⁵⁹ In contrast, in the *Temeltasch* case the European Commission of Human Rights held that the Swiss reservation which referred expressly to Article 6(3)(e) of the Convention could not be regarded as a reservation of a general character. The Commission further stated that although Switzerland had failed to comply with the requirement of Article 64(2) on submitting a brief statement of the law concerned, that failure was not sufficient to invalidate the reservation.⁶⁰ The Commission’s basic point of departure was that “[t]his question cannot ... be considered *in abstracto*, i.e. the approach cannot be whether non-compliance with this formal requirement automatically invalidates any reservations or declarations made in this way.”⁶¹ It did point to the possibility that a reservation made in breach of the requirements of Article 64(2) might not be regarded as contrary to the Convention and invalid.

⁵⁹ *Belilos v. Switzerland* (1988), 88 ILR 667-671.

⁶⁰ European Commission, *Temeltasch v. Switzerland* (1982), 88 ILR 630-632.

⁶¹ *Ibid.* at 631-632.

3. CONSIDERATION OF SOME PRACTICAL ISSUES

3.1. Distinction between a reservation and an interpretative declaration

The distinction between a true reservation and an interpretative declaration has been the most difficult issue to decide in state practice. For various practical reasons, states often take full advantage of the vagueness and ambiguity with regard to the distinction between the two. Sometimes a statement is deliberately couched in such vague terms that it could be easily taken as an interpretative declaration. It may thus escape objections while the author of the statement could assert that the statement in fact amounts to a reservation whenever it considers that to be in its interest to do so. In fact the present rules on reservations are designed to the advantage of the reserving state, based on the presumed right to make reservations. Besides, in practice particular weight is accorded to the intentions of the reserving state.

A further analysis of the *Belilos* case shows the complexity and subjectivity involved in the distinction between a reservation and an interpretative declaration. When ratifying the ECHR, Switzerland had made two ‘reservations’ and two ‘interpretative declarations’ in a single instrument of ratification, which read in part: “[T]he Swiss Federal Council [...] declares that the Convention ... is ratified with the following reservations and interpretative declarations ...”, and in respect of Article 6(1), under the heading of *interpretative declarations*, “... considers that the guarantee of fair trial in Article 6, paragraph 1 of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge”.⁶² On the one side, the applicant contended that the declaration could not be equated with a reservation and the European Commission also concluded that the declaration did not have the effect of a reservation in view of the wording and preparatory work of the declaration and of the fact that Switzerland had made both reservations and declarations at the same time in which case the latter could only exceptionally be equated with the former.⁶³ On the other side, the Swiss government relied on the concept of qualified interpretative declaration in asserting that the declaration was a reservation by nature. It explained that in its practice the criteria for distinguishing the two concepts were not absolute and the concept of a reservation in international law embraced any unilateral declaration designed to preclude or modify the legal effect of certain treaty provisions.⁶⁴ Instead of following the basic rules of treaty interpretation, the Court immediately went to look into the original intention of the drafters of the statement and found that the original intention was to make a reservation though the name of

⁶² 88 ILR 657-658.

⁶³ *Ibid.* at 663.

⁶⁴ *Ibid.* at 663-665.

the statement was changed when presented. Thus, the interpretative declaration was held to be a reservation. The facts being the same, the Commission and the Court came to quite different conclusions regarding the nature of the same statement. In the present case, the distinction between a reservation and an interpretative declaration should not be difficult to draw if the general rules of treaty interpretation had been followed in their normal order. It is very clear from the specific wording of the declaration and the context in which the term 'interpretative declaration' was used, that the declaration should be seen as an interpretation or understanding of a treaty provision. Only when the ordinary meaning of the term in its context is not clear should subsidiary means of interpretation be resorted to. This is also true for investigating the intention behind the terminology employed.

The difficulty of distinguishing a reservation from an interpretative declaration is further exacerbated by the definition of a reservation in Article 2(1)(d) of the VCLT, particularly the reference to 'however phrased or named'. Both jurisprudence and doctrinal analysis have been misled by the idea that the criterion to separate the two is whether a given statement purports to exclude or modify the legal effect of certain provisions in their application. Distinction has been made between 'a mere interpretative declaration' and 'a qualitative interpretative declaration', the latter being assimilated to a reservation.

The concept of reservation has been subject to a too broad interpretation and application. The phrase 'purports to' in Article 2(1)(a) has been given an excessive meaning, which is partly responsible for blurring the two distinctive legal terms and concepts which have their own rules of operation. Both reservation and interpretation have been employed in practice to vary the legal effect of a provision in its application to the parties. In the case of a reservation, the provision which is subject to the reservation is clear in its meaning, and what the reserving state intends to achieve is to exclude or modify the legal effect of such a relatively clear provision in its application. In the case of an interpretative declaration, the provision to which the declaration relates is not clear in its meaning, and what the declarant intends to do is to give an interpretation thereof while not excluding or modifying the legal effect of its application once the correct interpretation is established by the application of the rules on treaty interpretation. It may be easier to distinguish the two terms in concept than in practice. Though it is difficult to draw a clear line in most cases, it is possible to achieve a practical and reasonable result on the basis of the intention of the declarant which may be recovered from the provisions of the treaty and the terms used in the statement, in light of the principles of treaty interpretation and techniques, and taking into consideration the attitudes of other parties. As any statement is supposed to carry a meaning by the words used, it "has to be construed in accordance with the natural meaning of its terms".⁶⁵ As long as they are clear, no further investigation of the intentions behind them or resort to the preparatory process is needed. There should be a basic presumption that

⁶⁵ *Anglo-French Continental Shelf Arbitration*, 54 ILR 48.

“States were bound by their public statements and that there was no need to inquire at all costs their unspoken intentions” and “declarations in no way affected the scope and meaning of the instrument of ratification, which were exclusively determined by the treaty itself”.⁶⁶

3.2. Compatibility with the object and purpose of the treaty

Since the advisory opinion in the *Reservations* case, the term ‘object and purpose’(OP) of a treaty has become popular in the law of treaties. It has been employed as the key criterion for the validity of a reservation. It seems to be an objective yardstick as every treaty would have its object and purpose. But seldom does a treaty have clear provisions on its object and purpose. As a matter of fact, the concept is so abstract that it can hardly be considered objective. Although its sources may be objective, the identification of the object and purpose is the result of subjective activities by states parties which involve the parties’ appreciation and evaluation of the facts such as the agreed treaty text, the background of treaty negotiation and the preparatory work that have lead to the conclusion of the treaty.

The meaning of object and purpose of a treaty was taken as a well-established concept by the ILC when introducing the term into the VCLT, as the expression “had been used by the International Court of Justice and ... was found in many legal texts”⁶⁷. In the VCLT, the phrase can be found in Articles 19(c), 20(2), 31(1) and 60(3)(b) in respect of reservations, interpretation and breach of a treaty respectively. The ILC made no comments on any of these occasions when presenting its proposals to the diplomatic conference. This might be an indication that no need was felt to provide an explanation or definition of terms with an apparently uncontroversial and generally accepted meaning in the context in which they were used. It is open to question whether the phrase as used in Article 19(c) refers to a single OP or to any among several OPs. It has been suggested that there may be more than one OP in a treaty, in which case the principal OP would apply. The question seems not to be a valid one, as the expression should be understood as an abstraction of the deeper intentions behind the essential provisions of a treaty in the context of its negotiation background. Some would relate the OP to the relativity of the integrity of a treaty whereby treaty provisions may be designated as important or unimportant, essential or non-essential and substantive or procedural. All this may have some relevance here, but the OP is more complex. It is the generality achieved by subjective appreciation of all these facts, together with other relevant circumstances. It has a dual character of objectivity and subjectivity. It is because of this that in practice the OP operates in different ways.

⁶⁶ C.TOMUSCHAT, in YILC 1995-I at 155.

⁶⁷ Vienna Conference, *Official Records(1968)* at 415-416.

In a more subjective mode of operation, the OP test is applied by each individual party based on its own appreciation of the facts and specific situations involved, and from its point of view, including its political judgement and considerations. It is applied both in the context of Article 19(c) and Article 20(2) of the VCLT. In the way it is stated in Article 19(c), the OP is far from being a prohibitive and objective rule which alone will establish the permissibility of the reservation, like the rules referred to in Article 19(a) and (b). Due to the dominant subjective elements of the OP, the question whether a reservation is compatible with the OP will be assessed by the other parties as a result of their individual subjective appreciation in the context at hand. For example, in Article 20(4) and (5) the only exception to the applicability of the rules concerned is where "the treaty otherwise provides". While Article 19(a) and (b) can be said to belong to such an exception, Article 19(c) may not. Understanding of the provisions in this way may lead to the application of Article 20(4) and (5) in determining the compatibility of a reservation with the OP of a treaty. As the ICJ stated in the *Reservations* case:

"As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention."⁶⁸

The Court seems to place primary emphasis on the reaction of individual parties in assessing the compatibility of a reservation with the OP of the treaty. The ILC in its earlier draft adopted the view of the ICJ that the compatibility with the OP should be "taken into account both by states formulating a reservation and by states deciding whether or not to consent to a reservation that has been formulated by another state".⁶⁹ Although the ILC considered the compatibility requirement as essential for the permissibility of a reservation, it still regarded Article 19(c) as operating on a different basis than (a) and (b), in that (c) is a matter of appreciation by other parties and must be read in close conjunction with the provisions on acceptance of and objections to reservations. In this sense, the compatibility with the OP serves as a guide to conduct rather than as a prescriptive norm.⁷⁰

State practice provides little clarity on the application of the OP criterion. But the relatively few and inconsistent objections referring to the compatibility criterion in any case demonstrates that the criterion is employed by states as a guide in objecting to reservations. Though incompatibility with the OP would seem to result in the invalidity of the reservation so far as its opposability *vis-à-vis* the objecting state is concerned, in most cases such incompatibility does not preclude treaty relations between the objecting and reserving parties. For ex-

⁶⁸ ICJ Rep.1951:26.

⁶⁹ YILC 1962-II: 66.

⁷⁰ GREIG, *loc.cit.*n.13 at 86.

ample, the objections from Italy, Israel and the United Kingdom to a reservation made by Burundi to the 1973 Convention on Crimes against Internationally Protected Persons precluded the establishment of treaty relations on the ground of incompatibility of the reservation with the OP.⁷¹ In another case, however, the objections from eleven European states to the second reservation of the United States to the Covenant on Civil and Political Rights (CCPR) clearly stated that the reservation is incompatible with the object and purpose of the Covenant or with the specific article in question, but that their objections did not constitute an obstacle to the entry into force of the Covenant between them and the United States.⁷² There are cases of objections on the ground of incompatibility with the OP which do not state their effect at all. Should Article 20(4)(b) apply, the objections would not preclude treaty relations with the reserving State.

In an ideal situation of objective application of the OP criterion by a judicial body, the OP is moving from a mere guide to conduct to a legal norm on the basis of which the permissibility of a reservation can be determined. In the *Reservations* case the ICJ has pointed to the possibility of having the issue of compatibility objectively determined on the jurisdictional plane.⁷³ Under the ECHR and ACHR, the respective courts of human rights have been vested with the power to interpret and apply the Conventions including the competence to determine the validity of reservations. These regional judicial bodies have ruled on the invalidity of reservations in several cases, and given advisory opinions regarding the issue. Although there is no case directly dealing with the application of the compatibility of a reservation with the object and purpose of the treaty, the courts have at least set precedents for the judicial determination of the validity of reservations. It should be noted that in this jurisprudence the responses from other states parties have almost been disregarded except in one case (ECHR, *Loizidou* case)⁷⁴ where such responses were accorded marginal relevance.

3.3. Reservations and customary norms

Treaties and custom are the two main sources of international law. A customary rule may be codified or be reflected in a treaty, while a treaty might be evidence of custom or at least affirm state practice that could lead to the formation of a custom. The two sources are inter-related and co-exist. Even when a customary rule is identical with a treaty rule, it remains of practical value to

⁷¹ *Multilateral Treaties deposited with the Secretary-General, status as at 31 December 1994*, at 696-697.

⁷² *Multilateral Treaties deposited with the Secretary-General, status as at 31 December 1996*, at 131-134.

⁷³ ICJ Rep.1951: 26.

⁷⁴ *Loizidou v. Turkey (Preliminary Objections)*(1955), 103 ILR 622-661.

distinguish between them. The ICJ in the *Nicaragua* case rejected the US argument that norms of customary international law concerned with self-defence had been subsumed and superseded by Article 51 of the United Nations Charter. The Court concluded that “customary international law continues to exist and to apply separately from international treaty law, even where the two categories of law have an identical content”.⁷⁵ The independent identity of treaties and custom has a direct bearing on the topic under discussion.

Reservations can not be made in respect of custom, although there exists a similar mechanism for the exclusion of the opposability of a customary rule, by way of raising persistent objection in the process of rule-formation. Is it possible to make a reservation to a treaty provision that embodies or reflects a customary rule? There are divergent views on this question. In the *North Sea Continental Shelf* cases, the ICJ seems to reject the possibility to make reservations to a customary rule of international law. The Court expressed its view in the following terms:

“[I]t is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; ... whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded.”⁷⁶

The main purpose here was to prove that treaty provisions that are subject to reservations or not excluded from reservations are not regarded as declaratory of previously existing or emergent rules of customary law. Judge PADILLA NERVO in his separate opinion makes the point more straightforward by observing that

“[n]o right is conferred to make unilateral reservations to articles which are declaratory of established principles of international law. Customary rules belonging to the category of *jus cogens* cannot be subjected to unilateral reservations. It follows that if the Convention by express provision permits reservations to certain articles this is due to recognition of the fact that such articles are not the codification or expression of existing mandatory principles or established binding rules of general international law, which as such are opposable not only to the contracting parties but also to third States.”⁷⁷

⁷⁵ 76 ILR 349.

⁷⁶ 41 ILR 68.

⁷⁷ *Ibid.* at 113.

But Judges MORELLI, LACHS and SØRENSEN gave an opposite view on the matter. They de-linked the faculty of making reservations from the status of a provision as a rule of international customary law. As Judge SØRENSEN put it: “[T]he faculty to make reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognised rule of law”.⁷⁸

It is mostly contended that a treaty provision containing a customary rule cannot be the subject of a reservation. The view has been held that “it is surely out of the question to enter reservations to a treaty provision that has been construed to be a rule of general international law, or to a treaty enshrining such provisions”.⁷⁹ The Human Rights Committee of the CCPR in its General Comment No.24(52) stated that “provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be subject to reservations”.⁸⁰ This proposition is doubtful with respect to a rule of customary law (except *jus cogens*) which, by its very nature as *jus dispositivum*, is subject to modification by treaty law.⁸¹ Furthermore, customary rules, so long as they appear in a treaty, are treaty provisions in the context of the treaty. In the realm of treaty relations, they are operating as treaty rights and obligations and are subject to the rules relating to treaty interpretation and application. A reservation made in respect of such a provision would affect the legal effect and applicability of the treaty provision as such. It would not affect the operation of the identical rule as a customary norm where the rule in its customary form has been established independently of the treaty provision. If the formation of the customary rule resulted from the treaty provision in question, a reservation with respect to this latter provision would certainly be a relevant factor that should be taken into account when acknowledging the emergence of a customary rule.

It has been asserted that even if it is as a rule possible to make reservations to a treaty provision reflecting a customary rule, that would not apply to a rule containing *jus cogens*.⁸² Norms of *jus cogens*, by their nature, are rules that cannot be contracted out by a treaty. *Jus cogens* is a customary norm of a special character that is accepted and recognized by the international community of States as a whole and that can only be modified by a norm of general international law having the same character (VCLT Art.53). A treaty is void if it conflicts with such a norm. So it is logical to conclude that a reservation to a treaty provision that reflects a norm of *jus cogens* would not be permitted and thus be devoid of any legal effect.

⁷⁸ Ibid. at 222.

⁷⁹ P. WEIL, “Towards relative normativity in international law”, 77 AJIL(1983) 440.

⁸⁰ Human Rights Committee of ICCPR, General Comment No.24(52), 2 IHRR (1995) No.1:10-15 at 11.

⁸¹ Comment by M. NOWAK, 16 HRLJ(1995) 381.

⁸² Ibid.; Judge SØRENSEN, 41 ILR at 222.

However, if one approaches the matter from the other side, the conclusion might be different. A norm of *jus cogens* is conceptually never a treaty norm that can be modified by the consent of the parties to the treaty. A treaty provision can reflect or embody a norm of *jus cogens*, without *per se* being the *jus cogens* norm. Thus, a treaty provision is separable from a norm of *jus cogens*. A reservation to a treaty provision that reflects a norm of *jus cogens* would not affect the substance of the (customary) norm, but will vary the legal effect of the norm as a treaty provision while not affecting the effect of the norm which operates independently of the treaty. So, it is possible to suggest that a reservation to a treaty provision that reflects a norm of *jus cogens* might be permitted although it will have no impact on that norm in terms of substance.

It may seem not quite useful to distinguish between a treaty provision reflecting a norm of *jus cogens* and the norm of *jus cogens* itself, since the applicability of the substance of the norm can not be modified by a reservation. There are, however, practical considerations that may underlie the desire to distinguish the form from the substance of a norm of *jus cogens*. The *Nicaragua* case has confirmed the practical value of making reservations to a treaty provision that contains elements of a customary rule.

3.4. Severability of an invalid reservation

The VCLT does not provide rules on the legal consequence of an absolute invalid reservation which conflicts with the permissibility criteria of Article 19 (a) or (b), though it does set forth rules on the effect of a relative invalid reservation which is objected to by a party, *inter alia*, on the ground of incompatibility with the object and purpose of the treaty and a preclusion of treaty relations. In the case of an absolute invalid reservation, there seem to be two possibilities: (i) the invalid reservation invalidates the reserving state's act expressing its consent to be bound by the treaty and the reserving state does not become a party to the treaty; (ii) the invalid reservation is severable and the reserving State is bound by the treaty without the reservation.

The first possibility is a widely accepted view in both theory and practice. It is consistent with the consensual nature of treaty obligations. A reservation is a condition placed by the reserving State on its consent to be bound by the treaty. If the reservation or the condition on its consent is found to be invalid, the corollary is that the consent to be bound does not become effective.

The second possibility is put forward by BOWETT who writes:⁸³

“There is a patent contradiction in the expression of will by the State. There is the expression of a will to be bound by the treaty, as evidenced in the act of ratification or accession or even signature (if that is intended to be binding); and then there is the expression of a will to impose a condition, in the form of a res-

⁸³ BOWETT, *loc.cit.*n.31 at 75-76.

ervation, which is in contradiction with the intention to be bound by the treaty precisely because the reservation is not permissible under the treaty. Which expression is to prevail?"

By asking the question, he seems to presuppose the possibility of severance under certain conditions. After comparing it with a reservation to the optional clause of the ICJ Statute where Judge LAUTERPACHT envisaged a severability, Professor BOWETT comes to the conclusion that if it can be objectively determined that the state's paramount intention is to accept the treaty, then the invalid reservation can be struck out and disregarded as a nullity.⁸⁴ The crucial issue is, who shall have the authority to make such a determination of the state's intention. The European Court of Human Rights, following BOWETT's thesis, ruled in *Belilos* and *Loizidou* that the reservations in question were invalid and that the Convention was binding upon the reserving states. Encouraged by this practice, the Human Rights Committee of the CCPR asserted in its General Comment 24(52) that "such a[n] [invalid] reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation".⁸⁵

These practices are neither in conformity with the basis of the law of treaties, nor acceptable to states. The French observation in response to the General Comment stated that "agreements, whatever their nature, are governed by the law of treaties; they are based on the consent of States and the reservations are the conditions which the States attached to their consent. Necessarily, therefore, if the reservations are deemed incompatible with the purpose and object of the treaty, the only consequence that may be drawn from this is to state that the consent is not valid and to decide that States are considered not to be parties to the instrument concerned".⁸⁶ It has also been pointed out that arbitrarily disregarding the reservation might entail the risk of discouraging states from ratifying human rights treaties or even lead to denunciations by the existing parties.⁸⁷

The possible severability of a reservation should be distinguished from disregarding an invalid reservation by external bodies. It has been suggested that "severability of a kind may well offer a solution in appropriate cases, although its contours are only beginning to be explored in State practice".⁸⁸ It would certainly be congruous with the consensual character of treaty commitments for the reserving state to draw its conclusions as to the consequence of the determination of a reservation as being invalid. The state would have two options: either withdraw the reservation and become a party to the treaty or, if the reser-

⁸⁴ *Ibid.* at 77.

⁸⁵ *Loc.cit.*n.80 at 15.

⁸⁶ A.PELLET, *Second Report on the Law and Practice Relating to Reservations to Treaties* (1996), UN Doc. A/CN.4/477 and Add.1 at 76.

⁸⁷ UK observation on General Comment No.24(52), in 66 BYIL (1995) at 659-660.

⁸⁸ *Ibid.*

vation is in fact an essential part of its to consent, withhold its consent to be bound by the treaty.

3.5. Separate rules for human rights treaties?

There has been a misunderstanding according to which the VCLT rules on reservations were designed for the exclusive application to treaties of a reciprocal nature. Thus its applicability to human rights treaties was called into question. Although General Comment 24(52) recognized that reservations to the Covenant are governed by international law, it criticized the rules on objections to reservations, which were believed to be inappropriate for addressing the issue of reservations to human rights treaties since these were “not a web of inter-State exchanges of mutual obligations”.⁸⁹ The General Comment further claimed that it necessarily falls to the (Human Rights) Committee to decide the validity of a reservation to the CCPR. Does this justify a separate reservation regime for human rights treaties? In order to find an answer to that question, it is necessary to recall the development of the present rules and the basic nature of reservations to treaties.

From the drafting history of the VCLT it is clear that the Convention seeks to establish a single regime applicable to reservations to treaties regardless of their nature and their object.⁹⁰ The ILC even looked specifically at the regime governing reservations to human rights treaties, including the CCPR, but did not find it necessary to make the matter the subject of a special, different, rule like the two other exceptions where different rules apply (Art.20(2) and (3)). In its opinion in the *Reservations* case where the general, flexible, approach was pronounced, the ICJ stated that

“[t]he [Genocide] Convention was manifestly adopted for a purely humanitarian and civilizing purpose. ... In such a Convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention.”⁹¹

The Court concluded that

“[t]he complete exclusion from the convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.”⁹²

⁸⁹ Loc.cit.n.80 at 14.

⁹⁰ PELLET, loc.cit.n.86 at 24.

⁹¹ ICJ Rep. 1951: 24.

⁹² Ibid.

Thus the special nature and objectives of human rights treaties were well taken into consideration in the formation of the present reservation rules. In fact, it was “in the light precisely of those characteristics of the Genocide Convention, and in the light of the desirability of widespread adherence to it, that the Court set out its approach towards reservations”.⁹³

The central element of the present system of reservations that is considered to be not appropriate for human rights treaties is the possibility of objections being raised by an individual state in relation to reservations. It is suggested that a state’s objection operates on the basis of reciprocity, while there is no reciprocity in human rights treaties.⁹⁴ Apart from whether or not there is reciprocity in such treaties, however, reciprocity is not the sole element of the objection rule though it does play a part wherever appropriate. It is not necessarily true that the reciprocity rule applies whenever there is a reservation, regardless of whether the treaty provision in question can be applied reciprocally. As has been eloquently argued by Professor PELLET,

“...unless it is by ‘doctrinal decree’, reciprocity is not a function inherent in a reservations regime and is not in any way the object of such a regime. Integrity and universality are reconciled in a treaty by preserving its object and its purpose, independently of any consideration having to do with the reciprocity of the parties’ undertakings, and it is hard to see why a reciprocity that the convention rules out would be reintroduced by means of reservations.”⁹⁵

It should be noted that the essence of a treaty is the mutuality of consent by states. Treaties by their very nature consist of a reciprocal exchange of obligations and undertakings. By giving its consent to be bound by a treaty, a party is committed to obligations *vis-à-vis* other parties to the treaty, a breach of which would give rise to state responsibility on the part of the breaching party. If such a reciprocal nature of obligations is to be called into question, it will be the whole treaty system that is under challenge. In that extreme event, the protection of human rights would have to look for new media whereby its object and purpose could be effectively achieved.

The argument that the integrity of a human rights treaty would be at risk in the face of reservations is not irrefutable. A reservation by its nature serves to exclude or modify the application of certain treaty provisions, thus admittedly eroding the much-desired perfect integrity of a treaty. On the other hand, by infringing minor aspects of the integrity, a larger number of States would be able to participate in the treaty, thus enhancing the universality of the treaty, which is equally essential for the efficacy of the treaty. By its true nature, the rules governing reservations to a treaty should strike a delicate balance between the pursuit of integrity and that of universality of the treaty. Absence of reservations certainly enhance the integrity of the treaty. But integrity itself is not

⁹³ UK observation, *loc. cit.* n.87 at 656.

⁹⁴ See General Comment No.24(52), *loc. cit.* n.80 at 10-15.

⁹⁵ PELLET, *loc. cit.* n.86 at 41.

the ultimate aim of treaties. Furthermore, reservations are a 'necessary evil'⁹⁶ resulting from the current state of the international society and, consequently, cannot be qualified at the ethical level. They are part of the hard reality of international relations and closely connected with the very basis of international law. Taken in a more positive sense, it has been argued that they are an essential condition of life, and the dynamics of treaties that promote the development of international law in the process.⁹⁷

As international treaties are characterized by the consent of the states parties, reservations being part of the treaty system are also governed by the principle of consent. The ICJ stated in the *Reservations* case that "[i]t is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto".⁹⁸ This illustrates the need to give equal consideration to the will of the reserving state and that of the objecting state and to maintain a necessary balance.

Finally, the flexible nature of the present system lies in its residual rule: serving as a safeguard in case of silence of the treaty on the matter. It is always open for a specific treaty to set forth its own rules on reservations. It can prohibit any reservation or have different procedures for their formulation, acceptance, objection, as well as the effects thereof. It can also provide for an objective determination mechanism or a judicial body to assess the validity of a reservation. With so many options at the disposal of the parties to a treaty, there is indeed hardly any need for a separate set of rules on reservations to treaties relating to certain special subject-matters, such as human rights.

So there is really no gap or defect in the system, although problems might arise which are inherent to the treaty in question. The absence of special provisions in a treaty relating to the matter of reservations indicates, either that the parties have consented to rely on the operation of the general rules on reservations, or that the parties have been unable to lay down such rules because of disagreement.

4. CONCLUSIONS

It seems appropriate to draw the following conclusions with regard to the operation of the current system on reservations.

1. Starting from the traditional requirement of unanimous acceptance the reservations system has been brought up to date in line with the changed reality of the international legal order. The increased number of states, the new procedures of treaty-making, the need for a widest possible participation in a treaty while not endangering the essence of the treaty, and the consensual nature of

⁹⁶ R. AGO, YILC 1965-I: 151.

⁹⁷ PELLET, loc.cit.n.86 at 28.

⁹⁸ 18 ILR 368.

treaty obligations, have combined in militating in favour of the flexible approach as at present reflected in the VCLT provisions.

2. The success of the present reservations system lies in a well-stricken balance between integrity and universality of the treaty, neither of which can be sacrificed in favour of the other.

3. The key concept of the current flexible system is the required compatibility with the object and purpose of the treaty. It is both a criterion for the formulation of reservations and a guidance for the response by other parties. It is a seemingly objective criterion, but is normally applied on the basis of the subjective appreciation of individual parties. The chances for judicial determination of the compatibility with the object and purpose of a treaty are rare due to the reality and inherent deficiencies of the structure of international law.

4. There are some uncertainties and ambiguities in the current system which are, however, not fatal. They can be resolved according to the basic principles of treaty law and with a view to a fundamental balance between the integrity and the universality of the treaty and between the ideal and the reality of the international legal order.

5. The vitality of the present system lies in its flexibility and adaptability. The system is designed for general applicability, but it is a set of residual rules to be applied only where a treaty does not provide special provisions. It is open for any specific treaty to develop its own rules on reservations to that treaty.

6. The present system also applies to human rights treaties. There is no need to devise a separate and different system for human rights treaties. If there were a need for such special rules, these can be accommodated in the text of the treaty in question either at the time of conclusion or through amendment as agreed by the parties.

OBJECT AND PURPOSE OF TREATIES IN THE VIENNA CONVENTION ON THE LAW OF TREATIES

V. Crnic-Grotic*

1. INTRODUCTION

The Vienna Convention on the Law of Treaties¹ in many of its provisions refers to the 'object and purpose of the treaty' (French: *l'objet et le but*, Spanish: *el objeto y el fin*, Russian: *objekt i celj*).² Such reference is particularly relevant in the case of so-called 'silent treaties', i.e. treaties which do not contain explicit rules providing an answer to questions of treaty law that may arise. Thus, 'object and purpose' are determinant for the admissibility of reservations to a treaty that does not contain a relevant provision on reservations (Article 19 Conv.). The same applies for determining whether a treaty requires unanimous acceptance of a reservation (Article 20 paragraph 2), as well as for determining the admissibility of so-called *inter se* agreements concluded among some of the

* Faculty of Law, University of Rijeka, Croatia.

¹ Vienna Convention on the Law of Treaties, 1155 UNTS 331, adopted 23 May 1969, entered into force 27 January 1980, ratified by 81 states. The Convention constitutes the main conventional source of the international law on treaties today. Many authors and court decisions consider most of the Convention's provisions as a codification of rules of international customary law which were applicable even before the entry into force of the Convention. (See I.BROWNIE, *Principles of Public International Law* (3d ed., 1979) at 601; H.W.BRIGGS, "US ratification of the Vienna Treaty Convention", 73 *AJIL* (1979) 470-473; P.H. IMBERT, "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités", *AFDI* (1980) at 524-541) This view was confirmed by later developments. The 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations (UNdoc.A/CONF.129/15, adopted 21 March 1986, signatories: 38, ratifications: 23, not yet in force) contains provisions which are deliberately drafted in a similar or even, *mutatis mutandis*, identical way as those of the 1969 Convention. This reinforces the claim of their customary nature. Other provisions, however, do contain elements of progressive development. See I.SINCLAIR, "Vienna Conference on the Law of Treaties", 19 *ICLQ* (1970) 47-69 at 47. Therefore, a thorough examination of the various provisions and terms is necessary, especially those for which the Convention does not provide a definition. Finally, there is a clear connection between the 1978 Convention on Succession of States in respect of Treaties (adopted 23 Aug. 1978, in force: 6 Nov. 1996, signatories: 20, parties: 15) and the 1969 Convention, which also strengthens the above claim.

² See also the reference to object and purpose of treaties in the preamble and Art. 18 of the 1978 Convention on State Succession in respect of Treaties.

parties of a multilateral treaty and meant to modify the treaty relations between them (Article 41) or even to suspend its operation among them (Article 58 paragraph 1). The Vienna Convention also refers specifically to the object and purpose of a treaty in some of its 'general' rules on the law on treaties, such as the rule on interpretation contained in its Article 31 paragraph 1 and the rule regarding the interpretation of treaties authenticated in two or more languages (Article 33 paragraph 4). Article 18 of the Convention lays down the duty of the contracting parties not to defeat the object and purpose of a treaty even before its entry into force. Furthermore, under Article 60 of the Convention the object and purpose of a treaty are essential in determining whether a material breach of that treaty has occurred, giving the right to the injured party to unilaterally terminate or suspend its operation.³

The object and purpose of a treaty are not only relevant in those cases where they are expressly referred to in the Vienna Convention. The Convention also contains rules which are *directly or indirectly related to the object and purpose of a treaty*, such as, particularly, the rules relating to the question of the validity of treaties or their severance. According to some, even the question of classification of treaties falls within the scope of the Vienna Convention, although the latter does not contain specific rules on the matter. For reasons of space we shall not elaborate on these issues.

In view of the foregoing, it may be said that the Vienna Convention has linked some of the most important issues of making, application and termination of treaties with their 'object and purpose'. The lack of a definition of the terms in the Vienna Convention is, therefore, most remarkable.

In this paper we shall try to establish the true meaning of the terms 'object' and 'purpose' in the Vienna Convention and, accordingly, in general international law.

2. TERMINOLOGY

The first problem that we encounter is that of the terminology used. There has been a tendency to use different terms to express the same idea. Yaseen claims a variety of words expressing the notion of object and purpose of treaties, such as: *ratio legis*, aim of treaty, its role, function, economy or *economie générale*.⁴ Hudson moves one step further and claims that the Permanent Court of International Justice used the following words for the same purpose: nature

³ The term 'object of the treaty' is used in a different sense in Art. 61, where it relates to the supervening impossibility of performance, enabling the termination of the treaty in case of "the permanent disappearance or destruction of an object indispensable for the execution of the treaty". According to the accepted views this refers to a physical object.

⁴ M.K. YASEEN, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", 151 RdC (1976) 1-141 at 55.

of treaty, reach, object, spirit, accent, function, role, aim, purpose, intent, system, scheme, general plan and, of course, *raison d'être*.⁵ For purely practical reasons we have limited our research to the terms 'object' ('*l'objet*') and 'purpose', 'aim' ('*le but*').

The International Court of Justice, like its predecessor, does not use the terms consistently. Sometimes there is even inconsistency in the translation of a term from one official language of the Court to the other in the same judgment. We find a good example in the advisory opinion rendered by the PCIJ in the case concerning the Minority Schools in Albania. In the authentic, French, version, the Court said: "*Pour atteindre ce but, deux choses ont été considérées comme nécessaires et font l'objet des dispositions des dits traités*". In the same text in English translation we read: "In order to attain this *object*, two things were regarded as particularly necessary, and have formed the *subject* of provisions ...".⁶ If we look at the 'ordinary and natural meaning'⁷ of the words 'object and purpose', however, we realize how the confusion was caused. In the English language (the 'working language' of the Convention⁸) 'object' means, according to the Oxford Advanced Learner's Dictionary of Current English: "(1) something that can be seen or touched, material thing; (2) person or thing to which the action or feeling or thought is directed to, thing aimed at; end; purpose". According to the same dictionary 'purpose' means: "(1) that which one means to do, get, be, etc.; plan; design; intention; (2) determination; power of forming plans and keeping to them".⁹ The two words have a very close meaning in English. This is confirmed by the special (legal) definitions of the two words, with the one denoting the other.¹⁰ We can see the same similarity in French. The English word *object* is translated by the French words: *objet, chose; but*. The English word *purpose* translates into *but, objet; intention*. Clearly, both words have a very similar, if not identical, meaning.¹¹

⁵ M.O. HUDSON, *The Permanent Court of Justice 1920-1942* (New York 1943) 631-661.

⁶ *Minority Schools in Albania* (Adv. Op. 6 April 1935), PCIJ Series A/B No.64 at 17. The French text is often used by the French authors to show what the Court really meant by object and purpose.

⁷ Art. 31 of the Vienna Convention.

⁸ All the drafts on the topic of the International Law Commission, the 'birth place' of the Vienna Convention, came from British lawyers: BRIERLY, FITZMAURICE, LAUTERPACHT and WALDOCK.

⁹ *Oxford Advanced Learner's Dictionary of Current English* (OUP, London 1975). American-English dictionaries yield similar results. 'Object' is a noun with the following meanings: 1. something that is or is capable of being seen, touched, or otherwise sensed or something physical or mental which a subject is cognitively aware, 2. an end toward which effort or action or emotion is directed; goal; motive. On the other hand, 'purpose' can mean: something set up as an object or end to be attained; intention; resolution; determination; a subject under discussion or an action in course of execution. *Webster's New Collegiate Dictionary* (Springfield 1981).

¹⁰ Comp. *Black's Law Dictionary* (1968) at 1222 and 1400. The object of a statute, furthermore, means 'aim or purpose of its enactment'.

¹¹ LAROUSSE, *Dictionnaire Français-Anglais*.

The foregoing has made some writers wonder whether the two terms are synonyms or should at least be read together. The answer is not easy and, as we shall see, is not identical for all legal issues.

3. SILENT TREATIES

The references in the Vienna Convention to object and purpose in the case of silent treaties concern the admissibility of reservations and the so called *inter se* agreements. The issue of reservations deserves our closest attention, since it presents the fundamental issue of using object and purpose as an objective criterion.

3.1. Reservations to treaties

In the Vienna Convention the issue of reservations to treaties is directly connected to the 'object and purpose of the treaty'. This was the result of the struggle between the so-called traditional view of the integral application of a treaty and the modern view of its universal application. The integralists preferred the application of a treaty in its entirety even if by a smaller number of States, while the universalist view preferred a wider application even if this would imply the acceptance of reservations.

The struggle began with the issue of the status of reservations to the Convention for the Prevention and Punishment of the Crime of Genocide. Upon ratification of this Convention some states made a reservation to its Article IX prescribing the compulsory jurisdiction of the International Court of Justice.¹² Some other States were opposed to these reservations and to a right of the reserving States to become parties to the Convention. The United Nations General Assembly then decided to put the question both to the ICJ (with a request for an advisory opinion) and to the International Law Commission.

While the ICJ understandably limited its considerations to the Genocide Convention,¹³ the ILC was asked to give a more general view in the context of its work on the codification of the law of treaties and based on Article 15 of its Statute. The results were surprisingly different.

As to the first question, on whether the reserving State is to be regarded as a party to the Convention while still maintaining its reservation, although other

¹² Reservations were made by the Soviet Union and some other East European states (Bulgaria, Czechoslovakia, Poland, etc.).

¹³ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Adv. Opinion, ICJ Rep. 1951:15 at 20. The Court emphasized that it "will seek these replies in the rules of law relating to the effect to be given to the intention of the parties to multilateral conventions".

parties to the Convention have raised objections to the reservation, the Court in its opinion adhered to some undisputed principles of the law on treaties. One of these principles was that no State is bound to a treaty without its consent or, in other words, the principle of the integrity of the treaty. The Court examined the circumstances in which the Genocide Convention was concluded and emphasized that, even though the Convention had been adopted unanimously by the General Assembly of the UN, it was nevertheless the result of the application of the majority principle. Consequently, "the majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations". Finally, the Court considered that "the character of a multilateral convention, its purpose, provisions, mode of preparation and adoption were factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect".¹⁴

Based on the preparatory work and some other evidence, the Court concluded that the main intention of the UN member states, and therefore the main purpose of the Genocide Convention, was the punishment of the crime of genocide.¹⁵ Its object, said the Court, was to safeguard the very existence of certain human groups and to confirm and endorse the most elementary principles of morality. It must, therefore, be concluded that the United Nations General Assembly intended its universal application even with reservations.

On the basis of these considerations, the Court then introduced what would become known as the 'compatibility principle':

"... [I]t is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation."¹⁶

In other words, the compatibility test is decisive for both making the reservations and objecting to them.

The criticism of the advisory opinion was very fierce. The compatibility principle was considered a novelty without any foundation, neither in law nor in the intent of the parties.¹⁷ Most of the critics claimed that the criterion was subjective and that an objective test of compatibility was lacking.¹⁸

¹⁴ Id. at 22.

¹⁵ Id. at 23.

¹⁶ Id. at 24

¹⁷ K.HOLLOWAY, *Les réserves dans les traités internationaux* (Paris,1958) at 185. D.R.ANDERSON, "Reservations to Multilateral Treaties. A Re-Examination", 13 ICLQ (1964) 450-481 at 460 claims that the dissenting opinion had a better standing in law. However, he admits that the subsequent practice of States showed the need to change the traditional 'integ-

The International Law Commission, and its Special Rapporteur J.L. BRIERLY, joined the critics. In its Report of 1951,¹⁹ the Commission concluded, like the Court, that there was no satisfactory generally applicable rule in force regarding reservations to treaties. Hence the Commission meant to recommend a rule which "seems to it to be the least unsatisfactory" and voted in favour of the application of the unanimity rule whenever the treaty contained no specific provision on reservations.²⁰ Depending on the nature of the treaty, no reservations or only very specific reservations may be allowed. The greater part of the Report was dedicated to the compatibility criterion as formulated by the Advisory Opinion of the International Court. The criterion was criticized as being inapplicable to multilateral conventions in general, lacking an objective test and distinguishing between treaty provisions which do and those which do not form part of its object and purpose.

Nevertheless, the discussion in the UN General Assembly that followed the Advisory Opinion and the ILC Report stirred the wheel towards the compatibility rule.²¹ The ILC continued its work on the codification of the law of treaties while resenting the criterion, until the next Rapporteur, Sir HUMPHREY WALDOCK, submitted his first report in 1962.²² Although Sir HUMPHREY was even then hesitant and reluctant to adhere to the compatibility test, he had to depart from the unanimity rule which had become less and less acceptable to the states. His report subsequently led to the text of the Articles 19 and 20 of the Vienna Convention.²³

The Vienna Convention of 1969 adopted the compatibility test as one of the admissibility criteria for reservations. *Mutatis mutandis*, we find the same criterion in the subsequent Vienna Conventions on the law of treaties of 1978 (Art. 20) and 1986 (Art. 19-20). Article 19 speaks of 'Formulation of reservations' in the following way:

- "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
- (a) the reservation is prohibited by the treaty;
 - (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

rity' principle. See also K.ZEMANEK, "Some Unresolved Questions Concerning Reservations", in: *Essays in International Law in Honour of Judge M. Lachs* (1984) 323-336 at 325.

¹⁸ J.L. BRIERLY, *The Law of Nations* (5th ed., 1955) 250.

¹⁹ UN doc.A/CN.4/41, YILC 1951 Vol. II at 123.

²⁰ It was the rule applied and recommended by the Secretary-General. See his Report, UN doc.A/1372 (1950).

²¹ UNGA Res.598 (VI).

²² See his draft Art. 17, para. 2 (a), YILC 1962 Vol. II:31-32, 60-62.

²³ It is remarkable that the terms 'object and purpose' were considered to be well established in the international legal language by the Drafting Committee of the Vienna Conference. Comp. F.HORN, *Reservations and Interpretative Declarations to Multilateral Treaties* (1988):115-117.

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

Article 20 provides rules on the "Acceptance of and objection to reservations". The compatibility test appears in its paragraph 2:

"2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

Although the text of the Vienna Convention on reservations was, surprisingly, broadly accepted by the Conference,²⁴ the critics did not yield. The compatibility criterion continued to be disapproved as being imprecise, uncertain and too subjective for use,²⁵ making it impossible for states to adjust their actions with certainty to the legal norm.²⁶ The very few writers who did accept the criterion, still complained about the lack of an objective body competent to decide on the admissibility of a reservation.²⁷

The compatibility criterion in Article 20 seems less controversial, as most writers agree on the necessity for some special categories of treaties to keep the unanimity rule on the acceptance of reservations.²⁸ Nevertheless, here too the same objections against the compatibility criterion were repeated.²⁹

²⁴ I.SINCLAIR, *loc.cit.n.1* at 57. Ninety-two delegations voted in favour of Art. 19, 4 against and 7 abstained.

²⁵ Ch.ROUSSEAU, *Droit international public*, Vol.1 (1970) 126; D.O'CONNELL, *International Law*, Vol.1 (2nd ed.,1970) 239; J.SZTUCKI, "Some questions arising from reservations to the Vienna Convention on the Law of Treaties", 20 *GYIL* (1977) 277-305 at 298. HOLLOWAY, *op.cit. n.17* at 286-289, was particularly concerned that its subjective character would prevent any progress of international law through conventions. TOMUSCHAT considered the compatibility criterion to be a hollow phrase, void of any objectivity and bound to lead to contradictory results. C.TOMUSCHAT, "Admissibility and legal effects of reservations to multilateral treaties", 27 *ZaöRV*: 463-482 at 478.

²⁶ G.TEOBUL, "Rémarques sur les réserves aux conventions du codification", 86 *RGDIP* (1982) 679-717 at 697. His concern was with the distinction between, and the definition of, the terms 'object' and 'purpose'. Similar concerns were expressed by M.BOS, "Theory and Practice of Treaty Interpretation", 27 *NILR* (1980) 3-170 at 149-150.

²⁷ M.LACHS, "Le développement et la fonction des traités multilatéraux", 92 *RdC* (1957) 233-341 at 305; T.O.ELIAS, *The Modern Law of Treaties* (1974) 34; R.SZAFARZ, "Reservations to multilateral treaties", 2 *PolYIL* (1970) 293-316 at 301. Finally, writers like IMBERT were aware of the necessity for the criterion, although admitting its many flaws. P.H.IMBERT, *Les réserves aux traités multilatéraux* (1979) 138-140.

²⁸ G.A.L.DROZ, "Les réserves et les facultés dans les Conventions de la Haye de Droit International Privé", 58 *RCDIP* (1969) 381-424 at 388-392, claims that such would be the case with the Hague Conventions on private international law whose object and purpose are to unify the legal rules of the states parties.

²⁹ TOMUSCHAT, *loc.cit n.25* at 479.

State practice does not bring much light in the controversy.³⁰ It is quite varied, although there is some tendency towards the application of the Vienna Convention rules and criteria. When a state raises objections to a reservation as being inadmissible it does so on grounds of its incompatibility with the 'object and purpose' of the treaty. Nevertheless, even then different expressions are used besides 'object and purpose', such as 'aim of the treaty', its 'letter and spirit', its 'content and spirit' or its 'objects'.³¹

Some treaties specifically prescribe the compatibility test for the determination of the admissibility of reservations, such as the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. Its Article 20(2) states as follows:

"(2) A reservation incompatible with the object and purpose of this Convention shall not be permitted... A reservation shall be considered incompatible or inhibitive if at least two thirds of the States parties to this Convention object to it."³²

Very few treaties provide for an impartial body to determine the compatibility of a reservation.³³ It is usually left to the discretion of the parties to the particular treaty to decide individually whether or not they find a reservation incompatible with the treaty's object and purpose. Of course, sometimes the results are very different, especially in the case of treaties of a more or less controversial nature, such as the Convention on the Elimination of All Forms of Discrimination against Women.³⁴ That Convention, one might say, is infa-

³⁰ For the practice of states with regard to reservations, see F.HORN, *op.cit.*n.23 at 219; J.K.GAMBLE, "Reservations to multilateral treaties: A macroscopic view", 74 *AJIL* (1980) 372-395.

³¹ The effects of an objection constitute a separate problem.. In most cases the states concerned refrain from giving the objection the effect provided for in Art. 20(4)(b), namely the non-recognition by the objecting State of the reserving State as a party to the treaty. Some authors, however, claim that an incompatible reservation is inadmissible and, consequently, does not produce any effects, regardless of the objections. D.W.BOWETT, "Reservations to non-restricted multilateral treaties", 48 *BYIL* (1976-77) 67-92 at 82; D.O'CONNELL, *op.cit.*n.25 at 237. See also SZAFARZ, *loc.cit.*n.27 at 309 who claims that the objection of incompatibility has the effect of Art. 20 para 4(b), while other objections do not have such an effect.

³² International Convention on Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS.

³³ For the specific practice of the European human rights bodies (Commission and Court) based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, see P.H.IMBERT, "Les réserves à la Convention Européenne des droits de l'homme devant la Commission de Strasbourg (Affaire Temeltasch)", 87 *RGDIP* (1983) 580-623, and J.COHEN-JONATHAN, "Les réserves à la Convention Européenne des droits de l'homme (Belilos)", 93 *RGDIP* (1989) 273-315.

³⁴ Convention on the Elimination of All Forms of Discrimination against Women, adopted by UN GA Res. 34/180 of 18 December 1979.

mous for its reservations and the objections to them, despite the fact that its Article 2(2) does not permit a reservation incompatible with the object and purpose of the Convention. A number of states made *prima facie* incompatible reservations, yet very few states raised objections and still fewer among them used the right to deny the reserving State a status as a party to the Convention.³⁵

The compatibility criterion was introduced into the Vienna Convention as an objective criterion in the sense that it could be established in an objective manner.³⁶ It is linked to the 'object and purpose', it stems from the treaty text and can, accordingly, be objectively determined by interpretation of the treaty. Object and purpose, in this context, are used primarily in the sense of *ratio legis*, i.e. as the reason or the aim of the treaty. The requirement that the reservation be compatible with the object and purpose of the treaty should protect the very essence of that treaty, as well as of its parts.

It is to be noted that the ILC has resumed work on the problem of reservations to treaties.³⁷ One of the undisputed conclusions so far is the reaffirmation of the Vienna Convention reservations regime "particularly ... the object and purpose of the treaty as the fundamental criterion for determining the permissibility of reservations... [B]ecause 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".³⁸

3.2. Inter se agreements

The members of the modern international community are bound by numerous obligations. Sometimes they lose interest in continued participation in a treaty, or like to have their treaty obligations modified but are not able to bring all other parties to the negotiating table. Besides, parties to codification conventions containing dispositive obligations are sometimes expected to regulate

³⁵ See: B.CLARK, "The Vienna Convention's reservations regime and the Convention on Discrimination of Women", 85 AJIL (1991) 281; R.J.COOK, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", 30 VirgJIL (1990) 643. Comp. also the reservations to the Convention on Political Rights of Women, F.HORN, op.cit. n.23 at 306-310.

³⁶ J.RUDA, "Reservations to treaties", 146 RdC (1975) 95-218 at 182; ELIAS, op.cit.n.27 at 34-35.

³⁷ The General Assembly, in resolution 48/31 of 9 December 1993, endorsed the decision of the ILC to include in its programme of work the topic "The law and practice relating to reservations to treaties".

³⁸ ILC Report 1996, Chapter VI: Reservations to Treaties, Draft Resolution of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, at: <http://www.un.org/law>.

particular matters by separate bilateral treaties.³⁹ In all these cases it may occur that the states parties concerned conclude a separate treaty among themselves, deviating from the provisions of the original treaty, or agree to suspend or terminate the original treaty among themselves. The former case is called 'modification', in contradistinction to 'amendment' of a treaty. The difference basically lies in the fact that in the case of a modified treaty its parties have not had the intention to get all the parties of the original treaty to become parties to the new treaty. The later treaty has, usually, come about contrary to the amendment procedure for the original treaty which is, usually, based on the unanimity rule.⁴⁰ In any case, the general rule applicable to the new treaty, be it a case of amendment or modification, is, of course, that it binds only its contracting parties, according to the general principle *pacta sunt servanda*.

The question that arises with regard to *inter se* agreements concerns their admissibility if the original treaty is silent on the matter. Although there had been similar cases in the past, the Vienna Convention for the first time provided specific rules on the matter.⁴¹ Article 41 bears the title "Agreements to modify multilateral treaties between certain of the parties only". Its paragraph 1 reads as follows:

- "1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
- (a) the possibility of such a modification is provided for by the treaty; or
 - (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."

We see here the compatibility criterion employed in a similar manner as in Article 19(c): It is not allowed to conclude *inter se* agreements incompatible with the effective execution of the object and purpose of the treaty as a whole. The wording is somewhat different and the compatibility is related to the effective execution. The ILC gave an example of an incompatible treaty in its commentary to the 1966 Draft: an *inter se* agreement modifying substantive provisions of a disarmament or neutralization treaty. Such a treaty would be incompatible with the object and purpose of the original one, and, consequently, not permissible. In addition, the Commission emphasized that the conditions set in the article are not alternative, but cumulative, even though "the second and third conditions, it is true, overlap to some extent since an *inter se* agreement

³⁹ See, e.g., Art. 73 of the 1963 Vienna Convention on Consular Relations, 261 UNTS.

⁴⁰ See Article 40 of the Vienna Convention.

⁴¹ R.K.DIXIT, "Amendment or modification of treaties", 10 IJIL (1970) 37-50 at 43. However, note the Harvard Draft, Art. 22 (b), where compatibility with the general purpose of the previous treaty is required.

incompatible with the object and purpose of the treaty may be said to be impliedly prohibited by the treaty".⁴²

What is the status of an *inter se* agreement concluded contrary to Article 41 paragraph 1(ii)? Clearly, like an incompatible reservation, it is inadmissible; but is it null and void? The Vienna Convention is not very clear on this point.⁴³ The ILC did not adhere to the idea of nullity of an incompatible later treaty. The grounds for 'invalidity' provided for in Part V Section 2 of the Vienna Convention do not include 'incompatibility' with a previous treaty, not even in the case of so-called interdependent and integral treaties. According to the ILC's view, the issue belongs to field of state responsibility.⁴⁴ Accordingly, if states conclude an agreement contrary to the provisions of Article 41, the other parties of the original treaty may raise the question of international responsibility, while the validity of the later treaty would not be affected. Nullity is reserved for breaches which are considered especially serious, as provided in Part V Section 2 of the Vienna Convention.⁴⁵

Article 58 of the Vienna Convention deals with the *inter se* agreement whose object is to suspend a multilateral treaty:

"Suspension of the operation of a multilateral treaty by agreement between certain of the parties only:

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

the possibility of such a suspension is provided for by the treaty; or
the suspension in question is not prohibited by the treaty and:

- i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
- (ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend."

⁴² Commentary 1966 to draft Art.37 at 55; also in YILC 1966 Vol.II:235. I.SINCLAIR, *The Vienna Convention on the Law of Treaties* (1984) at 109, holds that the last two conditions "may prove to be unduly onerous in practice".

⁴³ Comp. recent views in J.B.Mus, "Conflicts between treaties in international law", 45 NILR (1998) 208-232 at 225-227.

⁴⁴ Commentary 1966 p. 37 at para.13. Comp. F.CAPOTORTI, "L'extinction et la suspension des traités", 134 RdC (1971) 417-588 at 509: "[L]a limité de la compatibilité avec l'objet et le but du traité initial vise surtout à éviter que soit conclu un accord *inter se* pour amender un traité duquel dérivent des obligations de type interdépendent ou integral".

⁴⁵ Even among the reasons for nullity enumerated in that part, only some cause the so-called absolute nullity *ex tunc*, i.e. from the beginning. These are the cases of use or threat of force and contravention with a norm of *jus cogens* character, provided for in Articles 51, 52 and 53 respectively.

The similarity with the provision of Article 41 is obvious and intentional. The criterion of compatibility with the object and purpose is used again as one of the key requirements for the admissibility of such *inter se* agreements in the case of a silent treaty. It is important to emphasize that the provision applies solely to agreements for the temporary suspension of the operation of the original treaty.⁴⁶

Both Articles 41 and 58 show that the Vienna Convention has opted for the principle of universality and for the possibility of subdivision of a multilateral treaty into smaller units. This process began with the introduction of the liberal regime of the reservations to treaties, and the use of object and purpose of the treaty as the framework for the parties' liberty.

4. OBJECT AND PURPOSE IN THE 'GENERAL RULES'

As already mentioned earlier, the Vienna Convention makes reference to a treaty's object and purpose in some of its general treaty rules. The first one, Article 18, relates to the duty to refrain from defeating the object and purpose of a signed or ratified treaty, while Articles 31 and 33 deal with interpretation. Finally, Article 60 refers to the object and purpose in relation with the termination of a treaty.

4.1. **Obligation not to defeat the object and purpose of a treaty prior to its entry into force**

A treaty produces its legal effects and binds its parties after it has come into force. This condition is in accordance with the well-established general principle of *pacta sunt servanda* and is affirmed in Article 26 of the Vienna Convention: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". Without prejudice to this rule, some treaty rules apply even before the treaty comes into force. These are rules governing "the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matter arising necessarily before the entry into force of the treaty" (Art. 24 para. 4).

The conclusion of treaties and the conditions for their entry into force follow all sorts of procedures and are often time-consuming. A treaty may be signed by a state's representative with reservation of ratification, which may take years to be realized. On the other hand, states may ratify a treaty long be-

⁴⁶ For some critical observations see SINCLAIR, *op.cit.*n.42 at 185; CAPOTORTI, *loc.cit.*n.44 at 511; B.VUKAS, *Relativno djelovanje međunarodnih ugovora* [The relative effect of treaties](1975) at 53.

fore the number of ratifications necessary for its entry into force is achieved.⁴⁷ What is the status of these treaties in the time interval before they are ratified or come into force? Clearly, the signatory or even the ratifying states are under no obligation to apply a treaty that is not in force, as this would be contrary to the *pacta sunt servanda* rule. Nevertheless, it would be equally wrong to claim that these states have no obligation whatsoever in respect of the signed or even ratified treaty. In the words of the International Court in the Genocide Convention Case:

"...[S]ignature constitutes a first step to participation in the Convention... Pending ratification, the provisional status created by signatures confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification."⁴⁸

The emphasis is, obviously, on the temporary status of the signatory state which produces certain provisional rights. At the same time, however, it produces obligations. This has been confirmed, admittedly not abundant, by state practice and case law. One of the best known cases usually cited in this context is the *Megalidis v. Turkey* case before the Greek-Turkish arbitral tribunal in 1928:

"...[I]l est de principe que déjà avec la signature d'un Traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire que puisse nuire au Traité en diminuant la portée de ses clauses... [Ce] principe... n'est qu'une manifestation de la bonne foi qui est la base de toute loi et de toute convention..."⁴⁹

Other cases have connected the behaviour of a state following its signature or its ratification of a treaty to the principle of good faith⁵⁰ or the abuse of rights which, however, cannot be presumed.⁵¹

The Harvard Draft Convention on the Law of Treaties of 1935 confirmed duties of a signatory state based on good faith, and prescribed that "pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult".⁵²

⁴⁷ The examples are numerous, including the Vienna Convention on the Law of Treaties itself (signed in 1969, entered into force in 1980). One of the most impressive examples is the Hague Protocol on Statelessness from 1930 that came into force in 1973.

⁴⁸ ICJ Rep.1951: 15, 28.

⁴⁹ *Megalidis v. Turkey*, Tribunal arbitral greco-turc (1928), 8 TAM 386.

⁵⁰ *Réparations allemandes selon l'article 260 du Traité de Versailles*, 1 RIAA: 439 at 522-533.

⁵¹ *German Interests in Polish Upper Silesia Case*, PCIJ Series A No. 7 at 37.

⁵² Harvard Research on International Law – Draft on the Law of Treaties (29 AJIL Supp.(1935, hereinafter 'Harvard Draft') at 788 (Art.9). Nevertheless, the Draft did not consider the good

Some writers agree on good faith as the basis of a duty not to voluntarily create a situation which would prevent one to be able to act according to the terms existing at the time of signing of the treaty.⁵³ According to PAUL REUTER, this obligation stems from the principle of good faith but has subsequently become a separate norm of international customary law.⁵⁴

The Vienna Convention approaches the problem in its Article 18:

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

In order to find out its meaning, we emphasize that it does not imply a duty to execute the treaty. It usually means a passive duty 'to refrain from', not to commit, certain acts.⁵⁵ Some writers, however, claim that there could even be an active duty if that would be necessary to preserve the object and purpose of the treaty.⁵⁶ Older writers have claimed that the duty to refrain refers to acts that would render it impossible or difficult to perform the treaty. Lord MCNAIR describes them as acts "(other than acts of routine administration) which will diminish the value of any property or other rights which would be transferred, or of any rights which would be created, when the treaty enters into operation".⁵⁷ More recent authors speak of acts which would render performance meaningless,⁵⁸ while some American writers refer to acts which are contrary to the purpose of the treaty and of an irreversible character.⁵⁹ Clearly, some trea-

faith principle to be a legal principle, so that its breach by a state would not produce any consequence other than 'jeopardising its name and reputation'.

⁵³ S.B.CRANDALL, *Treaties. Their Making and Enforcement* (2nd ed., 1916) 344. See for a similar view: J.M.JONES, *Full Powers and Ratification* (1946) 78; Ch.ROUSSEAU, *Cours de droit international public: La theorie générale des traités internationaux* (1959) 45; A.McNAIR, *The Law of Treaties* (1961) 204; O'CONNELL, *op. cit.* n.25 at 222-223.

⁵⁴ P.REUTER, *Introduction au droit des traités* (2nd ed. 1985) 62.

⁵⁵ J.P.COT, "La bonne foi et la conclusion des traités", 1 RBDI (1968) 140-159 at 155; A.M.ROGOFF, "The international legal obligation of signatories to an unratified treaty", 32 *Maine Law Review* (1980) 263-299 at 297.

⁵⁶ M.VILLIGER, *Customary International Law and Treaties* (1985) 322.

⁵⁷ MCNAIR, *op.cit.*n.53 at 204.

⁵⁸ VILLIGER, *op.cit.*n.56, *ibid.*

⁵⁹ R.F.TURNER, "Legal implications of deferring ratification of SALT II", 21 *VirgJIL* (1981) 747-784 at 747. Discussing the problem of the unratified SALT II agreement, he claims that it could be permissible to enlarge arms stocks even contrary to the agreement, providing there is

ties are more susceptible to be affected by such actions than others. Sir GERALD FITZMAURICE spoke of 'interdependent treaties', treaties whose performance would only make sense if all its signatories have the same obligations, such as a disarmament treaty.

In any case, the prohibition applies to actions which change the circumstances existing at the time of signature or ratification of the treaty and which cause the disappearance of the reasons for a State to sign or ratify the treaty. These reasons are to be determined objectively, through the object and purpose as stated in the text of the treaty. In this context the terms 'object and purpose' most often mean *commitments*, or, even more often, *reasons* for making a treaty, its *purpose* or its *ratio legis*.

4.2. Interpretation of treaties

Without any doubt, interpretation of treaties has been one of the most fundamental issues in the law of treaties. The key question in both practice and doctrine is: what are, if any, the rules of treaty interpretation.⁶⁰

Various writers have adhered to different approaches, but it is safe to say that there are three main methods of treaty interpretation: subjective, textual and teleological.⁶¹ According to DEGAN, the first method relates to the search for the intention of the parties to the treaty, while the textual method emphasizes the text of the treaty. The third method tries to interpret a treaty with respect to its purpose, aim or function.⁶² Furthermore, each method employs various means and processes in determining its principal element in interpreting the treaty.⁶³ Courts and arbitral tribunals have expressed their views on these matters in a number of judgments, awards and opinions.

We shall here limit our discussion to issues of interpretation relating to the object and purpose of the treaty. We have already seen in the foregoing account that the question of object and purpose is most closely connected with the teleological or functional method of interpretation. Some writers make a distinction between the two terms,⁶⁴ while others say that they are in fact syno-

no investigation of new weapons, since the new knowledge could not be annulled (at 783). Comp. M.GLENNON, "The Senate role in treaty ratification", 77 AJIL (1983) 257-280 at 275.

⁶⁰ For a historical overview of the rules of treaty interpretation, see V.D.DEGAN, *L'interprétation des accords en droit international* (1963) 25-66.

⁶¹ G.G.FITZMAURICE, *The Law and Procedure of the International Court of Justice* (a reprint of a series of articles on the work of the Court in the BYIL 1950-1963) Vol. 1 (1986) 42-43. He based his division on the work by LAUTERPACHT at the Institut de droit international.

⁶² DEGAN prefers to call it the 'functional' method as being more precise. DEGAN, *op.cit.*n.60 at 74-75.

⁶³ *Ibid.* at 70-71.

⁶⁴ O'CONNELL, *op.cit.*n.25 at 255; DEGAN, *loc.cit.* n.60.

nyms.⁶⁵ Despite minor differences, the starting point seems always to be: to establish the purpose or the aim of the treaty. The interpretation of a treaty in search of the treaty's object and purpose has also to do with 'effective interpretation' or the maxim *ut res magis valeat quam pereat*, also known as the *l'effet utile* principle. Treaties establishing, or concluded by, international organizations have presented additional problems as courts have appeared to be inclined to invoke object and purpose, especially in cases of *lacunae*. Thus, new terms were created: 'emergent purpose' and 'implied powers'. Finally, courts may differ on whether to find the treaty's object and purpose in or outside the intention of the parties or the text of the treaty. The latter occurs when the treaty's aim has evolved from the original aim as envisaged by the parties, or for the purpose of filling up *lacunae*, i.e. finding answers to questions which are not covered by the treaty.

One should always keep MCNAIR'S words in mind, according to which there are no clear-cut distinctions between the various methods and 'rules' on interpretation, and that they all serve one purpose, namely, to give "effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances".⁶⁶ This was also, more or less, the attitude adopted by the ILC. Article 31 paragraph 1 of the Vienna Convention provides the following 'general rule of interpretation':

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The subsequent paragraphs of Article 31 add additional elements that have to be taken into account, such as subsequent agreements, practice followed by the parties to the treaty in question, and any relevant rules of international law applicable in the relations between the parties concerned.

The Vienna Convention has, in a way, summarized the legal doctrine and experience of the past. It was HUGO GROTIUS who, in 1625, made one of the first attempts to lay down rules on treaty interpretation. He wrote of different *conjecturas* to be taken into account in the process of interpreting a treaty. Chapter VIII of his *De jure belli ac pacis* speaks of a 'reasonable motive' (*ec ratione movente*) and claims that the *ratio legis* or the purpose of the law should prevail. *Ratio legis*, however, is not the same as the intent of the par-

⁶⁵ E.HEXNER, "Teleological Interpretation", in: *Essays in Honour of H. Kelsen* (1964) 119-138 at 131; G.SCHWARZENBERGER, *International Law as Applied by International Courts and Tribunals*, Vol.1 (3rd ed. 1957) 517-531; D.SIMON, *L'interprétation judiciaire des traités d'organisations internationales* (1981) 102.

⁶⁶ MCNAIR, *op.cit.*n. 53 at 365.

ties.⁶⁷ The same distinction and the necessity to take into account the *ratio legis* is found with Vattel.⁶⁸

The first significant attempt at a codification of the law on treaties was made by the Harvard Law School in 1935. According to the view put forward in this project a treaty has to be interpreted, among other things, "in the light of the general purpose which it is intended to serve". Here again, it was held that 'general purpose' is not the same as the intention of the parties, however close the connection between the two may be.⁶⁹ 'General purpose' was apparently meant to serve as a corrective to a subjective interpretation of a treaty when a common intention of the parties cannot be established.

The *Institut de droit international* made a considerable contribution to the issue of treaty interpretation. While failing to draw up strict rules on interpretation, it recommended some principles in its Granada Resolution of 1956.⁷⁰ While it prescribed interpretation on the basis of the 'natural and ordinary sense of the terms of the text', it allowed the determination of objects of a treaty by 'other legitimate means' of interpretation, the *travaux préparatoires* and the subsequent practice of the parties.

The International Law Commission had the difficult task of formulating rules in an area of the law of treaties where most jurists claimed no rules existed. As we know the Commission adopted a general rule of treaty interpretation including the charge of interpreting a treaty 'in the light of its object and purpose'.

The notion of 'object and purpose' was introduced in 1964 by the third Special Rapporteur, Sir HUMPHREY WALDOCK, though only in a subsidiary rule of interpretation. His Article 70 para. 2 provided for turning to object and purpose and the context of the treaty when interpretation of the 'natural and ordinary sense' leads to an unreasonable, absurd or ambiguous result. The object and purpose were clearly seen as a means for correction of otherwise unacceptable results. However, Article 72 of the report provided for the, separate, application of the maxim *ut res magis valeat quam pereat*, requiring that the in-

⁶⁷ H. GROTIUS, *De jure belli ac pacis, Libri tres*, 1625, reproduced in *Classics of International Law* (Washington, 1913) Lib. II, Ch. XVI, para VIII. Comp. B. VITÁNYI, "L'interprétation des traités dans la théorie du droit naturel", 84 RGDIP (1980) 535-586 at 569, who writes that *ratio legis* is "la cause finale, c'est à dire le but que vise la loi ou le traité", and is, therefore, an objective criterion, while the intent of the parties is a subjective one. Accordingly, the substance of an obligation can only be considered with regard to the treaty's purpose or reason.

⁶⁸ E. VATTEL, *Le droit des gens ou principes de loi naturelle*, 1758, reproduced in *Classics of International Law* (Washington 1916) Lib. II, Ch. XVII, para. 287.

⁶⁹ Harvard Draft, Art. 19, and comments at 940, 952-953. According to the drafters, the problem was that disputes often occurred when there had been in fact no common intention of the parties to a treaty. Nevertheless, the interpretation process can and should effectuate the intention of the parties "in the sense that it is conformable to the general purpose which they had in mind when they concluded the treaty" (p. 953).

⁷⁰ 46 *Annuaire* (1956) 358. The Resolution was based on a draft prepared by Sir G. FITZMAURICE, advocate of the textual method.

terpretation produced an effect compatible with the natural and ordinary meaning of the treaty terms as well as 'with the object and purpose of the treaty'.⁷¹ The members of the Commission, however, voted against Article 72 and, accordingly, against the *ut res magis* maxim as a separate rule.⁷² Instead, the Commission later saw the principle embodied in the *bona fide* principle, all within the context of the textual method of interpretation.⁷³ In the Commission's final draft of 1966 the rule on interpretation (Art.27) was based on the textual approach including the following principal elements: good faith, ordinary meaning,⁷⁴ context⁷⁵ and object and purpose of a treaty, without hierarchical order among them. Their position in the text appears to be the result of logic, rather than legal hierarchy. Interpretation should, therefore, be the result of their interactive application, as a unique intellectual operation.⁷⁶ Hierarchy exists only with regard to the supplementary means of interpretation in the following draft Article 28.

The Draft came through the 1968 and 1969 Conference sessions rather unharmed with only minor drafting changes, despite some efforts to revise the whole textual approach.⁷⁷ At the final vote the articles on interpretation were accepted unanimously. They have made a strong impact on subsequent international practice.

The confines of 'object and purpose'

Many authors have asserted that interpretation according to object and purpose of a treaty should be limited by the text of the treaty and by the original intention of the parties. This refers to the textual and the subjective method of treaty interpretation.

According to the subjective method, the object and purpose of a treaty are determined as they were at the time of the conclusion of the treaty. The first

⁷¹ YILC 1964 Vol. II:53.

⁷² YILC 1964 Vol.I:275-296. In the interesting discussions CASTRÉN emphasized that "the rule of article 70 that a treaty should be interpreted by reference to its objects and purpose might in a way be said to constitute an affirmation of the principle of effective interpretation". See also: H.GUTIERREZ-POSSE, "La maxime 'ut res magis valeat quam pereat' (Interprétation en fonction de l'effet utile)", 23 ÖZÖR (1972) 229-254 at 249.

⁷³ Commentary para.6 to draft article 27, YILC 1966 Vol.II: 215.

⁷⁴ According to the Draft the meaning of the term depends on the intention of the parties.

⁷⁵ The Draft defines 'context' as comprising the text itself, including its preamble and annexes, as well as any agreement or any instrument relating to that treaty (Art. 27, para 2).

⁷⁶ SINCLAIR, op.cit. n.42 at 130 holds the view that under Art.30 of the Vienna Convention reference to object and purpose is in fact a secondary or ancillary process. On the other hand, R.BERNHARDT, "Interpretation and implied modification of treaties", 27 ZaöRV (1967) 491-506 at 498 sees in the general rule a unique and combined operation of all elements.

⁷⁷ Comp. M.S.McDOUGAL, "The ILC's draft articles upon interpretation: Textuality redivivus", 61 AJIL (1967) 992-1000; SINCLAIR, loc.cit.n.1 at 61-66.

and foremost task of treaty interpretation is to establish, and to give effect to, the common intention of the parties. The intention of the parties and, accordingly, their purpose, can be assumed or implied. This method was advocated by A. MCNAIR and is well founded in the international judicial practice.⁷⁸ In the Chorzów Factory Case the Permanent Court of International Justice held that when interpreting a treaty one must take into account not only the historical development of the treaties concerned and the grammatical and logical meaning of the words, but also 'the function' of the provision according to the intention of the parties.⁷⁹

According to DEGAN, the intention of the parties can be determined by '*le but primitif du traité*' by using the subjective method of interpretation.⁸⁰ SINCLAIR, however, warns for the dangers of such an approach: "In the case of general multilateral conventions, a search for the common intentions of the parties can be likened to a search for the pot of gold at the end of the rainbow".⁸¹ Other writers warn that this method of interpretation is not suitable for every kind of treaty.⁸² This is certainly true if one juxtaposes closed treaties with a fixed number of parties to so-called universal treaties, open to every State. In the first group of treaties it may be relatively easy to establish the common intention of the parties, but in the latter group there may be more parties than the original negotiating States. To establish their common original object may prove to be next to impossible, the more so since it is conceivable that the original purpose is lost or has changed over the years. In such cases it is often preferable to search for the treaty's object and purpose somewhere else, rather than in the earliest common intention of the parties.

Similar problems occur when the textual approach is applied in determining the treaty's object and purpose. In that case the object and purpose is an objective category, to be derived from the text, often its preamble, or implied in it,⁸³ while the interpreter does not derogate from the text. This approach has had many advocates. Among the older writers DE LOUTER claims that there must be a connection between words used in the treaty and the purpose of the treaty,

⁷⁸ MCNAIR, op.cit.n.53 at 380.

⁷⁹ Case concerning the factory at Chorzów (jurisdiction), 26 July 1927, PCIJ Series A No. 9 at 24.

⁸⁰ DEGAN, op. cit. n.60 at 134.

⁸¹ SINCLAIR, op. cit. n.42 at 130.

⁸² A.FAVRE, "L'interprétation objectiviste des traités internationaux", 17 ASDI (1960) 75-98 at 84-85, L.CAVARÉ, *Le Droit international public positif*, Vol.2 (2d ed.,1969) at 140. They distinguish between 'traités-lois' and 'traités-contrats'. See also W.LANG, "Les règles d'interprétation codifiées par la Convention de Vienne et les divers types des traités", 24 ÖZÖR (1973) 113-174.

⁸³ Comp. CRANDALL, op.cit. n.53 at 371: "[A] literal and narrow meaning of a clause may not be made to defeat the manifest purpose of the parties as gathered from the entire instrument".

while MARCELLE JOKL emphasizes the value of establishing the *raison d'être* of the treaty and at the same time justifies the use of the treaty's preamble.⁸⁴

CHARLES ROUSSEAU belongs to the writers who regard the consideration of the object and purpose as one of three fundamental principles of treaty interpretation. It equals the determination of the *ratio legis*, though it differs from the principle of *l'effet utile*. Furthermore, for this learned author the object and purpose are not the same as the motives of the parties, although he admits that the courts have failed to be consistent in distinguishing between the two.⁸⁵

The international judicial practice is rich with examples of invocation of the object and/or purpose of a treaty or other instruments with which is confronted. There is, however, an inconsistency in the use of the terms 'object' and 'purpose', as well as their synonyms.

In the case concerning the interpretation of the Memel Statute the Permanent Court of International Justice compared the purpose of the entire Statute with that of its Article 17.⁸⁶ Dealing with disputes relating to the protection of minorities after World War I, the Court as a rule looked for the purpose of the treaty in its preamble and juxtaposed it to the object and purpose of particular provisions.⁸⁷ On the other hand, in some other cases the PCIJ tried to find the purpose of the (peace) treaty in the intention of the Allied Powers to protect the minorities.⁸⁸

The International Court of Justice has been equally inclined to refer to the object and purpose of the treaties it had to interpret. In the Asylum Case (1950) the object and purpose of the Havana Convention of 1928 were found in the preamble, in connection with the intention of the parties.⁸⁹ The status of reser-

⁸⁴ J. DE LOUTER, *Le droit international public positif*, Vol.1 (1920) at 500; M. JOKL, *De l'interprétation des traités normatifs* (1936) at 51. At p.74, examining the practice of the PCIJ, she comes to conclusion that: "... c'est par examen de la raison d'être d'un traité que la Cour écarte toute interprétation susceptible de réduire la valeur d'un texte ou aboutissant à des résultats déraisonnables ou absurdes". Comp. also M. SIBERT, *Les traités internationaux* (1953) 137, who writes that the preamble "énonce le but de celui-ci avec une précision suffisante pour diriger l'interprétation du dispositif".

⁸⁵ ROUSSEAU, op.cit.n.25 at 272. P. GUGGENHEIM, *Traité de droit international public*, Vol.1 (2d.ed., Geneva, 1967) 253-254, admits the following principal maxims of interpretation: intention of the parties, clear meaning, and the purpose of a treaty.

⁸⁶ *Interpretation of the Statute of the Memel Territory*, 11 Aug. 1932, PCIJ Series A/B No. 49 at 314-317. The descriptive text of the French original 'le Statut n'est pas été créé' became 'purpose of the Statute' in the English translation.

⁸⁷ *Rights of Minorities in Upper Silesia (Minority Schools)*, 26 Apr. 1928, PCIJ Series A No.15 at 33; *German Settlers in Poland*, 10 Sept. 1923, PCIJ Series B No. 6 at 20, 24-25.

⁸⁸ *Question concerning the Acquisition of Polish Nationality*, 15 Sept. 1923, PCIJ Series B No.7 at 16.

⁸⁹ *Asylum Case*, 20 Nov. 1950, ICJ Rep.1950:226 at 275, 282. Here, again, the original French 'le but manifeste' became 'the manifest intention'. The preamble was also used in some other cases, such as the *Case Concerning Rights of Nationals of the USA in Morocco*, 27 Aug. 1952, ICJ Rep.1952:176 at 196: "The purposes and objects of this Convention were stated in its Pre-

vations to the Genocide Convention was determined by referring to the object and purpose of that Convention which the Court held to be implied in the intention of the UN General Assembly and the contracting parties.⁹⁰ However, in the jurisdiction phase of the Fisheries Jurisdiction Case, the Court made clear that the motives which led a party to conclude a treaty must be distinguished from the object and purpose of that treaty as an objective category. Thus the Court concluded that the motive of Iceland to enter into the Exchange of Notes might have been the recognition of a 12-miles fishery jurisdiction and it was plausible that this motive had disappeared in the meantime. However:

"... the object and purpose of the 1961 Exchange of Notes, and therefore the circumstances which constituted an essential basis of the consent of both parties ..., had a much wider scope ... [It] was also to provide means whereby the parties might resolve the question of the validity of any further claims. This follows not only from the text ..., but also from the history of negotiations ..."⁹¹

Clearly, the Court had departed from the subjective method of interpretation and, instead, used the textual method, although starting from the object and purpose of the treaty.

A very elaborate discussion of the ICJ's understanding of 'object and purpose' is to be found in the Case concerning US Diplomatic and Consular Staff in Tehran in 1980:

"The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Art. XXI, par. 2 of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by the peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Art. XXI par. 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed."⁹²

amble ... The Court can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects".

⁹⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Adv. Op. 28 May 1951, ICJ Rep.1951:15 at 23-24.

⁹¹ *Fisheries Jurisdiction* (UK v. Iceland), Jurisdiction, 2 Feb. 1973, ICJ Rep.1973:3 at 17.

⁹² *Case concerning US Diplomatic and Consular Staff in Tehran* (USA v. Iran), 24 May 1980, ICJ Rep.1980:3 para.54. Remarkably, the terms used in the authentic English language match those of the French translation. However, in the case between Nicaragua and the United States, the Court held that the object and purpose of amity treaties should not be interpreted too broadly, but limited to the specific areas foreseen by the treaty. *Military and Paramilitary Activities in and against Nicaragua*, Merits, 27 June 1986, ICJ Rep.1986:14 para.273 at 135-136.

Various arbitrations relating to the peace treaties following the two World Wars adhered to interpretation according to the object and purpose of the treaties.⁹³ One exemplary case is the arbitration, under Part III of the 1946 Paris Act, concerning the claims with respect to the removal of gold by the Germans from Rome in 1943. The Umpire, SAUSER-HALL, held that, in order to determine its object and purpose, "... il convient de rechercher quels sont les antécédents de cet Acte, quels sont les effets et quel est le résultat voulu par les Parties signataires. Cette analyse permettra de déterminer l'objet et le but de cet accord".⁹⁴

Some more recent cases also purport to confirm and clarify what is meant by object and purpose. In the *Young Loan Case* in 1980 the Tribunal took Article 31 of the Vienna Convention as its starting point since it was "widely held in jurisprudence and legal literature that the Convention..., as regards interpretation at least, ... is restricted to the codification of the customary law in force".⁹⁵ Using the 'step by step' technique as required by Article 31, the Tribunal tried to locate the object and purpose of the London Agreement on German External Debts (LDA) of 1953:

"Article 31(1) of the VCT requires, in addition to the wording and context, the 'object and purpose' of the treaty to be taken into account when interpreting unclear treaty provisions. The object of the LDA was the settlement of German external debts. The purpose of the LDA was an attempt to achieve a compromise, in the interests of all concerned, between the liabilities of the Federal Republic of Germany, which, ... felt itself bound to settle the whole German debt, and its actual economic capacity. A prerequisite of the fullest possible settlement with its creditors was the recovery of the German economy. This recovery, therefore, became as much the object of the treaty as the settlement of the debt itself... [T]he LDA's object could be achieved only if foreign creditors were prepared to waive a substantial part of their claims"

⁹⁶

⁹³ E.g.: *German Cession of Vessels and Tugs for Rhine Navigation* (France v. Germany), 8 Jan.1921, 1 RIAA:71; *German Cession of Vessels and Tugs for Elbe Navigation* (Czechoslovakia v. Germany), 14 June 1921, 1 RIAA:85-86; *Cession of Vessels and Tugs for Navigation on the Danube* (Allied Powers; Germany, Austria, Hungary and Bulgaria), 2 Aug. 1921, 1 RIAA:103.

⁹⁴ *Affaire relative à l'or de la Banque Nationale d'Albanie*, 20 Feb. 1953, 12 RIAA:13, at 39. At a different place the arbitrator emphasized that the proper way to interpret a treaty "selon la doctrine unanime du droit des gens" is to give "des dispositions conventionnelles entre Etats les sens usuel des termes employés par les Etats contractants, et de ne l'abandonner que si leur signification n'est pas compatible avec l'objet et le but de ces engagements". Ibid. at 46.

⁹⁵ '*Young Loan Case*' (Belgium, France, Switzerland, UK and US v. Federal Republic of Germany, May 16, 1980), 19 ILM (1980):1357 at 1370 (paras 16 and 30).

⁹⁶ Ibid. at 1377.

Hence, the Tribunal found that the terms 'object' and 'purpose' are two separate notions, albeit so closely connected that they have to be considered together, as stated in the preamble of the Agreement. The LDA, therefore, has to be interpreted with a view to the delicate balance between the justified aim for adequate satisfaction of the creditors and the need not to burden the debtors with an economically intolerable load.⁹⁷

In the case concerning the delimitation of the maritime boundary between Guinea and Guinea Bissau, the two parties had different views on the object and purpose of the French-Portuguese Convention on delimitation of 1886. For Guinea, its object and purpose was the delimitation of the African possessions of France and Portugal with the purpose of eliminating a source of dispute between them. For Guinea Bissau, however, its only purpose was the preparation of the delimitation, while the possessions constituted the object of the Convention. Finally, the Arbitration Tribunal held that the purpose of the Convention was the partition, the cession, the exchange of the possessions or their occupation, while the delimitation seemed to be only an aspect or a means of partition. On the basis of an analysis of the text and the preamble of the treaty the Tribunal reached the conclusion that this was the true object, not only of Article 1 of the Convention, but of the entire Convention.⁹⁸

More recently the Iran-US Claims Tribunal expressed its view on the Vienna Convention understanding of the object and purpose of treaties, as follows:

"It is to be noted that the Vienna Convention does not envisage that the words of a treaty be regarded in isolation; on the contrary it places 'the ordinary meaning' of those words first within the framework of 'their context' and then within, the still wider framework of the 'object and purpose' of the treaty. The Vienna Convention thereby codifies an established principle of international law."⁹⁹

The invocation of the object and purpose of a treaty has a special function before courts established for the protection of human rights and freedoms, such as the European Court of Human Rights (ECHR). Its task is to interpret the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and its subsequent Protocols. By way of starting point it assumes that "the Convention is a living instrument which... must be interpreted in the light of present day conditions...[T]he Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field".¹⁰⁰ Furthermore: "Given that it is a law-making treaty, it is also necessary to seek the interpretation that

⁹⁷ Ibid.

⁹⁸ Award of 14 Feb. 1985, para 56, 89 RGDIP (1985) 511; 19 RIAA:149 at 172.

⁹⁹ *International Schools Services, Inc. v. National Iranian Copper Industries Co.*, Case No. 111 (1984), 5 *The Iran - US Claims Tribunal Reports* 341.

¹⁰⁰ *Tyrer Case (Max Birching Case)*, 25 April 1978, para. 31, ECHR Series A Vol. 26.

is most appropriate in order to realise the aim and achieve the object of the treaty".¹⁰¹

Due to such views the ECHR sometimes departs from the strict text of the treaty and goes beyond the initial intent of the parties, applying the teleological or functional method of interpretation. However, even within the textual approach, the ECHR has often reached for the object and purpose of the Convention as a whole or its particular provisions.

Another principal feature of the ECHR's work relates to the application of the Vienna Convention, whose Articles 31 to 33, in the opinion of the Court, "enunciate in essence generally accepted principles of international law ...".¹⁰² An illustration of the Court's contemplation of the purpose of the European Convention is to be found in the so-called Belgian Languages Case:

"The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide the effective protection of fundamental human rights... The Convention therefore implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter." ¹⁰³

Teleological interpretation

We thus come to cases in which the courts look for implications beyond the very text of the treaty. Some writers have expressed their fear that, in so doing, the courts may cross that fine line between legislation and adjudication. Legislators make rules, judges apply them. By implying rules which are not explicitly contained in the text, the two different functions may be confused.¹⁰⁴

Interpretation according to the purpose of the treaty beyond the scope of the text is sometimes called (extreme) teleological interpretation. Very few writers appear to be in support of its wide application,¹⁰⁵ while most call for caution. Sir GERALD FITZMAURICE, as a traditionalist, limited the teleological method to some categories of treaties, such as multilateral conventions on so-

¹⁰¹ *Wemhoff*, 27 June 1968, paras. 7-8, ECHR Series A Vol. 7.

¹⁰² *Golder Case*, 21 Feb. 1975, para. 29, ECHR Series A Vol. 18.

¹⁰³ Case relating to *Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Merits, 23 July 1967, 2 Yearbook ECHR (1968) 832; 45 ILR 162.

¹⁰⁴ J.F. HOGG, "The International Court: rules of treaty interpretation", 44 *Minnesota Law Review* (1960) 5-73 at 63.

¹⁰⁵ M.S. McDUGAL, H.D. LASSWELL, J.C. MILLER, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (1967); B. BOLLECKER-STERN, "L'avis consultatif du 21 juin 1971 dans l'affaire de la Namibie (Sud-Ouest Africain)", 17 AFDI (1971) 281-329 at 288-294. The latter differentiates between the extensive, evolutive and teleological method of interpretation, the latter allowing for more precision, filling up the gaps and taking into account the *raison d'être* of the provision or the institution in question.

cial, humanitarian or law-making matters.¹⁰⁶ DEGAN speaks of the 'functional' method when he refers to the interpretation of a treaty with regard to its effect or its aim in the social order.¹⁰⁷ He considers the method particularly appropriate in the case of constitutions of international organizations and to be used for two principal purposes: (1) filling up gaps and (2) satisfying new needs which were not foreseen originally by the parties.¹⁰⁸ The method is called the 'objective method' by CAVARÉ,¹⁰⁹ while BENTIVOGLIO refers to it as interpretation based on the principle of functionality.¹¹⁰

These views come close to the so-called 'emergent purpose' interpretation or 'implied powers' theory. This allows for interpretation focused on the effectuation of the treaty¹¹¹ and, in the case of constitutive instruments, interpretation of the powers of an organ of an international organization.¹¹² Constitutive treaties have thus been interpreted in accordance with the requirements of the time, having in mind the changes that have occurred since the adoption of the instrument. In such cases international courts have reached for a greater latitude for interpretation, which is provided by the 'object and purpose' of the treaty, without contravening the clear meaning of the text, since "it is the duty of the Court to interpret the Treaties, not to revise them".¹¹³

Treaties dealing with the protection of human rights are also susceptible to this kind of teleological interpretation, with the effect of *ut res magis valeat quam pereat*.¹¹⁴ As we have seen earlier, the ECHR has a preference of interpreting the protected rights and fundamental freedoms in light of the changes that have occurred in the legal and social perceptions over the years. Even this method of interpretation need not necessarily lead to results directly contrary to the letter of the treaty.

While various means of interpretation may be employed in order to establish a newly emerging purpose of a treaty, the best result may be obtained by

¹⁰⁶ FITZMAURICE, op.cit.n.61, Vol. 1:42.

¹⁰⁷ DEGAN, op. cit.n.60 at 70.

¹⁰⁸ Ibid. at 139-140.

¹⁰⁹ CAVARÉ, op.cit.n.82, Vol.2 at 145-147.

¹¹⁰ L.BENTIVOGLIO, *Interpretazione del diritto e diritto internazionale* (1953) 262-264.

¹¹¹ L.EHRLICH, "L'interprétation des traités", 24 RdC (1928) 1-145 at 84.

¹¹² SIMON, op.cit.n.65 at 169: "L'interprétation de la répartition des compétences établie par le traité constitutif dans le sens d'un développement des fonctions de l'organisation se manifeste à travers la jurisprudence internationale dans deux directions distinctes, mais complémentaires: d'une part, le juge accepte l'extension matérielle des compétences de l'organisation, et d'autre part, il s'emploie à encadrer les compétences retenues des Etats membres".

¹¹³ *Interpretation of Peace Treaties* (Second phase), Adv.Op.18 July 1950, ICJ Rep.1950: 221,229. The greater latitude would, as a rule, result in political organs of organizations having competence to render an authentic interpretation of an constitutional instrument: "Les organes politiques de l'Organisation ont entrepris de se faire les interprètes de la Charte, et ce non selon le texte parfaitement clair de celle-ci, mais dans le but de servir les fins de l'Organisation, en fonction des circonstances internationales variables". DEGAN, op.cit. n.60:147.

¹¹⁴ See J.TOUSCOZ, *Le principe d'effectivité dans l'ordre international* (1964) 166.

relying on the subsequent practice of the contracting States, as provided by Article 31(3) of the Vienna Convention.

In international judicial practice courts often invoke the object and purpose of a treaty in order to go beyond the very letter of the treaty or the initial intentions of the parties. The PCIJ acknowledged the implied powers of the International Labour Organisation to regulate, 'incidentally', the personal work of the employer in light of the aim of the treaty, even though its Statute did not contain such an authorization.¹¹⁵ One of the most fundamental implied powers interpretations was employed by the ICJ in its Advisory Opinion in the Reparations for Injuries Case in 1949. In that case the question had arisen whether the UN was competent to act as an international person. Despite the fact that the Charter does not settle the question of international personality of the UN in explicit terms, the attribution of international personality was deemed indispensable by the Court in order for the United Nations to achieve its purposes and principles as specified in the Charter:

"The Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."¹¹⁶

The ICJ found itself in a similar situation in a couple of cases dealing with the international status of South-West Africa and the problem of the succession of UN mechanisms of control to those of the mandate system under the League of Nations. Lacking a clear provision authorizing the UN to take over the control mechanisms over the former mandates, the Court looked into Article 80(1) of the Charter and concluded that its purpose "must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision ...". Accordingly, the duty of international control was deemed to have remained in place.¹¹⁷

¹¹⁵ *Competence of the International Labour Organisation to regulate, incidentally, the personal work of the employer*, 23 July 1926, PCIJ Series B No. 13:18. The object and purpose were found in the preamble of the Statute. On the other hand, any limitations to its powers "clearly inconsistent with the aim and the scope of Part XIII" would have been expressed in the Treaty itself and could not be implied.

¹¹⁶ *Reparation for injuries suffered in the service of the UN*, Adv.Op. 11 April 1949, ICJ Rep.1949:174 at 178-182.

¹¹⁷ *International Status of South-West Africa*, Adv.Op. 11 July 1950, ICJ Rep.1950: 128,136. But the Court found that there was no duty to transfer the mandate to the Trusteeship system of the UN. Similar in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Adv.Op.21 June 1971, ICJ Rep.1971:16 at 30-33. In para. 53 of the latter opinion, the Court emphasized that the concepts embodied in Art. 22 of the Pact of the League of Nations were 'by definition evolutionary' and that the Court's interpretation must be affected by the "subsequent development of law"

The European Court of Justice and its predecessors, as the judiciary branch of the European Communities, is an extraordinary international court, due to the special nature of the treaties it has to interpret. As Lord DENNING put it, speaking of the Treaty establishing the European Economic Community,

"How different is this treaty! It lays down general principles. It expresses its aims and purposes... But it lacks precision. It uses words and phrases without defining what they mean... All the way through the Treaty there are gaps and lacunae"¹¹⁸

Against this backdrop, it is not surprising that the Court often employs the teleological method of interpretation, with reference to the objects and purposes of the treaties.¹¹⁹ Nevertheless, the Court stressed that the interpretation can not result in "a revision of the text which is clear and unambiguous".¹²⁰ With regard to the European Economic Community Treaty, the Court used various terms, such as 'general objectives', 'ultimate general aim' or 'primary object', in interpreting Article 85 of that Treaty, while avoiding interpretation that would be 'incompatible with the objectives of the Treaty':

"While the Treaty's primary object is to eliminate... the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Art. 2 of the Treaty."¹²¹

Indeed, the teleological interpretation is mostly employed in respect of Articles 2, 3, 4 and 5 of the Rome and Paris Treaties. These articles represent the basic objectives of the Communities on which the Treaties are based.¹²² Ac-

¹¹⁸ *Bulmer v. Bollinger*, Court of Appeal 1974, 60 ILR: 424.

¹¹⁹ Comp. the opinion of ANNE BREDIMAS, according to which the teleological interpretation is one of the aspects of the functional method, next to the principle *l'effet utile* and *l'effet nécessaire*. A. BREDIMAS, *Methods of Interpretation and Community Law* (1978)78-79. See also D.G. VALENTINE, *The Court of Justice of the European Communities*, Vol.1 (1965): 376.

¹²⁰ *Alpha Steel v. Comm.*, Case 14/81, ECR 1982:769, para. 33. Already in some of the early cases the European Court of Justice emphasized the importance of the goals set in Art. 2 of the Paris (ECSC) Treaty. Thus, for example, in Case 30/59, the Court allowed interpretation of the term 'subventions' only if the resulting definition was confirmed by other dispositions of the Treaty or by its objects as stated in its Art.2. *De Gezamenlijke Steenkolenmijnen in Limburg c. Haute autorité*, 23 Feb.1961, Rec.Vol.VIII/1962:1 at 38 et seq.

¹²¹ Case 14/68: *Wilhelm v. Bundeskartellamt*, 13 Feb.1969, ECR 1969: 1, para. 5 at 14.

¹²² P.PESCATORE, "Les objectifs de la Communauté Européenne comme principe d'interprétation dans la jurisprudence de la Cour de Justice", *Miscellanea W.J. Ganshof van der Meersch*, Vol.2 (1972) 325-363 at 326. According to this author, the principal aims of the Communities are: equality, freedom, solidarity and unity. See also Case 1/54 (*French Government v. High Authority of the ECSC*): "Articles 2, 3 and 4 of the Treaty, referred to at the beginning of Art. 60(1), constitute fundamental provisions establishing the Common Market and

cordingly, when the question of implied powers emerged, the Court readily gave the following view in the well-known ERTA Case in 1973:

"Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force, on 25 March 1969, of Regulation No. 543/69 of the Council on the harmonisation of certain social legislation relating to road transport... necessarily vested in the Community power to enter into any agreements with third countries relating to the subject matter governed by that regulation."¹²³

Dynamic interpretation is also found in cases relating to treaties on the protection of human rights, as is shown by the practice of the European and Inter-American Courts of Human Rights. As mentioned earlier, the ECHR has often taken as its starting point that the European Convention on the Protection of Human Rights and Fundamental Freedoms is 'a living instrument' that has to be interpreted in the light of contemporary conditions. Accordingly, and sometimes even in face of strong opposition among the members of the Court, the interpretation would occasionally depart from the meaning some terms used to have at the time of the conclusion of the Convention. A fine example of this practice is the 'Preto and Others' case in 1983 where the Court actually did 'not feel bound to adopt a literal interpretation' and held that 'reference to the object and purpose' of the particular Article was necessary.¹²⁴

By way of conclusion we may say that reference to a treaty's object and purpose is a legitimate means of interpretation, but that its employment is particularly accepted in case of treaties belonging to the category of constitutional instruments of international organizations and treaties on the protection of human rights.

In referring to object and purpose of the whole or part of the treaty or even a particular provision, courts and arbitral tribunals use these terms in plural and singular, and refer to either or both of them. The practice shows a great variety. The same applies with regard to the way in which specific objects and purposes are determined. Again, practice differs considerably. Although the text of the treaty constitutes the primary source, sometimes reference is made to the context. The preamble seems to be a most important, though not the exclusive,

the common objectives of the Community. Their importance is clear from Art. 95. In authorizing the High Authority to define prohibited practices, the Treaty obliges it to take into account all the aims laid down in Art. 2, 3 and 4". Reports of the Cases, [1954 to 1956] European Court of Justice, p. 1, 9.

¹²³ Case 22/70: *Commission v. Council* (ERTA), 31 March 1973, Rec.Vol.XVII:263. More on the use of this method see: PESCATORE, loc.cit.n.122; R.ORMAND, "L'utilisation particulière de la méthode d'interprétation des traités selon leur 'effet utile' par la Cour de Justice des Communautés Européennes", 12 *Revue trimestrielle de droit européen* (1976) 624-634.

¹²⁴ ECHR Series A Vol. 71; 73 ILR 482 at 491.

source for the deduction of the treaty's object and purpose. Most often some connection is found with the original intention of the parties, unless the court decides to interpret a treaty dynamically in light of the 'emerging purpose' of that treaty.

Plurilingual treaties

A rather recent problem of treaty interpretation has arisen in relation to plurilingual treaties, i.e. treaties concluded in two or more equally authentic versions in different languages. The problem appeared for the first time with the peace treaties concluded after World War I that were concluded in English and French.¹²⁵ Today the multitude of language versions has become a rule, rather than an exception, especially in the context of international organizations.¹²⁶

Interpretation of plurilingual treaties brings with it additional problems of finding the true meaning of the terms used.¹²⁷ There are two basic approaches in international legal doctrine and judicial practice. The first one starts from the presumption that one of the language versions has priority. It could be the language of one of the parties or the language of the party who took up the obligation, providing its language was used at all.¹²⁸ It could also be the 'working language' in which the treaty was prepared.¹²⁹ Another approach starts from the presumption of a single treaty, regardless of the number of language versions.¹³⁰ Consequently, it must be possible to find the common meaning stemming from the common intent of the parties.¹³¹

¹²⁵ Notwithstanding the fact that there are examples of 19th century treaties written in one language, but signed in two. Comp. *The Manica Arbitration*, in J.B.MOORE, *A Digest of International Law*, Vol. 5 (1906): 4985, 4992.

¹²⁶ Comp. M.TABORY, *Multilingualism in International Law and Institutions* (1980).

¹²⁷ ROSENNE argues that there are even differences in English terms in American or British version. S.ROSENNE, "Conceptualism as a Guide to Treaty Interpretation", *Mélanges R. Ago*, Vol. 1 (Milan, 1987) 417-431 at 421.

¹²⁸ CRANDALL, op.cit. n.53:389. The PCIJ indirectly applied this rule in the *Mavrommatis Palestine Concessions Case* (Jurisdiction), PCIJ Series A No.2:19. The European Court of Justice, however, considered the method inadmissible in Case 26/62. Cf. S.A.DICKSHAT, "Problèmes d'interprétation des traités européens résultant de leur plurilinguisme", 4 RBDI (1968) 40-60.

¹²⁹ Comp. *Interpretation of the Convention of 1919 concerning employment of women during the night* (Adv.Op.15 Nov.1932), PCIJ Series A/B No.50 at 365. J.HARDY, "The interpretation of plurilingual treaties by international courts and tribunals", 37 BYIL (1961) 72-155; P.GERMER, "Interpretation of plurilingual treaties: A study of Article 33 of the Vienna Convention on the Law of Treaties", 11 HarvILJ (1970) 400-427.

¹³⁰ See *Conditions of admission of a State to membership in the United Nations* (Art. 4 UN Charter), Adv.Op.28 May 1948, ICJ Rep.1947-1948:57; *Aerial Incident Case* (preliminary objections), 26 May 1959, ICJ Rep.1959:127.

¹³¹ EHRlich, loc.cit.n.111 at 99; D.ANZILOTTI, *Cours de droit international public* (Paris, 1929) 107.

The Vienna Convention adopted the latter view. Its Article 33, that was accepted unanimously at the conference, reads as follows:

"Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

For the purpose of the present paper, paragraph 4 is the most important provision. It contains the criteria for reconciling the different wording of the authentic versions of the treaty. The criterion consists of the referral to the object and purpose of the treaty. It is interesting to note that this is a second referral after the ordinary process of interpretation, *inter alia* in light of the treaty's object and purpose, has, apparently, not resulted in a satisfactory solution. One may wonder whether such a duplication is necessary. In the Young Loan Case before the Arbitral Tribunal for German External Debts the arbitrators held:

"The repeated reference by Article 33(4) of the VCT to the 'object and purpose' of the treaty means in effect nothing else than that any person having to interpret a plurilingual international treaty has the opportunity of resolving any divergence in the texts which persists, after the principles of Articles 31 and 32 of the VCT have been applied, by opting, for a final interpretation, for the one or the other text which in his opinion most closely approaches the 'object and purpose' of the treaty."¹³²

Material breach and termination of a treaty

Unilateral termination of a treaty as a consequence of its breach is one of the legitimate ways of termination of a treaty. It is founded in customary law and codified by Article 60 of the Vienna Convention.¹³³

¹³² *Young Loan Case*, 19 ILM (1980) 1357, para.39 at 1382.

¹³³ SINHA BHEK PATI, *Unilateral denunciation of treaty because of prior violations of obligations by the other Party* (1966) at 35, claims that the rule has been invoked by various states since 1793 and that it is a rule of customary international law. Some writers see the rule as one

The right to unilateral termination is not, however, the principal response to another party's breach of the treaty. Furthermore, a breach by one party does not automatically terminate the treaty.¹³⁴ The injured party has a choice either to insist on the implementation of the treaty or to ask for its termination and damages.¹³⁵ The latter is a very grave and final remedy. The Vienna Convention has, therefore, laid down strict rules and imposed significant limitations on the injured party. Besides, due to the special nature of international treaty relations, the Vienna Convention prescribes different rules for bilateral and multilateral treaties.

The principal rule is contained in Article 60, which bears the title "Termination or suspension of the operation of a treaty as a consequence of its breach". Article 60 paragraph 1, dealing with bilateral treaties, reads:

"1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."¹³⁶

Accordingly, there has to be 'a material breach' (French: *violation substantielle*, Spanish: *violacion grave*) in order for the right to unilaterally terminate or suspend the treaty to become available. The definition of a material breach, which is obviously very important, is to be found in paragraph 3 of the same article:

"3. A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

The International Law Commission in its Commentary to the 1966 Draft explained the difference between the term 'material' and 'fundamental' – used, *inter alia*, in the article relating to the *clausula rebus sic stantibus* (Art. 62 Vienna Convention) – :

of the general principles of law: CAPOTORTI, loc.cit.n.44 at 548-549; BROWNLIE, op.cit.n.1 at 615. See ANZILOTTI's dissenting opinion in *The diversion of water from the Meuse Case* (28 June 1937), PCIJ Series A/B No.70 at 49-50: "The principle underlying this submission (inadimplenti non est adimplendum) ... is one of these general principles of law ...". However, VILLIGER, op.cit.n.56 at 376, emphasizes that the rule is more common in the case of bilateral than multilateral treaty relations.

¹³⁴ McNAIR, op.cit. n.53 at 553; Harvard Draft, Art.27.

¹³⁵ Some writers make a distinction between termination resulting from a breach and that seized by way of legitimate reprisal. B.SIMMA, "Reflections on Art. 60 of the Vienna Convention on the Law of Treaties and its background in general international law", 20 ÖZÖR (1970) 5-83 at 20.

¹³⁶ Similarly, in multilateral treaty relations, "a material breach of a multilateral treaty by one of the parties entitles" other parties to undertake similar measures: Art.60 para.2.

"The word 'fundamental' might be understood as meaning that only the violation of a provision directly touching the *central* purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even though these provisions may be of an ancillary character."¹³⁷

Clearly, the Commission had in mind the possibility for a treaty to have several objects and purposes at different levels. In the words of PAUL REUTER:

"... il n'exige pas que la violation rende impossible la réalisation de l'objet et du but, il suffit que la disposition violée soit essentielle à cette réalisation, ce qui implique que l'objet et le but sont au moins sérieusement menacés dans leur réalisation."¹³⁸

Some writers, however, disapprove of the criteria used by the Vienna Convention. SIMMA and MAZZESCHI hold the view that the material breach should be determined by also taking into account the nature of the breach,¹³⁹ while ROSENNE holds that the breach can only be deducted from the law on state responsibility.¹⁴⁰

In an early arbitration case on the so-called Tacna-Arica Question, the arbitrator had to decide what administrative actions constituted a breach of a peace treaty between Chile and Peru:

"It is manifest that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement"¹⁴¹

The International Court of Justice acknowledged the codificatory nature of Article 60 in its advisory opinion on Namibia in 1971, i.e. before the entry into force of the Vienna Convention. According to the Court's view, the right to terminate a treaty exists "in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship".¹⁴² This

¹³⁷ Commentary 1966 to draft Art. 57, at para.9, YILC 1966 Vol.II:255.

¹³⁸ REUTER, *op.cit.*n.54 at 161. In his opinion, this was the only way to enounce the criteria of material breach in general terms.

¹³⁹ SIMMA, *loc.cit.*n.135 at 61; R.P.MAZZESCHI, *Risoluzione e sospensione dei trattati per inadempimento* (1984) at 122.

¹⁴⁰ S.ROSENNE, *Breach of Treaty* (Cambridge, 1985) 119, 123.

¹⁴¹ *Tacna Arica* Case (Chile v. Peru), 4 March 1925, 2 RIAA:921 at 943-944.

¹⁴² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Adv.Op.21 June 1971, ICJ Rep.1971:16 at 47, paras. 94-95. See also para. 96: "The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its

attitude was affirmed in some later judgments, most recently in the case between Hungary and Slovakia in 1997.¹⁴³

The breach of a multilateral convention is dealt with in a separate paragraph (para.2) of Article 60. In accordance with the basic principle, the reaction of the parties other than the defaulting state can be either collective or individual, either to terminate or suspend the treaty, in whole or in part, and to terminate it either in the relations between themselves and the defaulting State, or as between all the parties. In addition, any party other than the defaulting State is entitled to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

In the context of treaty violation and the available remedies, the object and purpose may be seen as the *ratio legis* of a treaty. Like in some other instances, the Vienna Convention allows a great deal of subjectivity to the individual parties in deciding whether they want the treaty to be terminated or not. Nevertheless there is a strongly objective criterion contained in the requirement that the breach should be material, which contributes to the accomplishment of the object and purpose of the treaty.

5. CONCLUSION: DETERMINATION OF OBJECT AND PURPOSE

The question of determination of a treaty's object and purpose has been a challenge to many international lawyers. We shall summarize their opinions according to whether they regard object and purpose as synonyms or as two separate or even opposite notions. In addition to some writers already mentioned above, others like CHARLES ROUSSEAU and OPPENHEIM-LAUTERPACHT hold the view that the object of a treaty consists of the obligations and rights

source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded".

¹⁴³ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), 25 Sep.1997, ICJ Rep.1997:46: "The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62". Hungary argued that the termination of the 1977 Treaty was justified by Czechoslovakia's material breaches of the Treaty, so the Court looked into the Vienna Convention and examined its Art. 60. In conclusion, the Court emphasized that the termination had been premature. (paras. 109-110). See also: *Fisheries Jurisdiction* (United Kingdom v. Iceland) (Jurisdiction), ICJ Rep.1973:18; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Adv.Op., ICJ Rep.1980:95-96.

prescribed by the treaty, while its purpose could be said to represent the result that the parties have set out to achieve.¹⁴⁴ DUGUIT probably influenced many French writers in adhering to this distinction. In his opinion, 'object' constitutes the material element of the treaty, while 'purpose' is its psychological element. The former provides an answer to the question '*quid?*' – what is wanted, the latter to '*cur?*' – why it is wanted.¹⁴⁵ YASEEN too holds that the two terms do not have the same meaning: the fact that the Vienna Convention always uses the two terms together means that it wanted to create a reasonable criterion denoting what the parties wanted to achieve within the limits of the set norm.¹⁴⁶

The Dutch lawyer BOS takes a compromising attitude, believing that the interpretation of 'object' will necessarily influence the interpretation of 'purpose'. It is, therefore, wise to consider the phrase 'object and purpose' as a unique expression denoting two closely related aspects of the same idea.¹⁴⁷ This view seems to be in accordance with the spirit of the Vienna Convention, which always uses the two notions together.

The essential feature of the reference to 'object and purpose' in the Vienna Convention is the subjectivity inherent in the two notions. As a rule, it is left to interested parties to assess whether the act in question – the formulation of reservations, the conclusion of an *inter se* agreement, the breach of provisions of the treaty, etc. – was lawful or not. This subjectivity can lead, and has sometimes actually lead, to very different results. Nevertheless, on the basis of proper interpretation, as confirmed by relevant judicial practice, it seems reasonable to suggest that the Vienna Convention does provide an objective framework for this subjectivity. This, it is suggested, consists of the text of the treaty.¹⁴⁸

¹⁴⁴ ROUSSEAU, *op.cit.*n.25 at 18. OPPENHEIM-LAUTERPACHT, *International Law*, Vol.1 (8th ed.,1955) at 893.

¹⁴⁵ L.DUGUIT, *Traité de droit constitutionnel*, Vol.1 (1921):151 at 284. See also: J.P.JACQUE, *Elements pour une théorie de l'acte juridique en droit international public* (1972) 169; CAVARE, *op.cit.*n.82 at 88; C.H.CHENG, *Essai critique sur l'interprétation* (1941) at 37.

¹⁴⁶ YASEEN, *op.cit.*n.4 at 57.

¹⁴⁷ M.BOS, *A Methodology in International Law* (1984) at 153.

¹⁴⁸ Comp. *US Diplomatic and Consular Staff in Tehran*, ICJ Rep.1980:3 at para.54, and *Military and Paramilitary Activities in and against Nicaragua*, ICJ Rep.1986:14 at para.273.

THE REVIEW AND REPUDIATION OF JUDGMENTS OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS

Suzuki Eisuke*

A proliferation of international tribunals¹ notwithstanding, no international administrative tribunal (IAT) provides a review process in the form of *appeal* to another tribunal.² The archetypal provision of the finality of an IAT's judgement was Article VI of the Statute of the Administrative Tribunal of the League of Nations, which stipulated that "[t]he Tribunal shall take decisions by a majority vote; judgements shall be final and without appeal". The Statute of the Administrative Tribunal of the Asian Development Bank similarly states in Article IX that "[a]ll decisions of the Tribunal shall be taken by [a] majority vote and its judgements in each case shall be final and binding". The central theme running through a large number of statutes of IATs is the finality of judgements without appeal.³

Each IAT's task is to settle internal disputes between the organization concerned and its staff within that organization's legal system.⁴ As it is an independent dispute resolution mechanism not only to safeguard the interests of staff members, but also the effectiveness of the organization concerned, respect for the tribunal and the effectiveness of its judgements hinge on its capacity for making accurate and right decisions as well as on its own internal discipline to correct its mistakes. In this connection, finality is a crucial element of stability in the internal legal order of the organization concerned. As a result, the rationality of law in repealing outdated legislation, amending an existing statute to

* Office of the General Counsel, Asian Development Bank. The views expressed herein are his personal views and do not necessarily reflect those of the Bank.

¹ See ELIHU LAUTERPACHT, *Aspects of the Administration of International Justice* (1991) 9-22.

² As explained below, the review mechanism provided in either the ILO Tribunal or the UN Tribunal is not, in *stricto sensu*, appeal to the ICJ. "There is no specific provision for any system of judicial appeal to the Court. It should be noted that establishing a system for review of judgments of administrative tribunals is an arrangement that must in no way be confused with an appeal system as such; it is clearly a review process and no more." T.O. ELIAS, 'The International Court of Justice in relation to the Administrative Tribunals of the United Nations and the International Labour Organization', in C. DE COOKER (ed.), *International Administration* (1990) V.4/1-2.

³ The finality of judgments without appeal of IATs equals Art. 60 of the Statute of the International Court of Justice that "[t]he judgment is final and without appeal".

⁴ See generally, C.F. AMERASINGHE, *The Law of the International Civil Service as Applied by International Administrative Tribunals*, Vols. I and II (2nd ed. 1995).

accommodate changes through time, enjoining unauthorized administrative actions, nullifying defective arbitral awards, appealing wrong decisions to a higher adjudicative organ and ultimately calling for a community-wide referendum, is sadly lacking in IATs.⁵ “Yet,” said Judge MANFRED LACHS of the International Court of Justice (ICJ), “no tribunal is infallible and occasionally questions were raised as to the correctness of its decisions”.⁶ “It is a matter for serious thought and consideration”, remarked Judge Sir ROBERT Y. JENNINGS, “whether more could be done to ensure that the principal judicial organ of the United Nations is the supreme court of the international community. . . .”⁷

1. PROLOGUE

With the striking growth of international organizations, the ICJ has been drawn into performing an external ‘supervisory jurisdiction’ in the form of advisory opinion.⁸ ‘Supervisory jurisdiction’ refers to a type of jurisdiction

“when the decision-maker is expected to respect the autonomy of another distinct and often structurally independent institution under supervision and to limit the enquiry to the *ways* the decisions were made in terms of certain pre-established prescriptions, for example, the competence of the entity under review, while refraining from substituting his or her own decision for that of the entity under supervision.” [emphasis original]⁹

The most elaborate form of supervisory function over IATs was set out in Article 11(1) of the Statute of the United Nations Administrative Tribunal (UNAT), which provided:

“If a Member State, the Secretary-General or the person in respect of whom a judgment has been rendered by the Tribunal (including any one who has succeeded to that person’s rights on his death) objects to the judgment on the ground that the Tribunal has exceeded its jurisdiction or competence or that the

⁵ MICHAEL REISMAN, “Revision of the South West Africa Cases”, 7 *Vanderbilt Journal of International Law* no. 3 (1966) 5.

⁶ *Application for Review of Judgment No.273 of the United Nations Administrative Tribunal*, ICJ Rep.1982: 325, 411 (dissenting opinion). See also REISMAN, loc.cit.n.5 at 5: “It seems inconceivable that the institutional procedures of the International Court of Justice should make no provision for human frailty and the rectification of errors, which even the most learned and best intentional officials of the world community might make”.

⁷ ROBERT Y. JENNINGS, “The United Nations at fifty: The International Court of Justice after fifty years”, 89 *AJIL* (1995) 493, 504.

⁸ See, e.g., *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, ICJ Rep.1980: 73; *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, ICJ Rep.1962: 151.

⁹ W. MICHAEL REISMAN, “The supervisory jurisdiction of the International Court of Justice: international arbitration and international adjudication”, 258 *RdC* (1996) 13, 24.

Tribunal has failed to exercise jurisdiction vested in it, or has on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which was occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgment, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.”

In the face of the growing confusion and criticism of the effectiveness and usefulness of the procedure for the supervisory function of the ICJ over the UNAT, in 1993 the United Nations General Assembly requested the Secretary-General to carry out a review of the procedure provided for under Article 11 of the UNAT Statute. A Report of the Secretary-General, submitted to the General Assembly in October 1994, concluded that:

“the present review procedure, provided for under Article 11 of the statute of the Administrative Tribunal of the United Nations, has not proved to be a constructive and useful element of the appeal system available within the Secretariat. On the contrary, this procedure has caused confusion and criticism which supports the view that the best solution would be to abolish the current procedure.”¹⁰

The UN Secretary-General’s Report thus confirmed the finality of the UNAT judgments by reiterating that “judgments of the Tribunal would be final and there would be no procedure which would allow the parties to the proceedings before the Tribunal to challenge its judgments.”¹¹

In the following year, as if endorsing the conclusion of the UN Secretary-General’s Report, Sir ROBERT JENNINGS, a former President of the ICJ, made the following devastating remarks in his plea “to ensure that the principal judicial organ of the United Nations is the supreme court of the international community, bearing in mind that a court which exists in isolation, however splendid, is not really in a position to be a supreme court in relation to other courts, as it does not have any formal relations with those other courts”:

“Some mention should perhaps be made also of that part of the advisory jurisdiction which involved the review by the Court of questions arising from decisions of the United Nations Administrative Tribunal. This should, in the opinion of the writer, be abolished as soon as may be. To employ the World Court for this kind of work is not free from absurdity; furthermore the judges of that

¹⁰ The Secretary-General’s Report on *Review of the procedure provided for under Article 11 of the Statute of the Administrative Tribunal of the United Nations*, UN Doc.A/C.6/49/2 para.37.

¹¹ *Ibid.*

Court have no expertise, and often no great interest, in that highly specialized corner of labour law.”¹²

The ‘specialized’ aspects of IATs relate only to their jurisdiction and structure, none of which can be considered a matter so ‘specialized’ as to preclude the supervisory jurisdiction of another appropriate tribunal. In particular, when each IAT is embedded with its own structural limitations that it is created and organized ‘within’ the same system, the need for a broader supervisory function external to IATs is obvious.¹³

Instead of trying to improve the existing procedure provided for under Article 11 of the UNAT Statute in such a way as to make it “a constructive or useful element in the adjudication of staff disputes within the Organization”, the General Assembly decided to abolish the review procedure by deleting *in toto* Article 11 of the Statute in December 1995.¹⁴ As a result, there has been no appeal or review with respect to judgments rendered by the UNAT after 31 December 1995. Up to the date of the Secretary-General’s Report of 17 October 1994, the Committee on Applications considered 92 cases, but only in three cases has the Committee decided to request an advisory opinion of the ICJ.¹⁵ The latest amendment of the UNAT Statute made no review possible. The baby was thrown out with the bath water!

This article examines the tension between authoritative expectations about finality on the one hand and effective demands for review in the decisions of IATs on the other; analyzes the instances in which those decisions were subjected to review by any body other than the concerned IAT itself; and recommends certain structural changes to the international system of IATs.¹⁶

¹² JENNINGS, *loc.cit.*n.7 at 503. Cf. Judge PIERRE PESCATORE’s views of the ICJ, *infra* n.153.

¹³ I am mindful of Judge MBAYE’s admonition in the Arbitral Award of 31 July 1989 on the danger of constituting the ICJ as a court of appeal after the completion of arbitration between states, but the nature of the supervisory function that can be fashioned by the ICJ over judgments of IATs is substantially different from Judge MBAYE’s concerns. Judge MBAYE’s declaration reads in part: “I fail to see why the International Court of Justice should automatically constitute itself as a *cour de cassation* for all States having made declarations under Article 36, paragraph 2, of its Statute, with respect to all arbitral awards in cases to which those States are parties, even if the Court were each time to take care not to act as a court of appeal or as one revising the award. That the need to decide a “question of international law” has been raised is surely not sufficient justification for such an inroad into another means of settlement of disputes between States. To deny this would be to embark on an adventure which would have disastrous consequences not confined to arbitral decisions. The court has fortunately refused to take this path.” ICJ Rep.1991: 53,80 (declaration of Judge MBAYE).

¹⁴ UNGA Res. 50/54 of 11 Dec.1995. See HUBERT THIERRY, “Some changes in international administrative justice”, 90 ASIL Proc.1996 at 329.

¹⁵ Secretary-General’s Report, *loc.cit.*n.10 at para.8.

¹⁶ PIERRE PESCATORE, “Two Tribunals and One Court: some current problems of international administration in the jurisdiction of the ILO and UN Administrative Tribunals and the International Court of Justice”, in NIELS BLOKKER and SAM MULLER (eds.), *Toward more effective supervision by international organizations: Essays in honour of Henry G. Schermers* Vol.1 (1994) 217 ; JOAMA GOMULA, “The International Court of Justice and administrative tribunals

2. THE PURPOSE AND EFFECT OF THE FINALITY OF THE JUDGMENTS OF IATS

Various immunities and privileges accorded to international organizations are designed to ensure the independence and autonomy of these organizations. The effect of these immunities and privileges in preserving the exclusively international character of the organizations and their staff is that national law is not applicable to the organizations if it would impede the independent operations and functions of the organizations.¹⁷ The relations between the staff members and the organizations are governed by a complex code of internal law consisting of, e.g., the Staff Regulations adopted by the General Assembly and the Staff Rules made by the Secretary-General for the implementation of the Staff Regulations.¹⁸ As the ICJ acknowledged in *Effect of Awards*, “[i]t was inevitable that there would be disputes between the Organization and staff members as to their rights and duties”.¹⁹ But staff members do not have recourse to the jurisdiction of national courts, from which the organization is immune.²⁰ As one commentator put it, “[t]here is therefore a vacuum which needs to be filled by the organizations themselves.”²¹

of international organizations”, 13 *Michigan Journal of International Law* (1991) 83; T.O. ELIAS, *New horizons in international law* (1992) 327; RUDOLF OSTRIHANSKY, “Advisory opinions of the International Court of Justice as reviews of international administrative tribunals”, 17 *Polish Yearbook of International Law* (1988) 101; and WOOSANG CHOI, “Judicial review of international administrative tribunal judgments”, in THOMAS BUERGENTHAL (ed.), *Contemporary issues in international law: Essays in honor of Louis B. Sohn* (1984) 347.

¹⁷ See C. WILFRED JENKS, *International immunities* (1961). For the most recent treatment of the subject, see SEGVEI TARASSENKO and RALPH ZACKLIN, “Independence of international civil servants (privileges and immunities)”, in DE COOKER, op.cit.n.2, at III.1/1. See also: *Respect for the privileges and immunities of officials of the United Nations and the Specialized Agencies*, UN Doc.A/C.5/36/31, 4 November 1981.

¹⁸ The ADB Administrative Tribunal (ADBAT) outlined “the principal rules of law within the framework of which the facts must be considered” as follows: “In addition to the constituent instruments of the Bank and of the Tribunal, as well as general principles of law, these rules are to be derived from the contract between the Bank and the staff member, the Staff Rules and Regulations of the Bank, the Personnel Handbooks for professional and support staff, and Administrative Orders and Circulars, as promulgated and applied from time to time, subject to other recognition and protection of any acquired right of the staff, and, by analogy, from the staff practices of international organizations generally, including the decisions of international administrative tribunals dealing with comparable situations.” Further, the ADBAT stated: “There is, in this sphere, a large measure of “common” law of international organizations to which, according to the circumstances, the Tribunal will give due weight.” *Carl Gene Lindsey v. Asian Development Bank*, Decision No.1, para.4 (1992), 1 ADBAT Rep.(1997) 1.

¹⁹ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Rep.1954: 47, 57.

²⁰ See e.g. *Broadbent v. Organization of American States*, 628 F.2d 27 (D.C. Cir. 1980): “[T]he special nature of the law governing employment in international organizations, clearly linked as it is with delicate questions of administrative policy, makes municipal tribunals totally unsuited to deal with it”. *Ibid.* at 35 n.27.

²¹ MICHAEL B. AKEHURST, “The law governing employment”, 12 *International Organization*

“The creation of an independent body, empowered to make binding decisions in legal disputes between an organization and its staff, is by no means an altruistic gesture from the organization’s point of view; without it, officials might suffer from a sense of injustice which would impair the smooth running of the Secretariat.”²²

“In these circumstances”, said the ICJ in *Effect of Awards*, “the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity.”²³

10. The omission of an institutionalized review process derives not so much from the status of international organizations enjoying immunity from national jurisdiction as from the desire of international organizations’ effective authorities that internal employment disputes should be settled expeditiously to avoid vexatious proceedings. The report of the Supervisory Commission, proposing the Statute of the Administrative Tribunal of the League of Nations, clearly explains that the omission of any provision for a review of judgements was deliberate:

“No provision for the revision of judgements of the Tribunal is inserted in the statute. It is considered that, in the interests of finality and of the avoidance of vexatious proceedings, the Tribunal’s judgements should be final and without appeal. ...”²⁴

(1967). In *Broadbent v. Organization of American States*, the Circuit Court approvingly quoted this passage in its opinion. *Ibid.*

²² *Ibid.*

²³ *Effect of Awards*, loc.cit.n.19 at 57. Given the vast discretionary powers vested in the General Assembly and the Secretary-General, a tribunal is a *control* system. In the beginning, the ICJ attributed the establishment of an administrative tribunal to the implied powers under Art.101 of the UN Charter (*Effect of Awards*, loc.cit.n.19 at 47, 58), but *see* the dissenting opinion of Judge HACKWORTH: “The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers. The General Assembly was given express authority by Article 22 of the Charter to establish such subsidiary organs as might be necessary for the performance of its functions whether those functions should relate to Article 101 or to any other Article in the Charter. Under this authorization the Assembly may establish any tribunal needed for the implementation of its functions.” *Ibid.* at 80. Cf. *Review of Judgment No. 273 of the United Nations Administrative Tribunal* (ICJ Rep. 1982 at 325) in which the ICJ unequivocally confirmed the subordinate status of the UNAT, stating that: “Certainly the Tribunal must accept and apply the decisions of the General Assembly made in accordance with Article 101 of the United Nations Charter. Certainly there can be no question of the Tribunal possessing any ‘powers of judicial review or appeal in respect of the decisions’ taken by the General Assembly, powers which the Court itself does not possess (ICJ Reports 1971, p. 45, para. 89). Nor did the Tribunal suppose that it had any such competence”. *Ibid.* at 363. For a succinct overview and analysis of the legal bases of IATs, *see* GOMULA, loc.cit.n.16 at 88-94.

²⁴ 9 *League of Nations Official Journal*, Special Supplement No.58 (1928) 254.

Likewise, the original UNAT Statute did not contain any provision for review of the judgements of that Tribunal. The Official Records of the Fifth Committee of the General Assembly shows that in an exchange between the representative of Belgium and the rapporteur of that Committee, the former asked the rapporteur "whether the decisions of the administrative tribunal would be final or whether they would be subject to a revision by the General Assembly." The rapporteur replied:

"[A]ccording to the draft Statute as prepared by the Advisory Committee, there could be no appeal from the administrative tribunal. The Advisory Committee feared an adverse effect on the morale of the staff if appeal beyond the administrative tribunal delayed the final decision in a case which had already been heard before organs within the Secretariat created for that purpose."²⁵

Other IATs established after the UNAT have invariably followed the same deliberate omission of any provision for review. The original intention and good faith in the proper functioning of an administrative mechanism for dispute settlement, however, did not always bear agreeable results reflecting the expectations and interests of effective elites of their respective organizations. The absence of review or appeal has, on occasion, caused institutional and financial crises in certain international organizations.

Law is a process of authoritative decision designed to maximize good things and to minimize bad things within a given group, be it territorially or functionally organized.²⁶ Any such group seeks to maintain such level of minimum order within as to maintain a reasonable degree of stability that enables group members to engage in sustained productive activities through time. Group demands for stability will create, over time, expectations about the finality of an authoritative decision when it is supported by sufficient effective power holders.²⁷ Effective decisions and authoritative decisions, however, are the products of two different processes of decision: an authoritative process may invoke the doctrine of *res judicata*, a general principle of law that a judgement rendered by a judicial body is final, whilst an effective power process may claim that a judgement was rendered by an *excès de pouvoir* and refuse to comply with the determination made by the authoritative process.²⁸ To

²⁵ Quoted in 'Effect of Awards', loc.cit.n.19 at 54.

²⁶ H.LASSWELL and M.MCDOUGAL, *Jurisprudence for a free society: studies in law, science and policy* (1992); M.MCDOUGAL, H.LASSWELL and W.M.REISMAN, "Theories about international law: prologue to a configurative jurisprudence", 8 *VirgJIL* (1973) 188; M.MCDOUGAL, H.LASSWELL and W.M.REISMAN, "The world constitutive process of authoritative decision", in C.BLACK and R.FALK (eds.), *The future of the international legal order*, Vol.1 (1969) 73; and M.MCDOUGAL, H.LASSWELL and L.CHEN, *Human rights and world public order: the basic policies of an international law of human dignity* (1980).

²⁷ W.MICHAEL REISMAN, *Nullity and Revision: the review and enforcement of international judgments and awards* (1971) 171-186.

²⁸ See, e.g., *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, 1960 ICJ Rep.192.

be effective and controlling, therefore, an authoritative decision must be backed up by effective power.²⁹ Law, after all, is a delicate balance of authority and control. As MICHAEL REISMAN remarked:

“Repudiation or attempted repudiation of an authoritative decision does not invariably follow every decision that contravenes the interests of a particular controlling group. Adverse decisions that do not mean serious shifts in power allocation are usually accepted; their sting is not so intense as to blind the victim’s recognition of the common benefits in a working decision process. Authority has ventured somewhat outside the perimeter of control but has not crossed that Rubicon beyond which its own effectiveness is imperilled.”³⁰

General international tribunals established by a *compromis* and discharging their respective functions within a context of low institutionalization know their authority is tenuous and their judgements are susceptible to a threat of repudiation. IATs, on the other hand, are created as permanent judicial bodies under special statutes of the organizations concerned and function within an organized and highly institutionalized context. According to the ICJ, therefore, the question of the nullity of the arbitral awards made in the ordinary course of arbitration between states does not apply to the judgements of international administrative tribunals functioning within a different legal situation. It stated in its Advisory Opinion on *Effect of Awards*:

“This problem would not, as has been suggested, raise the question of the nullity of arbitral awards made in the ordinary course of arbitration between States. The present Advisory Opinion deals with judgements pronounced by a permanent judicial tribunal established by the General Assembly, functioning under a special statute within the organized legal system of the United Nations, and dealing exclusively with the internal disputes between the members of the staff and the United Nations represented by the Secretary General. In order that the judgements pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the Statute of the Administrative Tribunal by virtue of Article 11 of that Statute and to provide for means of redress by another organ. But as no such provisions are inserted in the present Statute, there is no legal ground upon which the General Assembly could proceed to review judgements already pronounced by that Tribunal.”³¹

Despite the strong presumption of finality in the judgements of IATs, effective power holders continue to underpin traditional views that an arbitral award, though final and without appeal, may be vitiated by defects which make

²⁹ REISMAN, *op.cit.*n.27 at 146-154.

³⁰ *Ibid.* at 173.

³¹ ‘Effect of Awards’, *loc.cit.*n.19 at 56.

it void.³² Thus, the ICJ's initial assertion of the immunity of the UNAT's decisions from review notwithstanding, it did not go so far as to state that all decisions of the UNAT were valid.³³ On the contrary, the validity of the Tribunal's decision was qualified by the UNAT being "properly constituted and acting within the limits of its statutory competence".³⁴ In terms of substantive outcomes, therefore, there will be no difference between the finding of an act *ultra vires* of the UNAT not properly constituted and not acting within the limits of the statutory competence on the one hand and the finding of a traditional ground of nullity on the other.³⁵

3. JURISDICTION OF LIMITED POWERS AND NULLITY IN INTERNATIONAL LAW

All IATs' jurisdiction and competence are limited by their respective statutes, as the Administrative Tribunal of the Asian Development Bank (ADBAT) stated in its recent decision in *Cynthia Bares et al. v. the Bank*.³⁶

³² See Judge WINIARSKI's separate opinion: "I can see no difference between the nullity of an arbitral award and that of an award made by the Administrative Tribunal. An arbitral award, which is always final and without appeal, may be vitiated by defects which make it void; in this event, a party to the arbitration will be justified in refusing to give effect to it. This is not by virtue of any rule peculiar to ordinary arbitration between States; it is a natural and inevitable application of a general principle existing in all law: not only a judgment, but any act is incapable of producing legal effects if it is legally null and void. The Administrative Tribunal, organized as it is, for important practical reasons, is a permanent tribunal made available by the United Nations and accepted by staff members under a contract freely entered into. It does not and cannot constitute an exception to the general rule. . . . There can be no appellate procedure in the absence of an express provision which must in the first place establish an appellate tribunal. But appeal is one thing, and refusal to give effect to a judgment which is a nullity is another. The view that it is only possible for a party to rely on the rule relating to nullities where some procedure for this purpose is established, finds no support in international law. . . . [T]he absence of an organized procedure does not do away with nullities, and there is no warrant for the idea that there can be no nullity if there is no appropriate court to take cognizance of it. Nor is it necessary that the principle, in accordance with which a party is entitled to refuse to give effect to a judgment which legally is a nullity, should be enunciated in any express provision." *Ibid.* at 65.

³³ REISMAN, *loc. cit.* n.5 at 15.

³⁴ 'Effect of Awards', *loc. cit.* n.19 at 55.

³⁵ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, ICJ Rep.1991: 53, 108-109: "*Excès de pouvoir* is one of the most invoked rubrics of nullity and one of the areas where arbitral law will continue to face challenges and require development. Although the Parties, both of civil law jurisdictions, preferred to couch their arguments in terms of *excès de pouvoir*, similar concepts of total nullity find a place in the jurisprudence of other legal systems, including common law, where the concept of *ultra vires* has recently received extended development in the context of administrative and arbitral law." (dissenting opinion of Judge WEERAMANTRY)

³⁶ Decision No. 5 [1995], 1 ADBAT Rep.53.

“The Tribunal is not akin to one of general jurisdiction within the national sphere. Here the proceedings are controlled entirely by the Statute of the Tribunal as promulgated by the Bank. Whatever is done by or in this Tribunal can be done only in accordance with that Statute. Article II, paragraph 1, of this prescribes that the Tribunal may deal only with an application which ‘alleges non-observance of the contract of employment or terms of appointment’ of a staff member.”³⁷

Thus, the ADBAT stated that “the limitation upon the jurisdiction of this Tribunal is laid down in its Statute which is binding upon both the Tribunal and the Bank’s administration”.³⁸ The question of nullity of judicial or arbitral decisions in international law is more serious in other general international tribunals as they are, in the words of Judge JOHN BASSETT MOORE, “of limited powers”.³⁹ They are created by the consent of those equal and sovereign states. IATs also share the same fundamental issues relating to the question of nullity of their decisions as they are of equally limited powers prescribed in their respective statutory instruments.⁴⁰

Article III of the Statute of the ADBAT provides that “[a]ny issue concerning the competence or jurisdiction of the Tribunal shall be settled by the Tribunal *in accordance with this Statute*” [emphasis added]. The ADBAT is thus endowed with the competence to decide its own competence, and accordingly, the ADBAT has acted “in the exercise of its *inherent* jurisdiction” [emphasis added] in *Peter Nelson v. the Bank*.⁴¹ Nevertheless, the so-called *compétence de la compétence* cannot possibly mean that an IAT is the final and absolute judge of its own jurisdiction subject to no limitations. As the historical origin of the doctrine *compétence de la compétence* attests, it was designed to protect the interest of the adjudicative or arbitral process without taking cumbersome and disruptive steps of trying to obtain the consent of the parties each

³⁷ Ibid. at para.11.

³⁸ Ibid. at para.12.

³⁹ Judge MOORE’s classic statement: “Ever mindful of the tact that their judgments, if rendered in excess of power, may be treated as null, international tribunals have universally regarded the question of jurisdiction as fundamental. . . . The international judicial tribunals so far created have been tribunals of limited powers. Therefore no presumption in favor of their jurisdiction may be indulged. Their jurisdiction must always affirmatively appear on the face of the record.” *Mavrommatis Palestine Concession*, Judgment No. 2, PCIJ Ser.A No.2 at 60.

⁴⁰ For the different types of nullity under international law, see R.Y. JENNINGS, “Nullity and effectiveness in international law”, in *Cambridge essays in international law: Essays in honour of Lord McNair* (1965) 65-67.

⁴¹ Decision No.7 [1995], at para. 22. See *Nottebohm* (preliminary objection), ICJ Rep.1953 at 119: “... a rule consistently accepted by general international law in the matter of international arbitration. Since the Alabama case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.”

time in order to determine whether or not a particular matter was within the competence or jurisdiction of an *ad hoc* tribunal to decide.⁴²

With limited jurisdiction and limited competence, the absence of a review or appeal process in the statute of the IAT is saddled with contradictory propositions: one proposition clearly implies that an IAT cannot take action outside the limited scope of jurisdiction and competence prescribed in the statute; the other proposition states that “[w]hatever is done by or in this Tribunal”⁴³ cannot be reviewed or appealed. The combined effect of these contradictory propositions is to defy the basic notion that flesh and blood human beings sometimes make an error in decision. Judge LACHS warned that “no tribunal is infallible”.⁴⁴ Given that, “[t]o contend that their decisions are not reversible is to render limited powers limitless and to validate any excess of jurisdiction through the mere formality of handing down a judgement”.⁴⁵

No provision for a supervisory function by an external institution was included in the statutes of these administrative tribunals for fear of an adverse effect on the morale of the staff unless vexatious proceedings were avoided. Concerns for expeditious proceedings with finality averted an inquiry into the structural limitations embedded in each IAT, i.e., it was an institution within the system. Moreover, this sole focus on the interest of the staff poses a dilemma for effective power holders of the organizations because:

“[t]he right of review is the prerogative of final decision. This is a question of power. Insofar as patterns of authority reflect the interests of effective elites, the latter can be expected to cede final decision to authoritative processes. When, however, effective elites consider an authoritative decision divergent from their interests, they can be expected to assert their power to modify or nullify the decision or to realign the decision process as a whole.”⁴⁶

In the absence of a supervisory jurisdiction to be exercised by an external authority over the judgments of an IAT, how can the interests of staff members be protected against organizational imperatives⁴⁷ or how do the effective elites

⁴² See also I. SHIHATA, *The power of the International Court to determine its own jurisdictions. Compétence de la compétence* (1965). W. MICHAEL REISMAN, *Systems of control in international adjudication and arbitration* (1992).

⁴³ Loc.cit.n.35 at para.11.

⁴⁴ ICJ Rep.1982 at 411, para. 1 (dissenting opinion of Judge LACHS).

⁴⁵ REISMAN, loc.cit.n.5 at 13. See also *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, ICJ Rep.1991: 53, 119 (separate opinion of Judge SHAHABUDDIN): “The international arbitral process provides a useful procedure of peaceful settlement. The international community rightfully values the process. Clearly its entity must be protected against open-ended challenges to the finality of awards. Equally clear, it would be misconceived to seek to protect the system by suffering any serious fault in its operation to remain remediless: the preservation of the system and the vindication of its credibility are interlinked.” See also C.F.AMERASINGHE, “The future of international administrative law”, 45 ICLQ (1996) 773, 782-785.

⁴⁶ REISMAN, op.cit.n.27 at 71.

⁴⁷ REISMAN, loc.cit.n.9 at 34: “If the organizations are undergoing radical changes, for exam-

of the organization realign the decision process in response to an authoritative decision that they consider divergent from their interests?

4. PAST RESPONSES BY INTERNATIONAL ORGANIZATIONS

Both the International Labour Organisation (ILO) and the United Nations each realigned its decision process by amending its respective Administrative Tribunal's Statute so as to provide a review process in which effective groups' legitimate interests can be protected. But no organization would ask for a review of a judgment when the judgment concerned was in its favor. Where would the individual staff member concerned who lost the case go for appeal?

4.1. International Labour Organisation

At the outbreak of World War II, by a resolution of December 14, 1939, the Assembly of the League of Nations amended the Staff Regulations of employees of the League and the ILO by authorizing the Secretary-General of the League to shorten notice of termination from six months to one month and to extend the period of compensation over four annual installments, not, as before, in one payment.⁴⁸ Twelve officials of the Secretariat and one official of the ILO, whose contracts were terminated under the December 14, 1939 resolution of the League, complained to the Administrative Tribunal of the League of Nations (LNAT) that their contracts could not be modified unilaterally by decisions of the Assembly.⁴⁹

The Secretary-General of the League of Nations contended that the LNat had no jurisdiction on the ground that decisions of the Assembly were not subject to its review. The LNat, however, upheld the complainants' cases, stating the LNat's competence "to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials" implies "the attribution of full competence in respect of the execution of all contractual obligations entered into by the League of Nations towards its officials, and no distinction whatsoever is made between an act of the Assembly itself and an act of the agents whom it invests with authority over the staff".⁵⁰ It concluded that "[t]he Staff Regulations of the Secretariat, as in force at the date of the com-

ple, 'downsizing', a supervision for dismissing significant numbers of employees without regard to the quality of their performance but in the interests of organization efficiency, then the administrative tribunals, may not be the bulwark for the protection of employee rights."

⁴⁸ 20 *League of Nations Official Journal*, Part I at 424.

⁴⁹ 13 Annual Digest 199. See also FRANK GUTTERIDGE, "The ILO Administrative Tribunal", in DE COOKER (ed.), *op.cit.* n.2 at V.2/3-5.

⁵⁰ *League of Nations Official Journal*, Supplement No.107 at 206.

plainant's contract, formed part of the terms of that contract" under which "the complainant had an acquired right".⁵¹

As the LNAT was not convened until 1946 due to World War II, its emphasis on the contractual terms prior to 1932 as against the crisis situation developing in 1939 when World War II broke out completely ignored the time factor of the in-between period during which the crisis abated. The LNAT's refusal to consider the effects of crisis rendered the award unacceptable to effective power holders of the League of Nations. The Supervisory Commission declined to take the responsibility for recommending payment of the awards on the ground that "an acceptance of the findings of the Administrative Tribunal would put its decision above the authority of the Assembly".⁵² The Assembly met in April, 1946 and the Second (Finance) Committee set up a Sub-committee to consider the matter. The Sub-Committee characterized the LNAT's reasoning as an "excessively static legal view" and reported that:

"it seems to us impossible to suppose that, in no circumstances, however pressing the necessity in the interests of the peoples of the world, could the League derogate from some contract to a private individual employed by it."⁵³

Accordingly, the report of the Sub-Committee concluded:

- "Although there is no ordinary appeal for the Tribunal's decision, we think that it is within the power of the Assembly, which can best interpret its own decisions, by a legislative resolution, to declare that the awards made by the Tribunal are invalid and are of no effect both because they sought to set aside the Assembly's legislative act and because of their mistaken conclusion as to the intention of that act."⁵⁴

The Sub-Committee's report was adopted by the Second (Finance) Committee and the Assembly of the League of Nations then adopted the report of the Second (Finance) Committee.⁵⁵ Thus, repudiation of the LNAT's decision became complete. Several years later the ICJ wryly remarked in connection with *Effects of Awards* that "[i]t is unnecessary to consider the question whether the Assembly, which *in very special circumstances was winding up the League*, was justified in rejecting those awards".⁵⁶ [Emphasis added]

The League of Nations was liquidated in 1946. The International Labour Conference, acting upon the League's request, reconstituted the LNAT under the new name "Administrative Tribunal of the International Labour Organization" (ILOAT), with a few modifications to its Statute on October 9, 1946. The

⁵¹ *League of Nations Official Journal*, Special Supplement No.194 at 245.

⁵² *Ibid.* at 162, Annex 8.

⁵³ *Ibid.* at 262, Annex 26.

⁵⁴ *Ibid.* at 263, Annex 26.

⁵⁵ *Ibid.* at 133.

⁵⁶ 'Effect of Awards', *loc.cit.n.*19 at 62.

ILOAT Statute was amended by the International Labour Conference on June 23, 1949, which subsequently became Article XII of the ILOAT Statute:

- “1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.
2. The opinion of the Court shall be binding.”

It not only provided, for the first time, a supervisory mechanism by way of a request for an advisory opinion from the ICJ, but also made the ICJ's advisory opinion binding upon the parties to the dispute before a different tribunal.⁵⁷

The Executive Board's first challenge to a decision rendered by the ILOAT under Article XII of the ILOAT Statute was made in November, 1955 with respect to the *Leff, Duberg, Wilcox and Bernstein* cases.⁵⁸ These cases involved Executive Order No. 10.422 of January 9, 1953 whereby the President of the United States established machinery and procedures for the investigation of possible subversive activities against the United States by United States citizens employed or being considered for employment by the United Nations and the communication of the results of such investigation to the Secretary-General of the United Nations. All these complainants separately refused to answer a questionnaire for the purpose of this investigation and refused to reply to an interrogatory from the International Organizations Employees Loyalty Board of the United States Civil Service Commission. The Director-General of UNESCO refused to renew their fixed-term contracts on the ground of a lack of integrity in connection with the complainants' refusal to appear before the Loyalty Board.⁵⁹

⁵⁷ “The introduction of this procedural device was a most astute move, because whenever the execution of a judgment of the tribunal meets with resistance from an organization (or its member states, which at the end comes to the same thing) it places the governing body of this organization before an incapable alternative: either accept the judgment and execute it, or else bring the matter before the International Court of Justice and accept in advance its ruling as binding.” PESCATORE, *loc.cit.*n.16 at 222.

⁵⁸ *In re Duberg*, Judgment No.17 of 26 April 1955; *In re Leff*, Judgment No.18 of 26 April 1955; *In re Wilcox*, Judgment No.19 of 26 April 1955; and *In re Bernstein*, Judgment No.21 of 29 October 1955, all of the ILOAT.

⁵⁹ With respect to the appearance of United States citizens employed by the United Nations and by the specialized agencies before United States Federal Grand Jury and Congressional Committees and the investigations of the loyalty of such officials by United States Government agencies, see 20 ILR 505.

In its advisory opinion on *Judgements of the Administrative Tribunal of the ILO upon Complaints made against the UNESCO (Unesco)*,⁶⁰ the ICJ considered whether the use of the advisory jurisdiction of the ICJ for the judicial review of contentious proceedings which had taken place before other tribunals and to which individuals were parties, was compatible with the provisions of the UN Charter and the ICJ Statute, and with the requirement of the judicial process.⁶¹

The ICJ faced the question of equality between UNESCO and the officials again in connection with the actual procedure before it because the absence of equality became manifest from the provision of the ICJ Statute which precludes participation of individuals before the Court. The principle of equality of the parties, pursuant to Article 35(2) of the ICJ Statute, flows from “the requirements of good administration”.⁶² The ICJ managed to rectify the procedural inequality of the parties by adopting the procedure under which the written statement of the officials were submitted to the Court through Unesco and by dispensing with oral proceedings. The ICJ thus concluded “[a]ny seeming or nominal absence of equality ought not to be allowed to obscure or to defeat” the primary purpose of lending advisory assistance to “the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials.”⁶³

The ICJ’s advisory opinion is expressly made binding under Article XII of the ILOAT Statute, and such effect of the advisory opinion would exceed the scope attributed by the UN Charter and the ICJ Statute.⁶⁴ The ICJ acknowledged that “[t]he advisory procedure thus brought into being appears as serv-

⁶⁰ *Unesco*, ICJ Rep.1956: 77. The fundamental basis of authority for an advisory opinion is Art.96 of the UN Charter:

- “1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”

Likewise, Article 65, paragraph 1, of the ICJ Statute provides: “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” The effect of these separate provisions has enabled the ICJ to establish that its power to give an advisory opinion under Article 65, paragraph 1, of the ICJ Statute is “permissive” and “that power is of a discretionary character” (ICJ Rep.1973 at 21, para.23). Moreover, the ICJ considers its reply to a request for opinion “its participation in the activities of the United Nations” and, therefore, such request, “in principle, should not be refused” (ICJ Rep.1987 at 31, para. 25).

⁶¹ *Unesco*, loc.cit.n.60 at 84-86.

⁶² *Ibid.* at 86.

⁶³ *Ibid.* According to Professor E.LAUTERPACHT, “the Court chose to adopt an interpretation conferring upon itself greater scope of action, on the basis that this was necessary for the full achievement of the objectives of the regime governing the relationships between international organizations and their staff.” E.LAUTERPACHT, “The development of the law of international organizations by the decisions of international tribunals”, 152 RdC (1996) 379, 421.

⁶⁴ *Unesco*, loc.cit.n.60 at 84.

ing, in a way, the object of an appeal against the four Judgements, seeing that the Court is expressly invited to pronounce, in its Opinion, which will be 'binding', upon the validity of these Judgements".⁶⁵ The ICJ stated, however, that "a rule determining the action to be taken by [the Executive Board] on the Opinion" is an internal rule of the organization which created the ILOAT and such internal rule would in no way bar the ICJ from complying with the Request for an Opinion.⁶⁶

Article XII applies only to the Executive Board of the organization concerned that "challenges a decision of the Tribunal confirming its jurisdiction" or that considers that "a decision of the Tribunal is vitiated by the a fundamental fault in the procedure followed". It is not available at all to any staff member applicant-party to the case. The advisory proceedings under Article XII thus presents "a certain absence of equality between Unesco and the officials both in the origin and in the progress of these proceedings".⁶⁷ On equality in point of origin, the ICJ referred to "generally accepted practice" which requires "legal remedies against a judgment" to be equally open to either party, and said that "each possesses equal rights for the submission of its case to the tribunal called upon to examine the matter". The ICJ nevertheless ruled that the inequality in law arising from Article XII did not "in fact contribute an inequality before the Court" because "it is antecedent to the examination of the question before the Court".⁶⁸ Plainly, Article XII was designed to protect the interests of effective elites of the organization concerned. Nevertheless, the ICJ averted the issue by stating that it "is not called upon to consider the merits of such a procedure or the reasons which led to its adoption".⁶⁹

As the challenge raised against the ILOAT's judgements "refer[s] to the jurisdiction of the Administrative Tribunal and to the validity of the Judgements",⁷⁰ the *Unesco* Court stated in unequivocal terms that:

"The Request for an Advisory Opinion under Article XII is *not in the nature of an appeal on the merits of the judgement*. It is limited to a challenge of the decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. Apart from this, there is no remedy against the decisions of the Administrative Tribunal. A challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision."⁷¹ [Emphasis added]

⁶⁵ Ibid.

⁶⁶ Ibid. See ROBERTO AGO, "'Binding' advisory opinions of the International Court of Justice", 85 AJIL (1991) 439, 442.

⁶⁷ Ibid. at 83. See LEO GROSS, "Participating of individuals in advisory proceedings before the International Court of Justice: Question of equality between the parties", 52 AJIL (1958) 16.

⁶⁸ *Unesco*, loc.cit.n.60 at 85.

⁶⁹ Ibid.

⁷⁰ Ibid. at 83.

⁷¹ Ibid. at 98-99.

Accordingly, the *Unesco* Court ruled that “[t]he reasons given by the [ILO] Tribunal for its decision on the merits, after it confirmed its jurisdiction, cannot properly form the basis of a challenge to the jurisdiction of the Tribunal” because the question submitted to the *Unesco* Court “is concerned only with a challenge of a decision confirming jurisdiction. It does not refer to the other ground of challenge provided for in Article XII, namely a fundamental fault in the procedure followed”.⁷² Nevertheless, echoing its earlier formulation in *Effect of Awards*, the *Unesco* Court stated: “The Statute of the Administrative Tribunal could have provided for *other grounds for challenging the decision of the Tribunal than those referred to in Article XII. It has not done so*”. (emphasis added)⁷³ The ICJ in effect suggested in *Unesco* that it was prepared to play a role of an appellate court of IATs so long as the statutes of IATs provided appropriate grounds for nullity and review and that the organization concerned, be it an organ of the United Nations or a specialized agency, could stipulate grounds for review or appeal.⁷⁴

To date, *Unesco* is the only review of a judgement of the ILOAT, but as it was the first review case of IAT judgements, it has, since then, largely shaped the reasoning of the ICJ as demonstrated below with respect to the reviews of UNAT cases. Nevertheless, despite the subsequent confusion created by the ICJ’s review cases, it is clear that the *Unesco* Court dealt with the particular legal regime of the ILOAT, demonstrably different from the legal regime of the UNAT.

4.2. United Nations

In the wake of *Effect of Awards*, by resolution of December 17, 1954, the General Assembly of the United Nations undertook to amend the UNAT Statute with a view to “the establishment of procedure for review of the judge-

⁷² *Ibid.* at 99.

⁷³ *Ibid.* In ‘Effect of Awards’, the ICJ observed: “In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the Statute of the Administrative Tribunal by virtue of Article II of that Statute and to provide for means of redress by another organ. But as no such provisions are inserted in the present Statute, there is no legal ground upon which the General Assembly could proceed to review judgments already pronounced by that Tribunal.” ICJ Rep.1954 at 56.

⁷⁴ *Unesco*, loc.cit.n.60 at 98-99. Although the ICJ acknowledged that UNESCO undoubtedly had the general power to ask for an advisory opinion of the ICJ on questions within the scope of its activity, it refused to answer Question II as the question put to the ICJ was raised not in reliance upon the general power of UNESCO to ask for an advisory opinion, but in express linkage with Article XII of the ILOAT Statute and the question put to the ICJ was outside the orbit of Article XII. *Ibid.* at 99. See also SHABTAI ROSENNE, *The law and practice of the International Court* (rev.2nd ed.1985) 689-90, 718-19.

ments of the Administrative Tribunal” and accepted, in principle, judicial review of judgements of the UNAT.⁷⁵ The following year the General Assembly amended the UNAT Statute by adding new Articles 11 and 12 on the basis of the report of the Special Committee on Review of the Administrative Tribunal Judgements.⁷⁶ New Article 12, in line with a traditional formulation, provides for revision by the UNAT itself upon discovery of a new fact. A provision for revision on the basis of the discovery of a new fact has since been incorporated in a large number of statutes of other IATs.⁷⁷ New [but now deleted] Article 11, however, was an entirely different matter. It introduced a supervisory jurisdiction by an external authority as explained at the onset.⁷⁸

Eighteen years after Article 11 was adopted, the ICJ was called upon for the first time to consider a request for an opinion made under the procedure laid down in Article 11 in *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal (Fasla)*.⁷⁹ In light of the doubts expressed during the debates in the Special Committee and in the Fifth Committee of the General Assembly regarding the legality of the use of the advisory jurisdiction for the review of judgements of the UNAT, the ICJ examined first its competence to give an opinion and the propriety of its doing so in *Fasla*.

With respect to the ICJ's competence to give an opinion, the ICJ considered the question that, its contentious jurisdiction being limited by Article 34 of its Statute to disputes between States, the advisory jurisdiction might not be used for the judicial review of contentious proceedings which had taken place before other tribunals and to which individuals were parties. It said that “the existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court's opinion, does not change the advisory nature of the Court's tasks, which is to answer the questions put to it with regard to a judgement”,⁸⁰ and that “[t]he mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute”.⁸¹

While the ILOAT Statute denies the staff member access to the review process, Article 11, paragraph 1, of the UNAT Statute allowed not only the staff member, who was a direct party to the case, but also any member State which was not a party to the case nor privy to the original proceedings before the UNAT a *locus standi* in the review process. The *Fasla* Court dismissed the

⁷⁵ UNGA Res. 888 (IX).

⁷⁶ UNGA Res. 957 (X) of 8 November 1955 (A/3016).

⁷⁷ See, e.g., Art. XI para. 1 of the ADBAT Statute: “A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise judgment.”

⁷⁸ See text accompanying n. 9 *supra*.

⁷⁹ ICJ Rep. 1973: 167.

⁸⁰ *Ibid.* at 172, para. 14.

⁸¹ *Ibid.*

issue as being “without relevance to the present proceedings”, but acknowledged that “close examination by the Court” would be called for if there would be an application from a member state in the future.⁸²

In *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*⁸³ (*Mortished*), the first Advisory Opinion rendered under Article 11 of the UNAT Statute by an application by a member state, Mr. MORTISHED contended that the procedure

“allowing a third party to raise objections to a judgement in which it has no legal right or interest and to seek a review of that judgement is contrary to fundamental principles of the judicial process.”⁸⁴

The *Mortished* Court answered that the request for an Advisory Opinion did not emanate from a member State; therefore, it was not tantamount to intervention in the review process by an entity which was not a party to the original proceedings. Such answer may be referred to as structural formalism. It contended:

“[O]nce the Committee [on Application for Review of Administrative Tribunal Judgements] decided that there is a substantial basis for the application, the request for advisory opinion comes from the Committee and not from the member State. The origin of the application which the Committee has to consider, be it the initiative of a member State, of the Secretary-General or of a staff member party to the judgement in question, does not affect the formal origin of the request submitted to the Court: it is always from the Committee that this request emanates.”⁸⁵

Thus, the *Mortished* Court ruled that as the request for an Advisory Opinion came from the Committee, it was not “an intervention, at review level, of a member State and hence of a third person in relation to the original proceedings”.⁸⁶ Such reply from the ICJ, it is submitted, is less than persuasive and candid. It entirely glossed over the reasons and circumstances under which the General Assembly amended the UNAT’s Statute in 1955 *despite* the arguments against the propriety of a member state challenging the judgement in a dispute to which it was not a party. With the full knowledge of such arguments, the General Assembly nevertheless purposefully amended the UNAT’s Statute in order to permit an intervention by a member state in a dispute between the Secretary-General and a staff member. It was an act of recognition by the General Assembly, to quote Judge LACHS, that “a member State, as a representative of the Organization, can have a legitimate interest in questioning the Tribunal’s

⁸² Ibid. at 178, para. 31.

⁸³ ICJ Rep.1982: 325.

⁸⁴ Quoted in *ibid.* at 335, para. 24.

⁸⁵ Ibid.

⁸⁶ Ibid. at 336, para. 24.

decision on a matter concerning the staff member's rights and obligations *vis-à-vis* his ultimate employer, the Organization".⁸⁷ Plainly, Article 11 was not introduced into the UNAT Statute exclusively, or even primarily, to provide "judicial protection for officials".⁸⁸ As Judge LACHS stated, "the Court must therefore give due weight to the other party deserving judicial protection – namely, the Organization".⁸⁹ It simply underscores that the Secretary-General, as stated by the ICJ in *Effect of Awards*, is at all times subject to the control of the General Assembly in staff matters.⁹⁰

As Article 11 clearly reflected the reconfiguration of authority and control, the *Mortished* Court could not cross its own ambit of control beyond which its own effectiveness would be imperilled, despite the numerous irregularities pointed out by the *Mortished* Court itself with respect to the composition of the UNAT, the procedures followed in the Committee, and the application of the United States to the Committee. The *Mortished* Court thus held the view that it should comply with the request even though "the irregularities which feature through the proceedings in the present case could well be regarded as constituting compelling reasons for a refusal by the Court to entertain the request".⁹¹ The *Mortished* Court reasoned:

"The stability and efficiency of the international organizations, of which the United Nations is the supreme example, are however of such paramount importance to world order, that the Court should not fail to assist a subsidiary body of the United Nations General Assembly in putting its operation upon a firm and secure foundation. While it would have been a compelling reason, making it inappropriate for the Court to entertain a request, that its judicial role would be endangered or discredited, that is not so in the present case, and the Court thus does not find that considerations of judicial restraint should prevent it from rendering the advisory opinion requested. In the present case such a refusal would leave in suspense a very serious allegation against the Administrative Tribunal, that it had in effect challenged the authority of the General Assembly."⁹²

⁸⁷ *Ibid.* at 413, para. 9 (dissenting opinion of Judge LACHS).

⁸⁸ ICJ Rep.1973 at 183, para.40. The Secretary-General's Report on *Review of the Procedure provided for under Article 11 of the Statue of the Administrative Tribunal of the United Nations*, UN Doc.A/C.6/49/2, at para.35, was more explicit: "[T]he review procedures for Tribunal judgements were not established primarily for the purpose of giving applicants, or even executive heads, another level of appeal. Its purpose was rather to *enable States to challenge judgements that they considered for some reason as unacceptable* and to do so before the principal judicial organ of the United Nations, rather than in a representative body such as the General Assembly of the United Nations in which the decisions of a subsidiary organ such as a tribunal might well be set aside on essentially political considerations." [emphasis added.]

⁸⁹ ICJ Rep.1982 at 413, para. 10 (dissenting opinions of Judge LACHS).

⁹⁰ ICJ Rep.1954 at 60.

⁹¹ ICJ Rep.1982 at 347, para.45.

⁹² *Ibid.*

Judge LACHS referred to the irregularities committed at the stage of the Committee on Applications as ‘most striking’.⁹³ When the procedural irregularities were so striking and numerous, they could not *ipso facto* have met “the requirements of the judicial process”, as the *Mortished* Court itself observed, which was “essential for the Court’s decision as to what response it will make to the request for advisory opinion”.⁹⁴ Nonetheless, the *Mortished* Court complied with the request because the reply of the ICJ represents “its participation in the activities of the Organization and, in principle, should not be refused”.⁹⁵

4.3. The role of the ICJ as an appellate court under the former legal regime of the UNAT

Compared with Article XII of the ILOAT Statute, Article 11 of the UNAT Statute provided two *additional* grounds of objection to a judgement to the UNAT: (i) the UNAT had failed to exercise jurisdiction vested in it; and (ii) the UNAT erred “on a question of law relating to the provisions of the UN Charter”. From a standpoint of expanding the ICJ’s review function, most important was the latter ground of an error on a question of law relating to the provisions of the UN Charter. It, in effect, authorized the ICJ to function as an appellate court to the UNAT “to review the actual substance of the Secretary-General’s decision and, if necessary, to substitute its own opinion on the merits for that of the UNAT”.⁹⁶

The Committee on Applications for Review of Administrative Tribunal Judgements which exercised an initial screening power to determine whether “there is a substantial basis for the application” under Article 11, paragraph 2, of the UNAT Statute was composed of “the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly”. The General Committee consists of one Chairman and 27 members: The President of the General Assembly, as Chairman, the 21 Vice-Presidents of the General Assembly and the Chairmen of the

⁹³ *Ibid.* at 411, para.3 (dissenting opinion of Judge LACHS).

⁹⁴ *Id.* at 335, para.23.

⁹⁵ *Interpretation of Peace Treaties* (Advisory Opinion), ICJ Rep.1950 at 71. Under Article 11, paragraph 3, of the UNAT Statute, the Secretary-General had to give effect to the ICJ’s opinion or the UNAT had to act to confirm its original judgement or give a new judgement, “in conformity with the opinion of the Court”. The opinion of the ICJ was thus to be given “a reformatory character”. It was “the distinctly appellate character of the function”. Under deleted Article 11 of the UNAT Statute, the ICJ was the final authority on interpretation of the UN Charter or of staff regulations based on the Charter. GROSS, *loc.cit.n.67* at 36. As the ICJ stated in *Fasla*, “the opinion given by the Court is to have conclusive effect with respect to the matters in litigation” in the case before the UNAT and such was a “special effect to be attributed to the Court’s opinion by Article 11” of the UNAT Statute. ICJ Rep.1973 at 182-183, para.89.

⁹⁶ *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal*, ICJ Rep.1987: 4, 89, at para.15 (separate opinion of Judge ODA).

six Main Committees of the General Assembly as members, who are all politically elected. As the ICJ later remarked, "being composed of member States, the committee is a political organ", and it nevertheless discharged "functions which, in the Court's view, are normally discharged by a legal body".⁹⁷ Thus, the ICJ considered the review procedure under Article 11 not to be "free from difficulty".⁹⁸

The procedural difficulty in Article 11 of the UNAT Statute notwithstanding, the ICJ complied with the request for an advisory opinion under Article 11 because its refusal would deprive officials of "the judicial protection" in the form of a judicial review provided in the UNAT Statute "precisely in those cases in which the Committee has found that there is a substantial basis for the objections which have been raised against a judgement".⁹⁹ It is pertinent to recall at this juncture the ICJ's opinion in *Effect of Awards* that:

"[s]hould the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ--considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them--all the more so as one party to the disputes is the United Nations Organization itself."¹⁰⁰

As it was the Committee, a twenty-eight member political organ, that formulated the question to be put to the ICJ,

"the framing of questions to be put to the Court is often tinged with meta-legal conceptions of particular State Members of the Committee, which are often reflected in the manner of the categorization of the questions to be asked of the Court. The result has often been to make the question in the end either irrelevant or patently obscure."¹⁰¹

Nevertheless, the ICJ concluded that questions to be put to the ICJ by the Committee would arise in the course of performing its primary function of screening the applications presented to it under Article 11 of the UNAT Statute, and "that there is no necessary incompatibility because the exercise of these functions by a political body and the requirements of the judicial process, inasmuch as these functions merely furnish a *potential link* between two procedures which are clearly judicial in nature".¹⁰²

⁹⁷ ICJ Rep.1973 at 176, para.25.

⁹⁸ Id. at 183, para. 40.

⁹⁹ Id. at 177, para. 28.

¹⁰⁰ ICJ Rep.1954 at 56.

¹⁰¹ ICJ Rep.1987 at 18, 78.

¹⁰² ICJ Rep.1973 at 176, para.25.

“They are therefore questions which, in the view of the Court, arise within the scope of the Committee’s own activities; for they arise not out of the judgements of the Administrative Tribunal but out of objections to those judgements raised before the Committee itself.”¹⁰³

By segregating questions arising “out of the judgements of the Administrative Tribunal” and questions arising “out of objections to those judgements”, the ICJ underscored the nature of the advisory proceedings, in which “the task of the Court is *not to retry the case*” but to *give its opinion on the questions submitted to it* concerning the objections lodged against the judgements.¹⁰⁴

In *Fasla*, the first review case of a judgement of the UNAT after *Unesco*, which was an ILOAT case, the ICJ demonstrated the crucial difference between the legal regime of the ILOAT and that of the UNAT. In the legal regime of the ILOAT, the ICJ held that the distinction between jurisdiction and merits is of great importance because any mistakes with regard to jurisdiction can be corrected by the ICJ on a Request for an Advisory Opinion emanating from the Executive Board, but errors of fact or of law on the part of the ILOAT in its Judgements on the merits cannot give rise to review by the ICJ.

It is critical to recall that in *Fasla*, the ICJ was dealing with the same two grounds of objection, i.e., “jurisdiction” and “a fundamental fault in the procedure followed” under the ILOAT Statute or “jurisdiction” and “fundamental error in procedure” out of the four grounds of objection laid down in the UNAT Statute. The jurisprudence resorted to by the *Fasla* Court was the same as the *Unesco* Court even though these two cases originated from the different legal regimes of two separate Statutes concerned.¹⁰⁵ Thus, the *Fasla* Court’s reasoning that “[u]nder Article 11 of the Statute of the Tribunal ... the task of the Court is not to retry the case but to give its opinion *on the questions submitted to it* concerning the objections lodged against the Judgement” was consistent with the *Unesco* Court’s reasoning. Within that purview limited by the questions submitted to the ICJ, the *Fasla* Court was correct to state that it was not therefore “entitled to substitute its own opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal”¹⁰⁶ because the ICJ was not

¹⁰³ Ibid. at 174, para.21.

¹⁰⁴ Ibid. at 182, 38 and 187, 47. Cf. *The Arbitral Award Made by the King of Spain on 23 December 1906*, loc.cit.n.28 at 214: “[T]he Award is not subject to appeal and ... the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal. The Court is not called upon to pronounce on whether the arbitrator’s decision was right or wrong. These and cognate considerations have no relevance to the function that the Court is called upon to discharge in these proceedings, which is to decide whether the Award is proved to be a nullity having no effect.”

¹⁰⁵ Ibid. at 188, para. 48. The *Fasla* Court, referring to the *Unesco* Court, likewise held that “under Article 11 of the Statute of the United Nations Administrative Tribunal a challenge to a decision for alleged failure *to exercise jurisdiction* [or] *fundamental error in procedure* cannot properly be transformed into a proceeding against the substance of the decision.” Ibid. (emphasis added.)

¹⁰⁶ Ibid. at 187-88, para.47.

required to act on a genuine appeal, but “to give a reply to legal questions framed by an extraneous body which may well, and in fact in all cases, divert the Court from a discussion of the real problems”.¹⁰⁷

The *Fasla* Court, however, underscored the difference from the legal regime of the ILO Tribunal:

“This does not mean that *in an appropriate case*, where the judgement has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may not be called upon to review the actual substance of the decision [emphasis added].”¹⁰⁸

The review authority conferred upon the ICJ under the UNAT Statute in so far as an error of law relating to the Charter provisions was alleged was, to quote Judge SCHWEBEL, “designedly and decisively wider” than that which applies under Article XII of the ILOAT Statute.¹⁰⁹ The ICJ’s role was to determine if the circumstances of the case, “whether they relate to merits or procedure”, showed that any objection made to the judgement on one of the grounds stipulated in Article 11(1) was well founded. It was “not limited to the contents of the challenged award itself”, but must have considered “all relevant aspects of the proceeding before the Tribunal as well as all relevant matters submitted to the Court itself by each party to the case with respect to the objections raised against that judgement”.¹¹⁰ The ICJ thus held that “where the judgement has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may ... be called upon to review the actual substance of the decision”¹¹¹ and that, in reviewing proceedings, the ICJ was not “precluded from examining *in full liberty* the facts of the case”¹¹² [emphasis added]. As an objection on this ground related not to the validity of the judgement but to the merits of the judgement, the ICJ, when seized of a case of this kind, exercised “judicial review, a true appellate jurisdiction”.¹¹³

The *Fasla* Court suggested that if “the grounds of objection upon which the present proceeding are based” are the substantive ground of objection, the Court would act “as a court of appeal”.¹¹⁴ The *Mortished* Court on the other

¹⁰⁷ PESCATORE, loc.cit.n.16 at 231.

¹⁰⁸ ICJ Rep.1973 at 188, para.48.

¹⁰⁹ ICJ Rep.1982 at 478, para.33 (dissenting opinion of Judge SCHWEBEL).

¹¹⁰ ICJ Rep.1973 at 188, para.47.

¹¹¹ Ibid. at 188, para.48.

¹¹² Ibid. at 207, para.85.

¹¹³ GROSS, loc.cit.n.67 at 36.

¹¹⁴ “If the Court were acting in this case as a court of appeal, it might be entitled to reach its won conclusions as to the amount of the damages to be awarded, but this is not the case. *In view of the grounds of objection upon which the present proceedings are based*, . . . the Court must confine itself to concluding that there is no such unreasonableness in the award as to make it fall outside the limits of the tribunal’s discretion. This being so, the Tribunal cannot be considered as having failed to exercised its jurisdiction in this respect”. ICJ Rep.1973 at 197, para. 65 (emphasis added). See also ICJ Rep.1982: 454, 481, para. 37 (dissenting opinion of Judge

hand rhetorically asked itself about “the proper role of the Court when asked for an advisory opinion in respect of this ground of objection”, and eschewed an answer by stating:

“There are ... other reasons, some of them especially compelling in the present case, why the Court should not attempt by an advisory opinion to fill the role of a court of appeal and to retry the issues on the merits of this case as they were presented to the Tribunal.”¹¹⁵

The *Mortished* Court listed “the difficulties of using the advisory jurisdiction of the Court for the task of trying a contentious case, and especially one to which one of the parties is an individual”,¹¹⁶ but failed to mention the *Fasla* Court’s reasoning in complying with the request for an opinion. Instead, the *Mortished* Court reopened the argument that the interposition of the Committee between the Administrative Tribunal and the proceedings before the Court would be “unacceptable if the advisory opinion were to be assimilated to a decision on appeal”.¹¹⁷ The *Mortished* Court, while attributing the ruling of the *Fasla* Court to “the assumption that the proceedings before the Court were not to retry, on appeal, the same issue as that tried by the Administrative Tribunal”,¹¹⁸ overstated that *Fasla* Court’s assumption.¹¹⁹ If the rationale of *Fasla* were followed, the *Mortished* Court could have acted, as later remarked by Judge ODA in his separate opinion in *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*¹²⁰ (*Yakimetz*), “to function in substance similarly to an appellate court *vis-à-vis* UNAT, to review the actual substance of the Secretary-General’s decision and, if necessary, to substitute its own opinion on the merits for that of UNAT”.¹²¹

Despite the initial thrust of the ICJ’s reasoning developed both in *Unesco* and *Fasla*, the ICJ had restrained itself in all the subsequent cases, i.e., *Mor-*

SCHWEBEL).

¹¹⁵ ICJ Rep.1982 at 356, para. 58.

¹¹⁶ Ibid. at 356, para. 59.

¹¹⁷ Ibid. at 357, para. 60.

¹¹⁸ Ibid.

¹¹⁹ The *Fasla* Court, in fact, ruled that “the task of the Court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgement. The Court is not therefore entitled to substitute its own opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. Its role is to determine if the circumstances of the case, whether they relate to merits or procedure, show that any objection made to the Judgement on one of the grounds mentioned in Article 11 is well founded. *In so doing, the Court is not limited to the contents of the challenged award itself, but takes under its consideration all relevant aspects of the proceedings before the Tribunal as well as all relevant matters submitted to the Court itself* by the staff member and by the Secretary-General with regard to the objections raised against that judgement. These objections the Court examines *on their merits* in the light of the information before it.” [emphasis added] ICJ Rep.1973 at 187-188, para.47.

¹²⁰ ICJ Rep.1987: 18.

¹²¹ Ibid. at 89, para. 15.

tished of 1982 and *Yakimetz* of 1987, where the ICJ could have exercised judicial review in the role of an appellate court. The *Mortished* Court validated an unsustainable claim of ‘acquired rights’ to a repatriation grant admitted by the UNAT and the *Yakimetz* Court failed to address the essential question involved in the Application: is ‘secondment’ compatible with Article 100 of the UN Charter? The ICJ’s apparent inability to tackle the real problems presented by these cases is rooted in the majority judges’ own doubt about the role of the ICJ. Judge AGO, for example, has confessed that he ‘cannot help feeling’ that these requests for review “place the Court in an uncomfortable situation”¹²² and has concluded that “the Court has very little scope for exercising any decisive concrete influence in the interest of ensuring that administrative justice is genuinely done”.¹²³ Such attitude has rendered the ICJ unable to “face its responsibility, coming down from the height of its Byzantine rationalizations to the true work of international administration”.¹²⁴

It must be borne in mind, however, that judicial review of judgements of IATs by the ICJ is only made possible under Article 96 of the UN Charter which provides to the United Nations and specialized agencies access to the ICJ for advisory opinions. Since many IATs such as ADBAT are outside the orbit of the United Nations system or the specialized agencies of the United Nations, either the administrator of these organizations or their staff cannot seek a review of any judgement of their IATs nor can they invoke a broader supervisory jurisdiction of an external institution. What can they do?

5. REVIEW OF THE TAX REIMBURSEMENT CASE

The Asian Development Bank faced that dilemma when the judgement in *Ferdinand P. Mesch and Robert Y. Siy v. the Asian Development Bank* was rendered by the ADBAT on 8 January 1994 (*Mesch I*).¹²⁵ The ADBAT held, *inter alia*, that “[i]n principle, the terms and conditions of employment of the Applicants entitle them to reimbursement . . . of income tax levied and paid on their salaries”.¹²⁶ The ADBT stated that:

¹²² *Ibid.* at 107, para. 4 (separate opinion of Judge AGO).

¹²³ *Ibid.* at 108.

¹²⁴ PESCATORE, *loc.cit.*n.16 at 237.

¹²⁵ Decision No.2. I acted as principal counsel in all the proceedings relating to *Ferdinand P. Mesch and Robert Y. Siy v. the Asian Development Bank* (No.2) of 31 March 1995 (*Mesch I*), Decision No.2, 1 ADBAT Rep.21; *Ferdinand P. Mesch and Robert Y. Siy v. Asian Development Bank* (No.2) of 31 March 1995 (*Mesch II*), Decision No.6, 1 ADBAT Rep.67; *Ferdinand P. Mesch and Robert Y. Siy v. the Asian Development Bank* (No. 3) of 13 August 1996 (*Mesch III*), Decision No.18, 2 ADBAT Rep.117; and *Ferdinand P. Mesch and Robert Y. Siy v. the Asian Development Bank* (No. 4) of 7 August 1997 (*Mesch IV*).

¹²⁶ *Ibid.* at 16.

“The Charter, Bylaws, and Board Resolutions did not establish any obligation of the Bank in respect of the reimbursement of income tax levied on staff salaries; equally however, those documents did not prohibit the adoption of any such obligation. Likewise, although the letters of appointment issued by the Bank to professional staff did not include any express undertaking to reimburse income tax, nevertheless they did not specifically exclude that prospect. There was thus no pronouncement by the Bank as to the exclusion of tax reimbursement.

....

In balancing in the present case the equities as between the Bank and its staff, the Tribunal considers that more weight should be given to the interests of the employee than to those of the employer, if only because the Bank could have so structured its terms of employment as to exclude expressly the prospect of equal pay for comparable work and could thus have excluded the need for tax reimbursement. But it never did so. Any ambiguity or uncertainty in this respect, wherever appearing in documents emanating from the Bank, must therefore, be resolved *contra proferentem* and in favor of the staff.”¹²⁷

The ADBT therefore required the Bank to reimburse Applicants and other similarly situated staff for the taxes paid on their salaries derived from the Bank “upon a reasonably prompt claim being made, accompanied by proof of payment of such tax”.¹²⁸ This authoritative decision handed down by the ADBAT posed a serious challenge to the process of effective decision as it was then constituted, because the Bank had never reimbursed any income tax levied and paid by any staff members since the inception of the Bank in 1966. Not only did *Mesch I* defy the expectations held by the effective power holders of the Bank, it caused the initiation of a process of review, which ultimately led to the repudiation of that decision. The dilemma of the Bank was, however, fundamental to the *review* of the judgement of the ADBAT, which was ‘final and binding’ without appeal.

The ADBAT itself was established in 1991 as an independent judicial body to settle disputes between staff members and the organization. The integrity and judicial authority of the ADBAT must be maintained in order to foster the morale of Bank staff. If the authority of the ADBAT were tampered with by effective power, the integrity and independence of the ADBAT, the very base on which the ADBAT’s authority rests, would be utterly weakened. Thus, finality and review appeared irreconcilable.

“[N]ullification and review are not governed solely by the exigencies of effective power. If an authoritative process is sustained by effective elites because it serves their interests, the impulse to nullify a particular authoritative decision will be counteracted to some extent by their long-range interest in continuing that authoritative process of decision. As the probability of damage to processes

¹²⁷ *Ibid.* paras 14 & 17.

¹²⁸ *Ibid.* at para. 22.

of authority by a nullification increases, a parallel impulse to limit the review and its effects emerges.”¹²⁹

Subsequent to the *Mesch I*, therefore, the Board of Directors of ADB, upon a careful review of the decision and the issue of tax reimbursement, adopted, on 6 October 1994, a resolution (Resolution) which expressly stated that “the Bank shall discharge its obligations under the Statute of the Administrative Tribunal of the Asian Development Bank in connection with Decision No. 2.” At the same time the Resolution reaffirmed the Bank’s long-standing practice of non-reimbursement of taxes and provided that the Bank shall not reimburse the taxes paid by any Governor, any Director, any Alternate, the President, any Vice President and any staff member of the Bank for the taxes paid by them in respect of their salaries and emoluments from the Bank, effective upon the date of the Resolution.

The Resolution explicitly mentioned “the Bank’s choice actually made and consistently enforced” not to reimburse for the income tax levied and paid by its staff members, and reaffirmed the Bank’s “long-standing practice of no reimbursement of taxes”. Further, the Board of Directors in the Resolution confirmed the Bank’s commitment to the principle of equal pay for comparable work and further clarified that, in accordance with the Bank’s consistent practice, this principle would apply to salaries and emoluments before the imposition of any tax. Thus, the Resolution simply expressed what had *always* been the policy and the practice of the Bank.

Subsequent to the adoption of the Resolution, the lawfulness of the Resolution was challenged by the staff members concerned in *Ferdinand P. Mesch and Robert Y. Siy v. the Asian Development Bank (No. 3)*¹³⁰ (*Mesch III*). As the ADBT remarked

“Although some terms and conditions of employment can be prospectively altered, the principle that fundamental and essential terms and conditions of employment cannot unilaterally be amended is now a recognized principle which can be regarded as part of the law common to international organizations. That principle imposes a limitation on the powers of the governing bodies of every international organization, restraining the unilateral amendment of such terms and conditions. Without deciding whether that principle could have been excluded by the provisions of the Charter of the Bank, it suffices to note that the Charter does not do so, and therefore the powers of the Board of Governors and of the Board of Directors of the Bank are subject to that limitation. However, when the Bank was founded there was no institution which was empowered to compel the Bank to comply with that principle. And when the Statute of the Tribunal was adopted, that limitation already existed: it was not one imposed or deemed to have been imposed by the Statute. The Tribunal was given jurisdiction in respect of complaints by staff members alleging non-observance of their

¹²⁹ REISMAN, *op.cit.*n.27 at 72.

¹³⁰ Decision No.18, 2 ADBAT Rep.117.

contracts of employment and terms of appointment. That Statute does not prescribe any pertinent exception or qualification in respect of the jurisdiction of the Tribunal, and so that jurisdiction extends to non-observance of contractual terms resulting from the infringement of that principle.”¹³¹

The ADBAT thus concluded that “it has competence to consider whether a decision of the Bank embodied in a Resolution of the Board of Directors is a nullity because it purports unilaterally to amend a fundamental and essential term or condition of employment”.¹³²

The tax reimbursement case litigated successively over the years culminated in *Ferdinand P. Mesch and Robert Y. Siy v. the Bank (No. 4)* of 7 August 1997¹³³ (*Mesch IV*) in which, to quote a passionate dissenting opinion of Professor BRIGITTE STERN, “the Tribunal has *de facto* overruled one of its decisions in such a way, without saying so”.¹³⁴ The ADBT stated that “it can ... hardly be said under the facts of this case that tax reimbursement was reasonably assumed by staff members to be central to their contract of service or that they had a reasonable expectation of its continuation, in light of the fact that the Bank, over the decades since its formation in 1966, had never implemented such a benefit”.¹³⁵ It also stated that “the Tribunal did not consider tax reimbursement to be an intrinsically fundamental term which could not have been excluded”.¹³⁶ Moreover, the ADBT stated it had not decided in *Mesch I* that “tax reimbursement is always a corollary of ‘equal compensation for equal work,’ or is inextricably intertwined with external comparison with the IBRD”.¹³⁷

With respect to the principle of equal compensation for equal work, the ADBT explained that the principle means “equal pay for work of equal value” and “the application of the principle involves only a consideration of the ‘value’ of the work to the employer”.¹³⁸ The ADBT accordingly held that “the employer’s obligation to treat its employees equally does not extend to remedying discrepancies created by the conduct of the State of which the employee is a citizen”.¹³⁹

Professor BRIGITTE STERN lamented in her dissenting opinion that “the Tribunal has endorsed, through what [she] personally consider[s] a painstaking and contradictory legal reasoning, the Bank’s 6 October 1994 Resolution whose

¹³¹ Ibid. at para.22.

¹³² Ibid. at para.24. This is in accord with *de Merode*, WBAT Rep.[1981] Decision 1. The ADBAT’s conclusion stands in sharp contrast with the Statute of the IMF Administrative Tribunal which limits its own jurisdiction. See AMERASINGHE, loc.cit.n.45 at 785-786.

¹³³ Decision No.35 of 7 August 1997.

¹³⁴ Ibid. Dissenting Opinion of Professor STERN, at para. 3.

¹³⁵ Ibid. at para.24.

¹³⁶ Ibid. at para.28.

¹³⁷ Ibid. at para.34.

¹³⁸ Ibid. at para.30.

¹³⁹ Ibid.

avowed purpose was to eliminate for the future the normal consequences that were to flow from one of its decisions.¹⁴⁰ Indeed, the opinion in *Mesch IV* shows a 'painstaking' analysis in its effort to stay within the rationale of *Mesch I*, but in effect to reverse *Mesch I* in light of the Resolution under which the issue before *Mesch IV* was "whether the obligation to reimburse tax is a fundamental and essential condition of employment."¹⁴¹ The ADBAT held in a 3-2 split decision "that reimbursement of national income taxes is not a fundamental and essential condition of employment; that the Bank therefore had the power unilaterally to amend the condition as to tax reimbursement; and that the Board of Directors Resolution was valid."¹⁴²

It is a truism that every decision, once made, is subject to review. Although review takes a variety of forms, it is not easy for any decision-maker to repudiate his or her own decision previously made. It would be much less painful for another institution to overturn a decision made by somebody else. Self-scrutiny or self-censorship is a most difficult function to discharge. Objectivity perforce requires mental and intellectual detachment from the subject matter under review.

6. TOWARD THE FUTURE

The review and repudiation of judgments of IATs were necessarily triggered by the interests of the organization concerned, first as evidenced by the ILO Tribunal's amended Statute. Thus, even the abolishment of the review procedure provided under Article 11 of the Statute of the UN Tribunal notwithstanding, the Secretary-General's Report alluded to the need for "Member States to seek an advisory opinion"¹⁴³ of the ICJ in cases where they have reason to believe that the UNAT has exceeded its jurisdiction or competence or to consider that the UNAT has erred on a question of law relating to the provisions of the UN Charter. The Report rationalized that "[t]hese two grounds do not relate to the merits of the dispute between the staff member and the Organization but relate to fundamental constitutional issues of division of powers between legislative and judiciary which is a legitimate concern of Member States".¹⁴⁴

Such focus on the interests of member states and the organization has paid only scant attention to the unique status of a staff member as an agent under international law. He or she is not "a private person" *vis-à-vis* the Secretary-General, "the chief administrative officer of the Organization".¹⁴⁵ The point

¹⁴⁰ Ibid. Dissenting Opinion, at para. 3 (Professor STERN).

¹⁴¹ Ibid. at para.16.

¹⁴² Ibid. at para.49.

¹⁴³ The Secretary-General's Report, loc.cit.n.88, at para.38.

¹⁴⁴ Id.

¹⁴⁵ ICJ Rep.1973: 134-38 (dissenting opinion of Judge MOROZOV).

that needs to be emphasized is that international civil servants are not ‘individuals’ in an ordinary sense; they are a special category of individuals who enjoy the right of functional protection under international law.

“In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that States, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that – whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent – he should know that in the performance of his duties he is under the protection of the organization.”¹⁴⁶

The agent’s status is governed internally by the internal law of the organization which flows from Article 100 of the UN Charter and externally by the privileges and immunities accorded to him under international law. Should the organization as his employer be allowed to appeal to the ICJ, the other party to the dispute, an individual staff member, should equally be allowed to do the same. The moment the individual staff member responds to the application for review filed by the organization or a Member State in order to meet the requirement of the judicial character of the ICJ that “both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court”,¹⁴⁷ the conventional criticism that the ICJ is not open to individuals collapses, in that whoever triggers the process, the equation is always the same.

Various proposals were made in the past ranging from the merger of the UNAT and the ILOAT to the harmonization of the two Tribunals by creating a second-tier administrative tribunal over them, but none materialized for the obvious difficulty involved in any of the proposals.¹⁴⁸ It has been declared ‘a lost cause’.¹⁴⁹ None of the proposals, however, paid attention to regional organizations which are outside the orbit of the UN system. How can we struc-

¹⁴⁶ *Reparation for injuries suffered in the service of the United Nations*, ICJ Rep.1949: 174, at 183-84.

¹⁴⁷ ICJ Rep.1956 at 86.

¹⁴⁸ See, e.g., ICJ Rep.1987 at 74-75 (declaration of Judge LACHS); *ibid.* at 76 (separate opinion of Judge ELIAS); *ibid.* at 108-09 (separate opinion of Judge AGO); RUDOLF OSTRIHANSKY, “Chamber of the International Court of Justice”, 37 ICLQ (1988) 30, 52; and MANFRED LACHS, “Some reflections on the contribution of the International Court of Justice to the development of international law”, 10 Syracuse JILC (1983) 239, 276-77 (1983).

¹⁴⁹ AMERASINGHE, *loc.cit.*n.45 at 776.

ture an appeal or review process to which these non-UN system organizations can also have access?

There are four kinds of IATs. The UNAT and the ILOAT are the two principal tribunals for all international organizations under the UN system. The jurisdiction of the UNAT covers at present the United Nations, the International Civil Aviation Organization and the International Maritime Organization (the IMO) whereas the jurisdiction of the ILOAT covers all functional international organizations headquartered in Europe except the IMO.¹⁵⁰ The third kind of tribunal belongs to the international financial institutions, i.e., the World Bank Administrative Tribunal covering the IBRD, IFC, and MEGA, the Inter-American Development Administrative Tribunal, the ADBAT, the IMF Administrative Tribunal, and the African Development Bank Administrative Tribunal. (There are proposals under consideration for a tribunal of the European Bank for Reconstruction and Development.) The fourth kind of tribunal is related to regional community-organizations such as the Organization of American States and the European Community.

As each group of IATs has developed its own jurisprudence and flavor, it would be difficult to alter the established structures of these tribunals.¹⁵¹ I therefore recommend the following.

Each organization should establish its own administrative tribunal within its organizational 'district' which should act as a tribunal of first instance, i.e., 'a district court', so to speak, which deals with all preliminary issues involving factual questions. Contested legal issues can be raised later on appeal to the UNAT or the ILOAT which should act as 'a Court of Appeal' for those organizations which are under the jurisdiction of either Tribunal at present. For this purpose, the UNAT and the ILOAT must create their respective *tribunals of first instance*, as in the case of the Court of First Instance of the Court of Justice of the European Communities, to deal with all original applications not

¹⁵⁰ The following Organizations have accepted the ILO Tribunal's Jurisdiction: World Health Organization (WHO), United Nations Educational, Scientific and Cultural Organization (UNESCO), International Telecommunication Union (ITU), World Meteorological Organization (WMO), Food and Agricultural Organization of the United Nations (FAO), European Organization for Nuclear Research (CERN), General Agreement on Tariffs and Trade (GATT), International Atomic Energy Agency (IAEA), World Intellectual Property Organization (WIPO), European Organisation for the Safety of Air Navigation (Eurocontrol), Universal Postal Union (UPU), European Patent Organisation (EPO), European Southern Observatory (ESO), Intergovernmental Council of Copper Exporting Countries (CIPEC), European Free Trade Association (EFTA), Inter-Parliamentary Union, European Molecular Biology Laboratory (EMBL), World Tourism Organization (WTO), African Training and Research Centre in Administration for Development (AFRAD), Central Office for Railway Transport (OCTI), International Center for the Registration of Serials (CIEPS), International Office of Epizootics (OIE), United Nations Industrial Development Organization (UNIDO), International Criminal Police Organization (Interpol).

¹⁵¹ "The two tribunals are well-established in their separate identities and it would be foolish to resume the bygone project of a possible merger." PESCATORE, loc.cit.n.16 at 236. See also ELIAS, loc.cit.n.2 at 29-33; AMERASINGHE, loc.cit.n.45 at 776-78.

only from those organizations which do not establish administrative tribunals as their own 'district courts', but also from staff members of the United Nations or the ILO. Likewise, in the case of the financial institutions, their own respective administrative tribunals should each act as 'a district court', from which legal issues should be raised on appeal to the World Bank Tribunal which should act as 'a Court of Appeal' for all financial institutions representing 'a functional region'. The World Bank Tribunal must also create its tribunal of first instance within to deal with all the original applications from staff members of the IBRD, IFC and MIGA. Out of these 'Courts of Appeal' comes further appeal to the ICJ at the apex of this judicial hierarchy as "the principal judicial organ of the United Nations" which can "contribute in practical terms to the improvement or operation of the law within the United Nations system".¹⁵² In this way, all applications will be examined judicially in the normal system of adjudication without ever resorting to a political organ such as the Committee on Applications for Review.

Although these recommended procedures will require various amendments to the respective Statutes of the UN, ILO and World Bank Tribunals as well as to other administrative tribunal statutes, the procedure of appeal in each group of administrative tribunals will be uniformly established throughout their respective statutes of administrative tribunals, and the respective Statutes of the UN, ILO and World Bank Tribunals as they relate to the appeal or review process to the ICJ will also be fashioned uniformly in order to permit the use of the advisory function of the ICJ as a *de facto* appellate function.¹⁵³

¹⁵² ICJ Rep.1987:18 at 75 (declaration of Judge LACHS). See a critical comment offered by a judge of the ILO Tribunal: "The International Court has shown no sensitivity to [the characteristics of administrative jurisdiction, which must remain close to the facts and which requires rapid and clear decisions]. Therefore, the opinion rendered so far have remained useless pieces of legal fiction." PESCATORE, loc.cit.n.16 at 231.

¹⁵³ In dealing with a request for an advisory opinion the ICJ exercises its power in proper cases to determine the real meaning of the question put to it. In *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the ICJ underscored that "if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions formulated in the request". ICJ Rep.1980: 73 at 88, para.35.

THE ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL: CONSTITUTIVE INSTRUMENTS AND CASE-LAW

Raul C. Pangalangan*

1. INTERNATIONAL ADMINISTRATIVE TRIBUNALS IN THE CONTEXT OF INTERNATIONAL LAW

International organizations have established administrative tribunals to address unique dilemmas deriving from their institutional independence and international character. The law governing the institutional life of such an organization cannot be the municipal legal system of its members or of its host government,¹ and can only be drawn from its constituent charter as interpreted in light of general principles of international law. Moreover, in order to ensure the political independence of the organization and its staff members as international civil servants,² these charters contain jurisdictional immunities which place the organization beyond the reach of the courts of the municipal legal order of its member states.³

* University of the Philippines, Manila; Asian Development Bank Administrative Tribunal. The views expressed here are the author's alone and do not represent the official views of the Tribunal.

¹ C.F. AMERASINGHE, *Principles of the institutional law of international organizations* (1996) at 13.

² See *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Rep.1950: 4. But see *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal [Yakimetz case]*, ICJ Rep.1987:18: this involved the practice of the then USSR and other socialist countries whose nationals (apparently until 1988) could only be seconded from the national governments, reflecting their "scepticism of the concept of an impartial and objective international civil service". A.ALI, "The international civil service: the idea and the reality", in C.DE COOKER (ed.), *International Administration: Law and Management Practices in International Organizations*, I.1. The Court ruled that the person being on loan from a government, it was necessary to secure the consent of that government.

³ See, for instance, Agreement Establishing the Asian Development Bank (hereinafter: the ADB Charter), Art.50 ("Immunity from Judicial Proceedings") and Art.55 ("Immunities and Privileges of Bank Personnel"), and Agreement between the Asian Development Bank and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank (hereinafter: the Headquarters Agreement), Art.III ("Immunity from Judicial Proceedings") and Art.XII ("Privileges and Immunities ...").

Institutional independence, therefore, diminishes the recourse by international civil servants to the usual legal devices for protecting their rights. Referring to the United Nations Administrative Tribunal⁴ it was stated:

"Because of the immunity of these international organizations from the jurisdiction of the courts of their member States, the only way of giving staff members any form of judicial redress for complaints that they may have against the organizations arising out of their terms of employment has been by creating a special internal tribunal – the UN Administrative Tribunal."⁵

Without administrative tribunals, disputes between international civil servants and their employer organizations would be settled, not by judicial means, but through administrative decision by an executive organ. Management decisions were thus final because unappealable, and aggrieved staff did not have recourse to any impartial appeal mechanism.⁶ The World Court acknowledged this in the *Effects of Awards* case, which upheld the power of the UN Tribunal to grant relief in the form of compensation:

"In the absence of ... an Administrative Tribunal, the function of resolving disputes between staff and Organization could be discharged by the Secretary General Accordingly, in the three years or more preceding the establishment of the Administrative Tribunal, the Secretary General coped with this problem by means of joint administrative machinery, leading to ultimate decision by himself."⁷

Indeed, in the case of the World Bank Administrative Tribunal (hereinafter, the WB Tribunal), it was explained that without such a tribunal, national courts might assert jurisdiction over complaints against the bank by staff members, undermining the international character of the bank and its staff.⁸ Indeed, it was explained that the World Bank created its own tribunal instead of submitting to the jurisdiction of extant administrative tribunals (e.g., the UN Tribunal) in

⁴ Hereinafter: UN Tribunal. Statute of the United Nations Administrative Tribunal, UNGA Resolution 351(IV), 24 November 1949, as amended by UNGA Resolution 957(X), 8 November 1955.

⁵ E. LAUTERPACHT, *Aspects of the Administration of International Justice* (1991) 106-7.

⁶ AMERASINGHE, *op.cit.n.1* at 446.

⁷ *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, *adv.op.*13 July 1954, ICJ Rep.1954: 61. The UN and ILO tribunals have, through their respective statutes, submitted to review under the advisory jurisdiction of the ICJ (UNAT Statute, Art.11; ILO Statute, Art.12; ICJ Statute, Art.65(1)). See T.O. ELIAS, *The International Court of Justice in relation to the Administrative Tribunals of the United Nations and the International Labour Organisation*, in DE COOKER, *op.cit.n.2* at V.4.

⁸ C.F. AMERASINGHE, "The World Bank Administrative Tribunal: its establishment and its work", in DE COOKER, *op.cit.n.2* at V.3/2-3, citing memorandum from the World Bank President to the Executive Directors, dated 14 January 1980.

order “to maintain its independence ... from organizations that were increasingly being subjected to some degree of politicization”.⁹

International organizations thus create their respective courts under their charters, and voluntarily submit to the jurisdiction of those courts. The International Labour Organisation¹⁰ established its administrative tribunal in 1946; the United Nations, in 1949; the World Bank¹¹ and the Inter-American Development Bank,¹² both in 1981; the Asian Development Bank,¹³ in 1991; and the International Monetary Fund, in 1992.¹⁴ The International Court of Justice has rendered advisory opinions reviewing decisions by those administrative tribunals whose statutes provide for such review.¹⁵

These tribunals usually have been created even without express authority under the constituent charter of the organization. Although the Preparatory Commission of the United Nations had expressly recognized the possibility of creating an administrative tribunal patterned after that of the League of Nations,¹⁶ the establishment of the UN Tribunal was in fact challenged before the World Court, on the ground, *inter alia*, that the General Assembly could not have created a subordinate body capable of binding the Assembly itself. In the *Effects of Awards* case (*supra*, text at n.7) the World Court recognized that the power of the United Nations to establish an internal court, “though not expressly provided in the constituent instrument, were conferred upon [the organization] by necessary implication as being essential to the performance of its duties”¹⁷ and thus arose “by necessary intendment out of the Charter”.¹⁸ The Court continued:

⁹ C.F. AMERASINGHE, *Documents on International Administrative Tribunals* (1989) at 44.

¹⁰ Statute of the Administrative Tribunal of the International Labour Organisation, 9 October 1946, as amended on 29 June 1949 and 17 June 1986.

¹¹ Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association, and International Finance Corporation, 1 July 1980.

¹² Statute of the Inter-American Development Bank Administrative Tribunal, April 1981 as amended in November 1981 and March 1984.

¹³ Statute of the Administrative Tribunal of the Asian Development Bank (hereinafter ADB Tribunal Statute), 1 April 1991, as amended 1 January 1995, in 1 ADBAT Rep.(1998) 99 and 2 ADBAT Rep.(1998) 191.

¹⁴ Statute of the Administrative Tribunal of the International Monetary Fund, 15 October 1992.

¹⁵ In addition to the advisory opinions already cited, the fourth and most recent is *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal [Mortished case]*, Advisory Opinion of 20 July 1982, 1982 ICJ Rep.325. Recourse to the ICJ is provided for only in the Statutes of the UN and the ILO Tribunals. However, the UN General Assembly has decided, by resolution dated 11 December 1995, to amend Art.11 of the UN Tribunal Statute, and limit recourse to the ICJ for cases delivered as from 1 January 1996. (*The International Court of Justice*, 4th ed.(1996) at 86-87.

¹⁶ GUTTERIDGE, “The ILO Administrative Tribunal”, in DE COOKER, op.cit.n.2 at V.2/2.

¹⁷ AMERASINGHE, op.cit.n.1 at 449.

¹⁸ *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, adv.op. 13 July 1954, ICJ Rep.1954: 47.

"[T]he Tribunal is established [...] not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions. [Its] judgment[s are] *res judicata* and ha[ve] binding force between the parties to the dispute. As this final judgment has binding force on the United Nations Organization as the juridical person responsible for the proper observance of the contract of service, that Organization becomes legally bound to carry out the judgment and to pay the compensation awarded to the staff member."¹⁹

The result is the international administrative tribunal, whose jurisdiction is 'novel'²⁰ in international law:

"Individuals, international organizations and states have been parties in controversies brought before the[se] tribunals; public international contracts, staff rules and regulations unilaterally issued by international organizations and multilateral treaties have been construed by the judges of these institutions."²¹

The World Court has noted the international character of international administrative proceedings, notwithstanding that they deal with disputes, not between states, but between an individual and an international organization. Its advisory opinion was sought to review a decision by the International Labour Organisation Administrative Tribunal (hereinafter, the ILO Tribunal), upholding the termination of four staff members by the UNESCO, which had submitted to the jurisdiction of the ILO Tribunal. Significantly, the dissenting opinions highlighted the difficulty inherent in the inequality between individual grievants and the international organization, i.e., that despite the contentious character of the dispute, the grievants could not present their case directly to the Court but rather through statements submitted to the international organization entitled to seek an advisory opinion.²²

¹⁹ Ibid. at 53.

²⁰ A. SCHECHTER, *Interpretation of ambiguous documents by international administrative tribunals* (1964) at 3.

²¹ Ibid. at 126-27.

²² The advisory jurisdiction of the Court is limited to requests by public international organizations (ICJ Statute, Chapter IV). See also *Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO*, adv.op.23 Oct.1956, ICJ Rep.1956:77; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, adv.op.12 July 1973 [*Fasla*], ICJ Rep.1973:166 (the Court's advisory jurisdiction can be exercised in cases relating to proceedings before other tribunals wherein individuals were parties).

2. THE ADB TRIBUNAL: CONSTITUTIVE INSTRUMENTS AND BRIEF HISTORY

2.1. The ADB as an international organization

The ADB is a multilateral institution, with headquarters in Manila, Philippines, which serves as the regional development bank in Asia and the Pacific. It is governed by a charter establishing the Bank in 1966, and is run by a Board of Governors, comprising representatives of all its Member Countries who meet annually²³ and a Board of Directors, elected by the Governors, "responsible for the direction of the general operations of the Bank".²⁴ The President is the "chief of the staff of the Bank" and is responsible for the "organization, appointment and dismissal of the officers and staff".²⁵ The political neutrality of the institution and its staff is secured through the "Prohibition of Political Activity: The International Character of the Bank", which states:

"2. The Bank, its ... officers and staff shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member concerned. Only economic considerations shall be weighed impartially in order to achieve and carry out the purpose and functions of the Bank.

3. The President, Vice-President(s), officers and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member [state] of the Bank shall respect the international character of this duty"²⁶

Its charter further provides that the Bank as an institution shall enjoy 'immunities, exemptions and privileges' in the territory of each member state. The Bank is thus immune from the jurisdiction of the courts and government agencies of its member states.²⁷ This immunity is further strengthened by its Headquarters Agreement with the host state, the Philippines, which provides for 'immunity from judicial proceedings'.²⁸

Of its current²⁹ 1,924 staff members, 645 are professional staff, while 1,279 are support staff (of whom 1,133 are Filipino). The professional staff are geographically distributed, and consist of various nationalities; the support staff, however, are predominantly of Philippine nationality. Staff members are

²³ ADB Charter Arts.27-29.

²⁴ ADB Charter Arts.30-33.

²⁵ ADB Charter Art.34.

²⁶ ADB Charter Art.36.

²⁷ ADB Charter, Chapter VIII ("Status, Immunities, Exemptions and Privileges").

²⁸ Headquarters Agreement Art.III. See *Bares*, Decision No.5 [1995], 1 ADBAT Rep.53, 55, recognizing that ADB is immune from suit in national courts; *Department of Foreign Affairs v. National Labor Relations Commission* (G.R. No.113191, 18 Sep.1996), upholding the ADB's immunity from legal process under the Headquarters Agreement.

²⁹ As of August 1999.

organized in a single employees' organization, the Staff Council. The rights and benefits of staff are contained in Staff Rules issued by the Board of Directors and in administrative orders and circulars issued by management.

2.2. The Statute and Rules of Procedure of the ADB Tribunal

In 1990, the ADB adopted a Personnel Policy Statement³⁰ setting forth the fundamental principles governing its personnel, including the observance of "due process in all areas of personnel administration".³¹ The Statement specifically referred to an Administrative Tribunal:

"Where grievances arise, staff will be entitled to invoke administrative review as well as the grievance and appeals procedres, without fear of reprisal, including ultimate recourse to an Administrative Tribunal whose decision shall be binding on the Bank and the staff."³²

The Tribunal was established in April 1991. Until then, disputes on the interpretation of staff rights and benefits were decided by internal grievance machinery, culminating with an Appeals Committee comprised of fellow staff members designated by Management and the Staff Council.³³ With the creation of the Tribunal, decisions by Management were subject of judicial review by a panel of external judges.

Following similar process in other international organizations, the ADB Board of Directors created the Tribunal through a 'Statute',³⁴ which set out the Tribunal's jurisdiction, composition and basic procedure. To preserve and maintain the independence of the Tribunal, the judges function independently under this Statute. Indeed, although the judges are appointed by the Board of Directors, the list of candidates is drawn up by the President only after consultation with the Staff Council.³⁵

The original Statute provided for three members, appointed for a term of three years and who were to select a chairman from amongst them.³⁶ The judges were to be "persons of high moral character and [who] possess the qualifications required for appointment to high judicial office or [are] juriscon-

³⁰ Approved by the Board of Directors on 7 December 1990, see *Personnel Handbook for Professional Staff and Personnel Handbook for Supporting Staff*.

³¹ *Ibid.* para. xiii.

³² *Ibid.* para. xi.

³³ Administrative Order No.2.06, *Grievance and Appeal Procedures*, issued 23 September 1987.

³⁴ Statute of the Asian Development Bank Administrative Tribunal, 1 ADBAT Rep., Appendix I, at 99.

³⁵ *Ibid.* Art.IV para.2.

³⁶ *Ibid.* Arts.IV and V.

sults of recognized competence".³⁷ The Statute also provided for an Executive Secretary to assist the Tribunal in preparing the cases for decision and "who, in the discharge of duties, shall be responsible only to the Tribunal".³⁸ The Tribunal has usually met twice a year at the Philippine headquarters of the ADB, although it has also met outside the Philippines as allowed in its Statute.³⁹ The Rules of Procedure, adopted by the Tribunal pursuant to the Statute,⁴⁰ took effect on 1 January 1992.

The Tribunal has decided 44 cases since it was established. These cases are published in its own Reports, published by the office of the Executive Secretary. There are now four volumes of the Reports: Volume I covers the years 1991 to 1995 and includes all the decisions rendered by the first set of judges; it also contains the original Statute (April 1991) and Rules of Procedure (December 1991). Volume II covers the year 1996, and contains as well the revised Statute (revised 22 December 1994, effective 1 January 1995) and Rules of Procedure (revised, effective 1 January 1992 and amended up to 10 August 1995). Volume III and IV cover, respectively, the years 1997 and 1998.

2.3. Historical survey: the Judges, revisions of the Statute and the Rules, and case highlights

The first set of judges sat on the Tribunal from 1991 to 1995. Professor ELIHU LAUTERPACHT, CBE, QC, then Director of the Research Centre of the University of Cambridge (later also President of the World Bank Administrative Tribunal and currently Judge ad hoc before the International Court of Justice in the Genocide Case involving the former Yugoslavia), was elected Chairman of the Tribunal. The other judges were Philippine Supreme Court Justice FLORENTINO FELICIANO (now judge of the Appellate Body of the World Trade Organization in Geneva), and Sri Lankan Supreme Court Justice MARK D. H. FERNANDO (now also judge at the ILO Tribunal).

The Tribunal rendered its first judgment in December 1992, holding that the applicant's separation from the Bank, with the expiration of his initial fixed-term appointment, was defective due to procedural unfairness. The Tribunal held, notwithstanding that a fixed-term appointee has no right to the renewal of his contract, that he was entitled to procedural fairness in the process leading to the decision whether or not to renew that contract. The Tribunal, citing precedent from the WB Tribunal, also read its remedial powers to include – not just

³⁷ Ibid. Art.IV para.1.

³⁸ Ibid. Art.IV para.V para.2.

³⁹ Ibid. Art.VII ("taking into account the need for the efficient and cost-effective conduct of the proceedings as well as for providing the opportunity for full and fair hearings").

⁴⁰ Ibid. Art.VI.

a choice among rescission of the contested decision, specific performance or, in its place, compensation – the power to grant compensation for injury caused.⁴¹

At the following session, held in January 1994, the Tribunal resolved its first performance evaluation (PER) case and found that the staff member's PER scores did not reflect his true rating due to an informal quota of 'distinguished' ratings. The Tribunal also laid down the guiding principle by which it will review management decisions that are discretionary in character. Such power of judicial review was triggered the moment these decisions had an "effect upon the position of staff members in their individual relationships with the Bank". The applicable test was whether such decisions had been "arbitrary, discriminatory or improperly motivated, or have been carried out in violation of a fair and reasonable procedure".⁴² The Tribunal also decided the first of its four tax reimbursement decisions, all brought by the same applicants, one American and one Filipino. They were subjected to income taxation by their respective states of nationality, which, through treaty reservations at the time of ratification, had taken themselves out of the ADB Charter's tax immunity clauses. The Tribunal upheld their claim that the Bank's express guarantee of equal treatment entailed an obligation to equalize the salaries paid them, i.e., through tax reimbursements.⁴³

In 1995, the Tribunal decided a most dramatic case arising from the murder of a ranking lawyer of the Bank in its own basement parking area, in the hands of a member of its own security contingent. A Philippine court had found that the security guard was guilty of fatally stabbing the victim. The family sued the Bank for compensation before the Tribunal. The Tribunal, finding that the claim was founded on contract and not on vicarious liability arising from tort, held that any supposed defects in the Bank's security system could not have prevented the tragic event, and that the Bank had met its duty to exercise reasonable care to ensure the safety of its staff members. The Tribunal nonetheless recommended, in a 'Rider' to its judgment, an *ex gratia* payment to the widow and children of the victim, considering that otherwise they would be in the same financial position as if the victim had not died under such extraordinary circumstances.⁴⁴

The Bank amended the Statute in 1995, increasing the membership of the Tribunal from three to five members, providing for hearings by panels of three, and expressly providing for the recording of dissenting opinions.⁴⁵ With the resignation of judges LAUTERPACHT and FELICIANO, four new members were appointed: Professor BRIGITTE STERN of the University of Paris I, Dr. LAXMI SINGHVI who was India's High Commissioner to London, Professor

⁴¹ *Lindsey*, Decision No. 1 [1992], 1 ADBAT Rep. 1.

⁴² *Tay Sin Yan*, Decision No. 3 [1994], 1 ADBAT Rep. 35.

⁴³ *Mesch and Siy*, Decision No. 2 [1994], 1 ADBAT Rep. 21.

⁴⁴ *Bares et al.*, Decision No. 5 [1995], 1 ADBAT Rep. 53.

⁴⁵ Statute of the Asian Development Bank Administrative Tribunal (as amended on 22 December 1994, effective 1 January 1995), 5 ADBAT Rep., Appendix I, at 191.

TOSHIO SAWADA of Sophia University, and Professor ROBERT GORMAN of the University of Pennsylvania Law School and one of the founding judges of the WB Tribunal. With the increase in membership, the Tribunal was to be headed by a President and a Vice-President. Justice FERNANDO, the remaining member, was elected President, and Professor GORMAN was elected Vice-President.

Among the highlights of the work of the 'new' Tribunal are the following: the first case filed by a member of the supporting staff (who won his claim against what he felt was an unfair PER rating),⁴⁶ and the first disciplinary cases appealed to the Tribunal (finding that investigative process met the essential due process requirements).⁴⁷ In a case of a member of the supporting staff who was kept by the Bank on renewed one-year contracts for more than twelve years and was 'regularized' only two years before his mandatory retirement. The Tribunal set aside these contracts as not reflecting the true intent of the parties, deemed the increased retirement benefits to. The Tribunal held that the use of short-term contracts which denied him benefits was a *détournement de pouvoir* or abuse of power, and set aside the one-year contracts as not reflecting the true relationship between the Bank and the staff member.⁴⁸ Finally, the Tribunal also upheld the exclusion of certain staff members from what they claimed was a generous early retirement program.⁴⁹

In light of the new provisions of the Statute, the Tribunal also had its first dissenting opinions, both by Professor BRIGITTE STERN and, in the second, with Professor SAWADA joining the dissent. In a case where the Tribunal upheld the mandatory retirement age of 60 set forth in administrative orders, Professor STERN found that the age of retirement of 65 fixed in the Staff Regulations issued by the Board in 1966 remained valid and could not have been validly revised by internal practice, memoranda or other issuances by management.⁵⁰ In the last of the tax reimbursement cases, the same claimants challenged the decision by the Board of Directors, subsequent to the Tribunal's decision, expressly prohibited such payments following the Tribunal's earlier decision. Professor STERN contended that the Board may not do so unless it likewise disavowed or expressly abandoned the principle of equal pay for equal work internally and externally.⁵¹

New judges have since been appointed to the Tribunal, two in 1996 and one in 1997. Professor STERN was replaced by Professor MARTTI KOSKENNIEMI of the University of Helsinki, Dr. SINGHVI, by Dr. THIO SU MIEN, former law dean and private practitioner in Singapore; and Professor SAWADA, by Professor SHINYA MURASE, likewise of Sophia University.

⁴⁶ *Isip*, Decision No. 9 [1996], 2 ADBAT Rep. 1.

⁴⁷ *Zaidi*, Decision No. 17 [1996], 2 ADBAT Rep. 89; *Chaudhry*, Decision No. 23 [1996], 2 ADBAT Rep. 171.

⁴⁸ *Amora*, Decision No. 24 [1997], 3 ADBAT Rep. 1.

⁴⁹ *Breckner*, Decision No. 25 [1997], 3 ADBAT Rep. 25.

⁵⁰ *Samuel (No. 2)*, Decision No. 15 [1996], 2 ADBAT Rep. 51; STERN, dissenting, at 69.

⁵¹ *Mesch and Siy (No. 4)*, Decision No. 35 [1997], 3 ADBAT Rep. 71; STERN and SAWADA, dissenting, at 93.

The Tribunal recently rendered two decisions interpreting the principle of equal treatment. The first involved the claim by forty Filipino professional staff against the exclusion of Filipinos from the full enjoyment of certain benefits extended to other similarly situated staff; their claim was upheld as regards two benefits, force majeure protection and education grants, but rejected as regards two other benefits, home leave and separation pay).⁵² The second involved the claim of a woman professional staff member that her separation from the Bank was due, *inter alia*, to gender-based discrimination; the gender claim was thrown out, though the Tribunal did find some procedural defects in the Bank's decision.⁵³

3. CASE-LAW OF THE ADB TRIBUNAL

An author, reviewing the early work of international administrative tribunals, noted the "near total absence of citation to the authority of prior decisions of the same court or judgments of other courts"⁵⁴ and a general tendency thus to treat each case as unique.⁵⁵ He also noted the readiness of these tribunals to interpret documents even absent any ambiguity, contrary to the usual rule of interpretation and, more specifically, the 'clear-meaning' doctrine,⁵⁶ and to seek recourse to the travaux préparatoires and the intent of the parties.⁵⁷

This section surveys the points of law established by the Tribunal in its case-law. It is limited however to questions relevant to public international law, and thus excludes the more specific points, of personnel practice, for instance, that are of interest only internally to the Bank's own staff.

3.1. Sources of Law

While the applicable law can be variously characterized, e.g., as a distinct part sui generis of international law, as the 'internal law' of the organization, or as mere contract, it has been characterized as part of international law in its aspect as the emanation of the constituent treaty establishing the organization, from which the power to legislate the internal law is derived. "The [constituent] treaty itself is international law and, therefore, generates international law".⁵⁸

⁵² *De Armas et al.*, Decision No. 39 [1998], 4 ADBAT Rep. 9.

⁵³ *Alexander*, Decision No. 40 [1998], 4 ADBAT Rep. 41.

⁵⁴ SCHECHTER, *op.cit.*n.21.

⁵⁵ *Ibid.* at 110.

⁵⁶ *Ibid.* at 130.

⁵⁷ *Ibid.* at 132-33.

⁵⁸ AMERASINGHE, *op.cit.*n.1 at 326.

3.1.1. General Matters

3.1.1.1. Nature of the ADB Tribunal

“The Tribunal is not akin to one of general jurisdiction within the national sphere. Here the proceedings are controlled entirely by the Statute ...”⁵⁹ As stated above (supra p. 216), there was the tragic killing in the Bank’s headquarters of one of its counsels by a member of its own security contingent.⁶⁰ The victim’s family thereupon sued the Bank for compensation. From the outset, the Tribunal declined to treat the claim as one founded on the law of tort, i.e., the Bank’s vicarious liability for injuries caused by its staff, which may have otherwise prospered in a national court for which, however, the Bank was immune. The Tribunal recognized

“the theoretical possibility that the parties might have agreed to resort to this Tribunal not as the Administrative Tribunal of the Bank subject to its Statute but as a group of individuals who, though happening to be the Members of the Tribunal, have agreed, at the request and with the consent of the parties and, for the purpose of the particular proceedings, to act as a special tribunal or arbitral body outside the scope of the Tribunal’s Statute.”

The case having been brought under the Statute, the Tribunal’s jurisdiction was thus limited to the Bank’s contractual liability to its staff, and the Tribunal found that the Bank had not been negligent.

Flowing from this strict adherence to the contractual scope of its jurisdiction, the Tribunal declined to apply the international law relating to the responsibility of states for the wrongful acts of officials causing injury to aliens:

“The Tribunal is not authorized to assess the international responsibility, tortious or otherwise, of an international organization on the plane of public international law, especially at the instance not of another person of comparable international standing, but rather upon the initiative of an aggrieved individual.”⁶¹

3.1.1.2. Sources in general

The Tribunal identified the following as the ‘principal rules of law’ which provide the ‘framework’ for its decisions: the constitutive instruments of the Bank and of the Tribunal; general principles of law; the employment contract; staff rules and regulations, including administrative issuances; the Personnel Handbooks issued to staff; and ‘by analogy’, staff practices of other international organizations, including the decisions of international administrative tri-

⁵⁹ *Bares*, Decision No.5 [1995], 1 ADBAT Rep. 53, 55.

⁶⁰ *People v. Fernando Macalindong*, Criminal Case No.91164, slip op., Regional Trial Court, Branch 156, Pasig, Metro Manila, Philippines.

⁶¹ *Bares*, Decision No.5 [1995], 1 ADBAT Rep. 53, 57, 65.

bunals. The Tribunal also referred to a 'common' law of international organizations and to 'acquired rights' of staff.⁶²

3.1.2. *Specific sources*

3.1.2.1. Fundamental and essential conditions of employment

The Tribunal affirmed that while the Bank had the power unilaterally to change the conditions of employment of staff, certain elements are "fundamental and essential in the balance of rights and duties of the staff member [and] are not open to any change without the consent of the staff member affected".⁶³

"Although some terms and conditions of employment can be prospectively altered, the principle that fundamental and essential terms and conditions of employment cannot unilaterally be amended is now a recognized principle which can be regarded as part of the law common to international organizations. That principle imposes a limitation on the powers of the governing bodies of every international organization, restraining the unilateral amendment of such terms and conditions."⁶⁴

The Tribunal had earlier found that the Bank's declaration of equal treatment of all staff meant, absent any qualification, that the Bank should reimburse the taxes paid by staff (in this case, one American and one Filipino), whose national governments taxed ADB income unlike other ADB member governments which had waived their power to tax. The Bank subsequently adopted a resolution "reaffirm[ing] its long-standing practice of non reimbursement" and declaring that henceforth, its obligation of equal treatment shall be interpreted to apply to before-tax salaries.⁶⁵ The two staff members returned to the Tribunal and challenged this resolution as a unilateral amendment of a fundamental and essential condition of employment. The Tribunal upheld the resolution, holding that the right to tax reimbursement was not a fundamental and essential condition of employment.⁶⁶

"Fundamental terms are of two kinds. [The first are terms which] are so basic that they will always be implied, and perhaps are not even capable of express waiver save in extraordinary circumstances

[The second are terms] which are not intrinsically fundamental, but may become so if the parties so intend."⁶⁷

⁶² *Lindsey*, Decision No.1 [1992], 1 ADBAT Rep. 1, 2.

⁶³ *Mesch & Siy (No. 3)*, Decision No.18 [1996], 2 ADBAT Rep.117, 125.

⁶⁴ *Ibid.* 117, 126.

⁶⁵ *Mesch and Siy (No. 2)*, Decision No.6 [1994], 1 ADBAT Rep.21.

⁶⁶ *Mesch and Siy (No. 4)*, Decision No. 35 [1997], 3 ADBAT Rep. 71.

⁶⁷ *Ibid.*, at 80-81.

Examples of the first kind are the following:

"that an employee must be paid for his services, that he is entitled to a weekly holiday and to leave, that due process must be observed before he is dismissed, and that on matters of remuneration, employees are entitled to a fair wage, one that assures "equal remuneration for work of equal value", and one that does not discriminate between men and women."⁶⁸

Examples of the second are rights which are 'acquired' when they are embodied either in the Staff Regulations or rules and are "of decisive importance to a candidate for appointment", or in the contract of appointment "and both parties intend that [these] should be inviolate."⁶⁹

The Tribunal found that these conditions had not been satisfied. Since the Bank's formation, there had been no "pattern or practice of making such reimbursement, let alone one that [was] clear, unambiguous, consistent, and of significant duration". Staff members could thus not have reasonably assumed tax reimbursement to be 'central to their contract', or to be of 'decisive importance to them'.⁷⁰

A dissenting opinion objected to the majority's view that some rights are fundamental per se while other rights "may become fundamental when the parties so agree". Citing the World Bank Tribunal's reasoning in *De Merode*, the dissenting opinion contended that the 'expectations of the parties' is not a workable criterion because in any contract there are at least two subjective intentions, two conflicting intents.⁷¹ The dissent contended that the principle of equal pay for equal work has been recognized by both parties and by the Tribunal as a fundamental and essential term of employment. Since this entails both 'formal' and 'effective' equality, it is thus 'inseparable' from the principle of tax reimbursement. The "equalization of remuneration ... whether through tax reimbursement or any other system to the same effect – is inherent to this principle".⁷²

3.1.2.2. Contract of employment

The Bank's staff comprises tenured, regular employees and untenured contractual employees.⁷³ In a case wherein a person was kept on one-year contracts for thirteen years and was 'regularized' just about 3 years prior to retirement, the Tribunal held that the contracts did not "correctly reflect the true relation-

⁶⁸ *Ibid.* at 80.

⁶⁹ *Ibid.* at 81.

⁷⁰ *Ibid.* at 82.

⁷¹ *Ibid.* (STERN dissenting) 71, 100.

⁷² *Ibid.* STERN dissenting, at 93.

⁷³ Administrative Order No.2.01, *Recruitment and Appointment*, revised 9 July 1998.

ship” between the parties, and that the intent of the parties as manifested in the contracts was that the relationship was that of employer and employee.⁷⁴

“[R]ecourse to successive short-term or temporary contractual appointments to jobs which are essentially of a permanent nature is not a fair employment practice, particularly if such appointments can be shown to have been made only to deny employees security of tenure or other conditions and benefits of service.”⁷⁵

3.1.2.3. Practice by other international organizations

Some aspects of fair procedure, for instance, were found to be a “widespread practice” that can qualify as “a general practice accepted as law”.⁷⁶ A dissenting opinion in one of the landmark tax reimbursement cases likewise cites “the generally accepted practice of the overwhelming majority of international organizations” and “precedents of international administrative tribunals”.⁷⁷

3.1.3. Interpretation

“In any community, including the workplace, something more than what is legally correct is desirable.” A woman working as a secretary in the Bank filed a complaint before a Philippine court for slanderous utterances by her supervisor, who was arrested but no sooner released because of his immunities as a staff member of an international organization. While the case was pending, the Bank conducted its yearly performance evaluation of staff, and this supervisor, together with other staff who supervised the secretary, evaluated the secretary, who subsequently complained about her negative rating. The Tribunal held that the supervisor who was sued and briefly jailed could not have possibly possessed the requisite neutrality and impartiality called for in such an evaluation exercise, and that the consequent rating was thus defective.⁷⁸

In the tax reimbursement case cited above, the Tribunal stated:

“In balancing ... the equities as between the Bank and its staff, the Tribunal considers that more weight should be given to the interests of the employee than to those of the employer, if only because the Bank could have so structured its terms of employment as to exclude expressly the prospect of equal pay for comparable work and could thus have excluded the need for tax reimbursement. But it never did so. Any ambiguity or uncertainty in this respect,

⁷⁴ *Amora*, Decision No.24 [1997], 3 ADBAT Rep.1, 7.

⁷⁵ *Ibid.*

⁷⁶ *Lindsey*, Decision No.1 [1992], 1 ADBAT Rep.1, 3.

⁷⁷ *Mesch and Siy (No. 4)*, STERN dissenting, Decision No.35 [1997], 3 ADBAT Rep.71, 106.

⁷⁸ *Cabal*, Decision No.22 [1996], 2 ADBAT Rep.163, 167.

wherever appearing in documents emanating from the Bank must, therefore, be resolved *contra preferentem* and in favor of the staff.⁷⁹

And in its first decision, the Tribunal, noting that the due process guarantees were not expressly incorporated in the Bank's rules until the Personnel Policy Statement of 1991, stated that the "fact that such provisions were not formally incorporated into the Bank's practice [earlier] is a reflection of the insufficiency of the Bank's expression of pertinent obligation, not of the absence of such obligation."⁸⁰

3.2. Jurisdiction

3.2.1. Admissibility *ratione temporis*

The Statute fixes a 90-day period for the filing of applications. The Tribunal has also opened the door to "continuing causes of action", otherwise time-barred, that may be deemed to arise anew periodically, as in the case of reimbursements for taxes paid each year on Bank salaries⁸¹ (each tax payment giving rise to "a distinct cause of action"⁸²) or the annual dependency allowance wherein each non-payment creates a cause of action⁸³. A contested regulation may also be challenged, not just when it is issued but likewise when it is applied to a particular person and thus infringes his rights,⁸⁴ i.e., which thus constitutes "a specific, personalized and definitive rejection" of the applicants' claims.⁸⁵ The Tribunal has also held that the filing period does not run until a final decision has been made by the Bank.⁸⁶ However, the Tribunal has rejected attempts by parties to revive time-barred cases — asking the Bank to review the case and founding the jurisdiction of the Tribunal upon the refusal of that reconsideration.⁸⁷

Finally the Tribunal has invoked the 'exceptional circumstances' clause in the Statute which allows cases to be filed beyond the 90-day limit. In the very

⁷⁹ *Mesch and Siy*, Decision No.2 [1994], 1 ADBAT Rep. 21, 31.

⁸⁰ *Lindsey*, Decision No.1 [1992], 1 ADBAT Rep.1, 4.

⁸¹ *Mesch and Siy (No. 3)*, Decision No.18 [1996], 2 ADBAT Rep.117, 129.

⁸² *Mesch and Siy*, Decision No.2 [1994], 1 ADBAT Rep.21, 32.

⁸³ *Amora*, Decision No.24 [1997], 3 ADBAT Rep.1, 11.

⁸⁴ *Viswanathan*, Decision No.12 [1996], 2 ADBAT Rep.35, 36 (severance pay, also at the time of separation, when severance pay was payable; *Mesch and Siy (No. 3)*, Decision No.18 [1996],

2 ADBAT Rep.117, 126 (tax reimbursement, at time the Bank actually refused to reimburse taxes); and *Amora*, Decision No.24 [1997], 3 ADBAT Rep.1 (retirement benefits, upon retirement, when the entitlement became payable).

⁸⁵ *Mesch and Siy (No. 4)*, Decision No.35 [1997], 3 ADBAT Rep.71, 73.

⁸⁶ *Amora*, Decision No.24 [1997], 3 ADBAT Rep.1, 13.

⁸⁷ *Nelson*, Decision No.7 [1995], 1 ADBAT Rep.77, 84; *Behuria*, Decision No.8 [1995], 1 ADBAT Rep.89, 96.

first case filed before the Tribunal, the application could not be filed within that period because the then newly established Tribunal had not yet become fully operational and had yet to adopt its Rules of Procedure. However, the Tribunal has strictly defined 'exceptional circumstances' as "those which prevent compliance with the requirements as to time and internal remedies" and does not refer to the extraordinary nature of the grievance⁸⁸ or the "gravity of the injury per se" or the futility of further exhausting internal remedies.⁸⁹

3.2.2. Admissibility *ratione materiae*

Exhaustion of internal remedies has been considered as a requirement *ratione materiae*. No claim may be raised before the Tribunal unless either the claim itself was properly raised,⁹⁰ or the material had been made available,⁹¹ during in the internal appeals. Its rationale was explained thus:

"Internal remedies enable each party to better appreciate the position of the other; they provide the administration with an opportunity to ascertain the causes of an alleged grievance and to arrive at a settlement; and internal appeal bodies which are generally more familiar with organizational factors may also elicit material evidence which might not otherwise be available to the Tribunal. There must be cogent reasons for dispensing with internal remedies."⁹²

Also, It has further rejected as inadmissible *ratione materiae* cases where the party failed to meet the filing-periods before those internal grievance bodies.⁹³

The Tribunal hears only cases that arise from non-observance of the contract of employment, and has held as inadmissible cases that arise from other sources.⁹⁴ The claim must also pertain to the Applicant's own rights and benefits.⁹⁵ and not to another person's.

3.3. Justiceability of discretionary power

3.3.1. Reviewability of the exercise of discretionary power

The Tribunal, at the outset, recognized the "broad discretion [of the Bank] to determine [its] policy ... and its operational needs".

⁸⁸ *Nelson*, Decision No.7 [1995], 1 ADBAT Rep.77, 85.

⁸⁹ *Mesch and Siy (No.3)*, Decision No.18 [1996], 2 ADBAT Rep.117, 128.

⁹⁰ *Isip*, Decision No.9 [1996], 2 ADBAT Rep.1, 15.

⁹¹ *Wilkinson*, Decision No.10 [1996], 2 ADBAT Rep.19, 22.

⁹² *Mesch and Siy (No.3)*, Decision No.18 [1996], 2 ADBAT Rep.117, 127.

⁹³ *Behuria*, Decision No.8 [1995], 1 ADBAT Rep.89, 96.

⁹⁴ *Nelson*, Decision No.7 [1995], 1 ADBAT Rep.77, 86.

⁹⁵ *Carolina Chan*, Decision No.21 [1996], 2 ADBAT Rep.157, 157 and 160.

"In some respects this discretion is absolute; in others it is not. In case of dispute, the determination of the reviewability of the discretion falls within the jurisdiction of the Administrative Tribunal. Like any other judicial body, it possesses the competence to determine its own competence. In general, reviewable discretions are those the exercise of which can have an effect upon the position of staff members in their individual relationships with the Bank."⁹⁶

What is the extent of judicial review over managerial discretion? The Tribunal recognized that the power to review "does not mean that the Tribunal can substitute its discretion for that of the management".

"The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed."⁹⁷

This view affects the nature of the relief available from the Tribunal in these cases. The Statute provides that the following remedies are available: rescission of the decision contested, or specific performance of the obligation invoked, or, in lieu of specific performance and at the option of the Bank, payment of compensation.⁹⁸ The Tribunal, citing World Bank precedent,⁹⁹ has interpreted this to authorize the Tribunal to fix an amount of compensation without ordering either rescission or specific performance. Where the decision contested, however, is discretionary in character (e.g., a decision not to promote an officer), the Tribunal is not itself entitled to exercise that discretion (e.g., to promote the officer). "Such a direction would constitute an affirmative exercise by the Tribunal of a discretionary power belonging to the Bank and a substitution of the Tribunal's own judgment for that of the Bank".¹⁰⁰ Instead, the Tribunal is limited to setting aside the defective decision and, where applicable, remand the issue to the Bank for proper disposition.¹⁰¹

⁹⁶ *Lindsey*, Decision No.1 [1992], 1 ADBAT Rep.1, 4.

⁹⁷ *Lindsey*, Decision No. 1 [1992], 1 ADBAT Rep.1, 5.

⁹⁸ Statute, Art.X para.1.

⁹⁹ *Lindsey*, Decision No.1 [1992], 1 ADBAT Rep.1, 17 (citing *Skandera*, WBAT Rep.1981, Decision No.2, para. 29; *Buranavanichkit*, WBAT Rep.1982, Decision No.7, para. 30; *Broemser*, WBAT Rep.1985, Decision No.27, para. 40.).

¹⁰⁰ *Tay Sin Yan*, Decision No.3 [1994], 1 ADBAT Rep.35, 46.

¹⁰¹ *Ibid.* at 35 (setting aside a performance evaluation and the consequent denial of a promotion, and ordering a fresh evaluation on which the promotion may, or may not, be granted); *Isip*, Decision No.9 [1996], 2 ADBAT Rep.1; *Chan (No. 2)*, Decision No.36 [1997], 3 ADBAT Rep.111.

3.3.2. Reviewability of decisions by the Board of Directors

The Tribunal asserted its power to review decisions by one of the Bank's governing bodies, the Board of Directors. It stated that "fundamental and essential conditions" limits the powers of the governing bodies of every international organization, and that the Bank's Board of Governors and Board of Directors are subject to that limitation. The case pertained to the Bank's re-interpretation of its duty of equal treatment to apply to before-tax salaries:

"[W]hen the Statute of the Tribunal was adopted, that limitation already existed: it was not one imposed or deemed to have been imposed by the Statute. The Tribunal was given jurisdiction in respect of complaints by staff members alleging non-observance of their contracts of employment and terms of appointment. That Statute does not prescribe any pertinent exception or qualification in respect of the jurisdiction of the Tribunal"¹⁰²

The Tribunal was silent on the question of whether the international organization may exclude itself from that rule via a provision in its charter.¹⁰³ A dissenting opinion lamented that the Bank's re-interpretation, coming at the heels of the Tribunal's decision holding that the norm of equality entailed tax reimbursements, was "a blatant disregard of the Tribunal's authority".¹⁰⁴

3.3.3. Reviewability of disciplinary decisions

In disciplinary cases, is the Tribunal's task limited to reviewing the regularity of the proceedings below, or can the Tribunal inquire into the substantive findings? The Tribunal, citing precedent before the World Bank tribunal,¹⁰⁵ has inquired beyond the question procedural regularity and examined "(i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for [by] law ..., (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed".¹⁰⁶

3.3.4. Substantive limits on discretion

Apart from constraints flowing from "fundamental and essential conditions", the Bank's power to amend "non-fundamental and non-essential condi-

¹⁰² *Mesch and Siy (No.3)*, Decision No.18 [1996], 2 ADBAT Rep.117, 125.

¹⁰³ *Ibid.*

¹⁰⁴ *Mesch and Siy (No.4)*, STERN dissenting, Decision No.35 [1997], 3 ADBAT Rep.71.

¹⁰⁵ *Carew*, WBAT Rep.1995, Decision No.142 (see para. 32).

¹⁰⁶ *Zaidi*, Decision No.17 [1996], 2 ADBAT Rep.89, 92; see also *Chaudhry*, Decision No.23 [1996], 2 ADBAT Rep.171.

tions”¹⁰⁷ of employment are further subject to substantive and procedural restrictions.

The Tribunal has decided several claims on various grounds of discrimination. The first cases arose on the question of tax reimbursement and what equal treatment meant as between staff whose home governments had waived their power to tax their Bank salaries, and staff whose governments had not done so.

The Tribunal first held that the norm of equality must be applied to “net benefits, after tax”, i.e., effective and not merely formal equality:

"The Tribunal observes that the comparison of compensation levels on the practical plane necessarily involves a consideration of the net benefits, after tax if any, to the recipient. Therefore, it cannot be said that a given salary which, in the hands of one recipient, is taxable is the same as an identical figure which, in the hands of another, is not. Accordingly, the failure to consider the incidence of taxation is inconsistent with the principle of 'equal compensation for comparable work'."¹⁰⁸

The Bank subsequently adopted a resolution “reaffirm[ing] its long-standing practice of no reimbursement” and declared that the principle of equal treatment shall be applied to before-tax salaries. The matter was brought to the Tribunal, which found that the resolution was a valid unilateral act by the Bank and that the Bank’s duty of tax reimbursement was not a “fundamental and essential condition of employment” which can be changed only with the consent of all parties.¹⁰⁹ In that decision, the Tribunal interpreted the norm of equality as well:

"In the strict sense equal compensation for equal work means equal pay for work of equal value; and then the application of the principle involves only a consideration of the value of the work to the employer. Equally, the personal circumstances of the employee are irrelevant: thus the fact that, due to some physical disability, he has to incur additional expenses in coming to work does not entitle an employee to additional pay, because the value of his work to his employer remains the same. *The employer's obligation to treat his employees equally does not extend to remedying discrepancies created by the conduct of the State of which the employee is a citizen.*"¹¹⁰ (emphasis supplied)

A dissenting opinion states that non-discrimination necessarily “mean[s] not only purely nominal equality, but also effective equality”, as supported by past rulings and practices of other international organizations.¹¹¹

Another classification challenged before the Tribunal was discrimination on the basis of nationality. Filipino professional staff challenged their exclusion

¹⁰⁷ *Mesch and Siy (No. 4)*, Decision No.35 [1997], 3 ADBAT Rep.71, 89.

¹⁰⁸ *Mesch and Siy*, Decision No.2 [1994], 1 ADBAT Rep.21, 30.

¹⁰⁹ *Mesch and Siy (No. 4)*, Decision No.35 [1997], 3 ADBAT Rep.71.

¹¹⁰ *Ibid.* at 71, 84.

¹¹¹ *Ibid.* at 93.

from certain employment benefits, i.e., education grant, home leave, force majeure protection and severance pay. The Bank alleged that the exclusion was not nationality-based but was based either on place of service (as regards education and home leave benefits), on the extent of protection from political disturbances required (as regards force majeure) and, on the place of retirement (as regards severance pay). The Tribunal also clarified its earlier statement in the tax reimbursement cases that “equal pay for work of equal value” involved “only a consideration of the ‘value’ of the work to the employer”, and that accordingly “the personal circumstances of the employee are irrelevant”, e.g., the fact that “due to some physical disability, he has to incur additional expenses coming to work does not entitle [him] to additional pay, because the value of his work to his employer remains the same”.¹¹² The Tribunal held that, as regards employment *benefits*, the personal circumstances of the staff member were most relevant, e.g., spousal allowances, dependency allowances and education grants for children necessarily depend on whether the staff member has a spouse, dependents or children in school.¹¹³ The test of discriminatory treatment in this regard therefore is whether the “differences in personal circumstances arising from the [expatriate status of staff members] *vis-à-vis* their non-expatriate colleagues – constitute a rational basis” for exclusion.

Finally, a third criterion of classification brought before the Tribunal was gender. A woman challenged the Bank’s decision not to ‘regularize’ her appointment, allowing her initial three-year appointment to expire, contending *inter alia* that her male supervisors, due to cultural differences, apparently mistook her assertiveness for belligerence. The Tribunal found no evidence of gender-discrimination, although it awarded some compensation for procedural infractions.¹¹⁴

¹¹² Citing *Mesch and Siy (No. 4)*, Decision No. 35 [1997], 3 ADBAT Rep. 71, at 84.

¹¹³ *De Armas, et al.*, Decision No. 39 [1998], 4 ADBAT Rep. 9.

¹¹⁴ *Alexander*, Decision No.40 [1998], 4 ADBAT Rep.41.

PORT STATE CONTROL: A COMMENT ON THE TOKYO MOU AND ISSUES OF INTERNATIONAL LAW*

Ted L. McDorman**

1. INTRODUCTION

In December 1993 regional port state control came to the Pacific with the acceptance of the Memorandum of Understanding on Port State Control in the Asia-Pacific Region,¹ known as the Tokyo Port State Control MOU. The Tokyo Port State Control MOU came into effect in April 1994.

Port state control encourages the appropriate local maritime authorities to inspect vessels voluntarily in port to ensure that those vessels have been constructed, and are equipped, crewed and operated in compliance with the standards set by the relevant international treaties. Where vessels are detected as not being in compliance with the standard-setting conventions, the port state may prevent the offending vessel from leaving until the defects have been remedied. The goal is that as countries and regions adopt port state control, enforcement of international vessel standards will be enhanced and vessel-owners will undertake to comply with the standards voluntarily rather than risk detection of sub-standard vessels and face potential delays and penalties. The primary aim of port state control, therefore, is the identification and elimination of sub-standard vessels.

Port state control has not increased the number of international treaties which govern vessel-source marine pollution, rather port state control is a co-operative mechanism designed to enhance compliance with existing conventions.² A recent comprehensive study by Dr. EDGAR GOLD listed 83 interna-

* This contribution is a revised version of a paper presented at the SEAPOL-Kitakyushu International Conference on Port and Distribution Center Development held in Kitakyushu, Japan, 28-29 August 1998.

** Faculty of Law, University of Victoria, Victoria, British Columbia; Oceans Institute of Canada, Halifax.

¹ Memorandum of Understanding on Port State Control in the Asia-Pacific Region, 1 December 1993, reprinted in ROY S. LEE and MORITAKA HAYASHI (eds.), *New directions in the law of the sea: regional and national developments* (Dobbs Ferry, N.Y.: Oceana Publications, Release 97-1, November 1997). There have been several amendments made to the Tokyo MOU since its original adoption. The most recent, complete version of the Tokyo MOU and the one referred to in this contribution can be found by visiting the website www.ijnet.or.jp/tokyoumou/.

² See text *infra* accompanying notes 31-32 regarding the international legal status of the regional Port State Control arrangements.

tional treaties and related instruments as dealing with vessel-source marine environmental pollution.³ The treaties can be grouped into four categories. First are treaties which create jurisdictional competences for national governments to deal with national-flag vessels and, more importantly, foreign-flag vessels that are within waters claimed by a state. The most important of these treaties is the 1982 United Nations Convention on the Law of the Sea.⁴ Second are the conventions which create standards for vessel construction and operation and are directed specifically to the issue of marine environmental pollution. The most important of these treaties is the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL),⁵ its 1978 Protocol⁶ and the subsequent amendments. Third are the treaties that create liability and compensation schemes in the event of vessel-source marine pollution damage. The two best known of these treaties are the International Convention on the Civil Liability for Oil Pollution Damage, 1969 (CLC)⁷ and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (the Fund Convention),⁸ both of which have been updated by amendments and protocols. Finally, there are the general maritime safety conventions that apply to all ocean-going vessels. An important example is the International Convention for the Safety of Life at Sea, 1974 (SOLAS).⁹ Port state control is a new approach to preventing marine environmental pollution by encouraging compliance with the second and fourth categories of international treaties — the standard setting conventions.

This contribution will focus on the development and operation of port state control and has four sections: a section on the international law of the sea that forms the basis of port state control; a brief section on the history of regional port state control agreements; a section which examines the key operational aspects of the Tokyo Port State Control MOU; and a short conclusion.

³ See: EDGAR GOLD, *Gard Handbook on Marine Pollution* (Gard: Arendal, Norway, 2nd edition, 1998) 56 and 88-95.

⁴ United Nations Convention on the Law of the Sea, reprinted in 21 ILM (1982) 1261 (hereinafter: CLOS 1982).

⁵ International Convention for the Prevention of Pollution by Ships (MARPOL), reprinted in 12 ILM (1973) 1319.

⁶ Protocol Relating to the Convention for the Prevention of Pollution from Ships (MARPOL), reprinted in 17 ILM (1978) 546.

⁷ International Convention on Civil Liability for Oil Pollution Damage, reprinted in 9 ILM (1970) 45.

⁸ Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, reprinted in 11 ILM (1972) 284.

⁹ International Convention for the Safety of Life at Sea, 1184 UNTS 2.

2. INTERNATIONAL LEGAL ISSUES REGARDING PORT STATE CONTROL

2.1. Port State v. Flag State

International law embraces the fiction that ships are floating land masses of the state where the vessel is registered and that the law applicable to the ship is the law of the state of registry — the flag state.¹⁰ Thus, regarding international vessel standard treaties, a vessel is required to comply with those treaties binding upon the flag state. Moreover, enforcement of applicable treaties against vessels is to be undertaken by the flag state.

What port state control has accomplished is the addition of another group of states, those states with ports visited by vessels, with the responsibility to enforce international conventions which create vessel standards. Flag state jurisdiction has not been altered. Rather, what has occurred is an assertion of the international legal principle, that, within a port, the host state has absolute jurisdiction over visiting vessels in the same manner as if the visiting vessel were a foreign citizen vacationing or doing business in the host country. The result being that a visiting vessel is subject to and must comply with the laws and regulations of the host country.

There is no conflict in international law between the authority of a port state over a visiting vessel and the authority of the flag state respecting that vessel. International law is clear that the authority of the port state is superior to that of the flag state while the vessel is in port. As two writers state: "By entering foreign ports and other internal waters, ships put themselves within the territorial sovereignty of the coastal state".¹¹ While port state superior authority is the rule, there are several potential exceptions. First, if the visiting vessel is a government vessel, issues of sovereign or diplomatic immunity may arise. Second, if a vessel is not voluntarily in port but had to put into port because of an emergency or weather, there may be a limitation in customary international law on the authority of the port state regarding that vessel.¹²

While there is no conflict in international law between the authority of a port state and the flag state, the legal certainty does not accurately reflect the tension between the port state and the flag state. Traditionally, port states rarely interfered with foreign flag vessels voluntarily in port. Unless the activity of a visiting vessel or on board a visiting vessel directly affected the populace of the port, host states declined to exercise legal authority over visiting vessels.¹³ International commerce and sensibilities regarding national sovereignty supported

¹⁰ CLOS 1982 Art.91(1). See generally: E.D.BROWN, *The international law of the sea* (Aldershot: Dartmouth Publishing, 1994) at 287.

¹¹ R.R.CHURCHILL and A.V.LOWE, *The law of the sea* (Manchester: Manchester University Press, 2d.ed., 1988) at 54.

¹² *Ibid.* at 54 and 56-57.

¹³ *Ibid.* at 54-55.

port state forbearance in exercising authority over visiting foreign vessels. Port state control, while clearly supportable by international law, does interfere with the traditional expectations of visiting foreign vessels to be left alone while in port.

2.2. Access to port

An important corollary to the international legal principle that a host state has authority over foreign vessels voluntarily in port is that a port state can prohibit the entry into port of any vessel. Put another way, customary international law does not recognize the existence of a right of access to a port by a foreign vessel. Such a right of access may exist under international treaty law, for example, the 1923 Convention and Statute on the International Regime of Maritime Ports.¹⁴ International trade agreements, such as those administered by the World Trade Organization,¹⁵ also might be construed in such a way that a failure to allow port access could amount to a breach of an international trade law obligation.¹⁶ It is clear from the above that, subject to treaty obligations, a host state can deny access to its ports and impose what conditions it thinks reasonable on foreign vessels seeking access to a port. The economic realities of ocean trade, however, operate to keep conditions on access to port from becoming so restrictive that vessels elect to bypass the ports of certain countries.

2.3. Application of laws by the port state

The superior position of the authority of a port state over visiting vessels *vis-à-vis* the authority of the flag state can lead to the situation where a port state can apply an international treaty against a visiting vessel even though the flag state of the visiting vessel is not a party to that treaty. Usually an international treaty is only applicable and enforceable between states which are parties to the treaty. Flag states have argued that port states should not impose international agreements against visiting vessels to which the flag state is not a party. The flag state argument is based on the concern that a commercial vessel may face conflicting laws, that of the port state and the flag state. Moreover, it is argued that since a vessel is always subject to flag state laws and, only while in port subject to host state laws, that the law of the flag state should be respected. However, under principles of international law, once a foreign vessel voluntar-

¹⁴ Convention and Statute on the International Regime of Maritime Ports, 58 LNTS 285.

¹⁵ See Agreement Establishing the World Trade Organization, reprinted in 33 ILM (1994) 1144, in particular Annex 1 for a listing of the agreements administered by the W.T.O. The most important agreement is the General Agreement on Tariffs and Trade, 55 UNTS 194.

¹⁶ See LOUISE DE LA FAYETTE, "Access to ports in international law", 11 *International Journal of Marine and Coastal Law* (1996)1 at 18-21, who argues that international trade law does not interfere with a port state's right to deny a foreign flag vessel access to port.

ily enters into a port of a country, that vessel becomes subject to the laws and regulations of the host country irrespective of whether those laws and regulations are based upon treaties to which the flag state of the visiting vessel is also a party.

It must be noted that the laws and regulations that a port state can apply to a visiting vessel are not without legal limit. Customary international law directs that a port state can only enforce laws that relate to activities of a foreign vessel that take place while the vessel is in port. This includes construction, design, safety, crewing and equipment standards that a vessel must meet. The 1982 Law of the Sea Convention, which can be taken to be customary international law on this point, provides that a port state also can enforce laws that relate to activities of a foreign vessel that took place *in the waters of the host state* prior to a vessel's entry into port. The qualification is that the laws to be enforced by a port state must have been enacted 'in accordance with' the Law of the Sea Convention or applicable international rules and standards for vessel-source pollution prevention, reduction and control.¹⁷ Where an activity (for example, a pollution discharge) of a foreign vessel takes place on the high seas or in the waters of a third state, and that activity does not affect the port state, customary international law does not permit a host state to enforce its laws regarding that activity against a visiting foreign vessel in its ports.¹⁸ In such situations, the law that is applicable is that of the flag state or the coastal state where the activity took place.¹⁹ Article 218 of the Law of the Sea Convention, referred to as the port state enforcement provision, attempts to create an enforcement capacity for a port state in the situation where a foreign vessel discharges a pollutant on the high seas or in the waters of another state in contravention of existing international standards.²⁰ It is highly questionable whether Article 218 of the Law of the Sea Convention has emerged as part of customary international law. Moreover, few countries have extended their law to embrace a port state enforcement power of this type and none of the regional port state control accords discussed below have adopted the contents of Article 218 of the Law of the Sea Convention.

¹⁷ CLOS 1982 Art.220(1).

¹⁸ The most obvious exception to this statement concerns vessels engaged in piracy activities. Other excepted activities may include slave trading, drug trafficking and unauthorized broadcasting on the high seas. See Part VII of the CLOS 1982.

¹⁹ This limitation that exists on a port state is the result of the concept of extra-territoriality. See, generally, T.L.MCDORMAN, "Port state enforcement: a comment on Article 218 of the Law of the Sea Convention", 28 *Journal of Maritime Law and Commerce* (1997) 305 at 312-314. For the exceptional activities noted in *supra* note 18, the basis of the jurisdiction of a port state would be the universality principle of jurisdiction as accepted in customary international law or the specifics of the 1982 Law of the Sea Convention.

²⁰ For a full discussion of Art.218 port state enforcement, see MCDORMAN, *loc.cit.*n.19 at 305-322.

2.4. Departure from port

A final international law issue to be noted concerns the authority of a host state to detain, seize or arrest, and thus prevent the departure from port of a visiting foreign vessel.

The right of a foreign vessel to depart port is tied to the penalties that may be imposed against the vessel because of breaches of the statutory law of the host state or because of court orders and arrest that may arise from commercial disputes. International law does not inhibit local courts from imposing injunctions or like measures arising from commercial disputes against foreign vessels. Moreover, the ability of a host state to detain a foreign vessel in port as a result of a commercial dispute would appear to be consistent with international law, although qualifications on this power of detention may arise from the 1952 Arrest of Sea-Going Ships Convention.²¹

The more significant issue here is the ability of a foreign vessel to depart port where the host state has determined that the vessel is not in compliance with laws and standards related to the construction, design, equipment, operation or crewing of a vessel. There does not appear to be any restriction in international law regarding the type of penalty that can be levied against a foreign vessel which, while in port, breaches such laws or standards. Thus, detention, arrest or seizure of a visiting vessel would be possible. The 1982 Law of the Sea Convention only imposes limitations on penalties where foreign vessel activities, e.g. pollution discharges which breach the host state's laws, take place in the host state's territorial sea or exclusive economic zone. In such situations, only monetary penalties are to be imposed, except if, in the territorial sea, the alleged illicit activity was "a wilful and serious act of pollution".²² More generally, the Law of the Sea Convention in Articles 219 and 226(1)(c) permits a host state to take 'administrative measures' to prevent any vessel deemed 'unseaworthy' and which "would present an unreasonable threat of damage to the marine environment" from departing port.²³ The flag state of a vessel detained pursuant to these provisions would be entitled to pursue prompt release of the vessel through the dispute settlement procedures of the Law of the Sea Convention.²⁴

²¹ International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 439 UNTS 193. See GEORGE C. KASOULIDES, *Port state control and jurisdiction* (Dordrecht: Martinus Nijhoff, 1993) at 26.

²² CLOS 1982 Art.230(1) and (2).

²³ See SHABTAI ROSENNE and ALEXANDER YANKOV, *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol.4 (Dordrecht: Martinus Nijhoff, 1991) at 273-278.

²⁴ See the various learned articles in 11 *International Journal of Marine and Coastal Law*(1996) No.2 and the commentary on the first prompt release case before the Law of the Sea Tribunal by BERNARD H. OXMAN, "The M/V 'Saiga'", 92 AJIL (1998) 278-282.

2.5. Summary

International law of the sea provides that a port state has extensive authority over vessels voluntarily in port. Subject to treaty rights, access to a port can be denied and conditions on foreign vessel access can be imposed. There are few limitations on the laws that a host state can apply to a visiting vessel regarding construction, design, equipment, operation and crewing. Finally, the host state has wide powers of detention, arrest and seizure of vessels in port where local laws are breached.

3. HISTORY OF REGIONAL PORT STATE CONTROL MOUS

While international law has long accepted that a host state has authority over foreign vessels voluntarily in port, port states have been reluctant to upset the traditional approach of the flag state being responsible for enforcing marine pollution prevention and vessel safety laws against their vessels. This reluctance of a host state to impose strict laws against visiting vessels arose from economic realities. Competition between ports of different countries operated to ensure that a country did not adopt port laws unfavourable to trade. Moreover, strict environmental laws or other port laws regarding visiting vessels could increase the cost of goods. Finally, the shipping industry has long argued that host states applying differing local standards would create a checker-board of regulations that would increase compliance costs unreasonably and inhibit ocean trade. While certain states, such as the United States, because of their unique geographical, economic and political situation, could unilaterally apply strict port laws, other countries feared adoption of strict port laws would have the significant economic repercussions suggested by the shipping industry. However, the increasing concern about sub-standard vessels plying the oceans of the world — by the public, as a result of publicity surrounding oil tanker disasters such as the *Exxon Valdez*; by the shipping industry, because of their poor public image; and by governments, in response to the public and industry — created a demand for a co-operative or *regional* approach to encourage port states to enhance enforcement of marine pollution and vessel safety laws against visiting vessels.

The first such regional arrangement of port states was created in Europe through the 1982 Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment,²⁵ known as the Paris Port State Control MOU. This was followed a decade later by the 1992 Latin American Agreement on Port State Control,²⁶

²⁵ Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, reprinted in 21 ILM (1982) 1.

²⁶ The Latin America Port State Control agreement is discussed briefly in GOLD, op.cit.n.3 at 76.

then came the previously noted 1993 Tokyo Port State Control MOU, the 1996 Caribbean Port State Control MOU,²⁷ the 1997 MOU on Port State Control in the Mediterranean Region and preparations are being made for a port state control MOU for the Indian Ocean.

All the port state control arrangements are substantively similar and follow the model of the 1982 Paris Port State Control MOU.²⁸ For example, all the port state control MOUs contain wording in the preamble which indicates the need for a *regional* approach “to prevent the operation of substandard ships” in order “to avoid distorting competition between ports”.²⁹ Moreover, the preambles note that the ‘principal responsibility’ for implementing international standards on a vessel continues to rest with the flag state.³⁰ In other words, all the regional port state control MOUs are aware of the need to strike a balance between exercising the authority international law cedes to a port state with the responsibilities of flag states and, more importantly, economic realities.

Regional port state control has been approached through constitutive documents labelled as MOUs. The participants are the maritime authorities of the various countries rather than the states themselves. The intention was “not to enter into new contractual and binding obligations”.³¹ As a result, it can be stated that, as a matter of form, the MOUs are not international treaties. Operationally, however, the MOUs have all the characteristics of a functioning treaty with national maritime authorities applying the wording and fulfilling the expectations of the MOUs. In reality, only in the most technical sense are the regional port state control MOUs not international treaties.³²

4. THE TOKYO PORT STATE CONTROL MOU

The various port state control MOUs set out “guidelines for an improved and harmonized system of port state control and strengthened co-operation in the exchange of information”.³³ The idea of the port state control MOUs is that in each port of a region regular inspections will be undertaken of visiting vessels to determine whether the visiting vessels are in compliance with the standards laid down in specified international treaties. The information on the in-

²⁷ Memorandum of Understanding on Port State Control in the Caribbean Region, reprinted in LEE and HAYASHI, *op.cit.n.1*, Release 97-1, November 1997.

²⁸ The Paris Port State Control MOU is analyzed in detail in KASOULIDES, *op.cit.n.21* at 142-182.

²⁹ Tokyo Port State Control MOU, Preamble, paras. 6 and 7.

³⁰ Tokyo Port State Control MOU, Preamble, para. 5.

³¹ KASOULIDES, *op.cit.n.21* at 151, *see also* at 143-144.

³² The need to adopt differing approaches to international instruments so as to avoid form controlling or undermining substance is explained in detail in DOUGLAS M. JOHNSTON, *Consent and commitment in the world community* (New York: Transnational Publishers, 1997), in particular at 118-185, 211-246 and, regarding MOUs, at 284-285.

³³ GOLD, *op.cit.n.3* at 74.

spectations is to be shared among the port authorities of the region to avoid multiple inspections of vessels which are complying with standards, while allowing suspect vessels to be carefully monitored. All the vessel inspecting authorities are to apply the same international standards and implement equivalent procedures respecting inspection and reporting. Where sub-standard vessels are detected, the port authority is to detain the visiting vessel until the defect is remedied, or where that is not practical, allow the vessel to proceed to a port where the defect can be remedied.

The key points in the above overview of the operation of port state control under the regional MOUs are: what countries are part of a regional port state control agreement and how is the MOU administered; what international conventions are to be enforced by the port authorities; which and how many vessels are to be inspected; and when can a visiting foreign flag vessel be detained. The Tokyo Port State Control MOU will be reviewed looking at these four questions.

4.1. Adhering states and MOU administration

There are fifteen states, plus Hong Kong, which adhere to the Tokyo Port State Control MOU.³⁴ The Asian states are: the People's Republic of China, Indonesia, Japan, Korea, Malaysia, the Philippines, the Russian Federation, Singapore, and Thailand. The South Pacific states are: Australia, Fiji, New Zealand, Papua New Guinea, and Vanuatu. Canada is also a participating country. The Solomon Islands and Vietnam have signed the Tokyo MOU but have not yet formally accepted it. The United States, which has its own extensive programme of port state control,³⁵ has observer status.

The Tokyo MOU, like its regional cousins, creates a Port State Control Committee. The Committee is composed of representatives from all the adhering state authorities, observers from several United Nations organizations and other observers as the Committee deems appropriate. As noted, the United States is an observer. Amongst other things, the Port State Control Committee has the responsibility to develop and review inspection guidelines, approve amendments to the MOU, and develop and review procedures for the exchange of information. A small Secretariat, located in Tokyo, assists the work of the Committee.

³⁴ Annual Report on Port State Control in the Asia-Pacific Region 1997, website ijnet.or.jp/tokyomou/.

³⁵ See DAVID G. DICKMAN, "Port states, the United Nations Convention on the Law of the Sea, and the U.S. Coast Guard's Port State Control Initiative", paper presented at the 1995 Law of the Sea continuing legal education course held in Seattle at the Washington School of Law.

4.2. International conventions enforced

The Tokyo Port State Control MOU sets out eight international conventions which are to be enforced by the port authorities against all visiting vessels:³⁶

- the 1966 International Convention on Load Lines,³⁷
- the 1974 Safety of Life at Sea Convention (SOLAS),³⁸
- the 1978 Protocol to the 1974 SOLAS Convention,³⁹
- the 1973 Convention for the Prevention of Pollution from Ships (MARPOL), and the 1978 Protocol,⁴⁰
- the 1978 Convention on Standards for Training, Certification and Watch-keeping for Seafarers,⁴¹
- the 1972 International Regulations for Preventing Collisions at Sea;⁴²
- the 1969 Convention on Tonnage Measurement of Ships,⁴³ and
- the 1976 Merchant Shipping (Minimum Standards) Convention of the International Labour Organization (ILO Convention No.147).⁴⁴

The goal is that each inspecting authority will apply a uniform set of standards as contained in the designated international treaties. However, section 2.4 of the Tokyo MOU directs that each inspecting authority is only to apply those international conventions which are in force and binding for that port state. All the above noted treaties are legally in force. The record of state ratification of the treaties in the Tokyo MOU region is very good. Four of the eight instruments have been ratified by all the Tokyo MOU states.⁴⁵ The 1978 Protocol to the 1974 SOLAS Convention has not been ratified by Canada, Fiji, Papua New Guinea, the Philippines or Thailand. MARPOL has not been ratified by Fiji, New Zealand, the Philippines or Thailand. The Philippines is the only Tokyo MOU state not to be a party to the 1972 Collision Regulations. However, it appears that many of the Tokyo MOU states are not parties to the 1976 Merchant Shipping (Minimum Standards) Convention. Variation in enforcement

³⁶ Tokyo Port State Control MOU, section 2.1.

³⁷ International Convention on Load Lines, 640 UNTS 133, entered into force 21 July 1968.

³⁸ SOLAS Convention, *supra* n.9, entered into force 25 May 1980.

³⁹ Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, reprinted in 17 ILM (1978) 579, entered into force 1 May 1981.

⁴⁰ MARPOL Convention, *supra* n.5, and the 1978 Protocol of the MARPOL Convention, *supra* n.6. Entered into force 2 October 1983.

⁴¹ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, *United Kingdom Treaty Series* 1984:50 (Cmnd.9266). Entered into force 28 April 1984.

⁴² Convention on the International Regulations for Preventing Collisions at Sea, reprinted in 12 ILM (1973) 734. Entered into force 15 July 1977.

⁴³ International Convention on Tonnage Measurement of Ships, *United Kingdom Treaty Series* 1982:50 (Cmnd 8716). Entered into force 18 July 1982.

⁴⁴ Merchant Shipping (Minimum Standards) Convention (ILO Convention No.147), reprinted in 15 ILM (1976) 1288. Entered into force 28 November 1981.

⁴⁵ State ratification for the first seven listed treaties is based on information from the International Maritime Organization (IMO) as of 1 September 1998. See the IMO website: www.imo.org/imo/convent/status.htm.

will also exist where amendments are made to any of the eight conventions, since the Tokyo MOU directs that, while amendments are part of the listed conventions, a port state is only to enforce amendments which it has formally adopted.⁴⁶

4.3. Vessels inspected

The Tokyo Port State Control MOU, like the other regional port state control MOUs, provides that the standards in the designated international conventions are to be applied against all vessels irrespective of whether the visiting vessel's flag state is a party to the relevant convention. The wording of the Tokyo MOU directs that port authorities are to ensure that "no more favourable treatment" is given vessels from a state not a party to the relevant treaty than a vessel from a state a party to the relevant treaty.⁴⁷

In an ideal world, all vessels visiting a port would be inspected by the relevant host authorities. This, of course, is not practicable. A key component of regional port state control is to ensure that sufficient inspections are undertaken to provide a high degree of confidence that sub-standard vessels are being detected and to provide an impetus to ship owners to voluntarily comply with vessel standards. The Paris Port State Control MOU deals with this issue by encouraging each state to inspect 25 per cent of all vessels which enters its ports.⁴⁸ This 25 per cent requirement has led to 90 per cent of all vessels using ports in the European region being inspected.⁴⁹ The Tokyo MOU takes a different approach. The Tokyo MOU sets a regional target that, by the year 2000, 50 per cent of all ships operating in the region are to be inspected, leaving the question of how many inspections each state is to undertake to be determined annually by the Port State Control Committee.

The Tokyo MOU provides that in selecting vessels to inspect port authorities are to "pay special attention" to, amongst others: passenger ships; oil tankers, gas carriers and similar ships "which may present a special hazard"; vessels which have had recent deficiencies; and vessels which have not been inspected within the previous six months.⁵⁰

In both 1996 and 1997, the 50 per cent threshold was reached in the Asia-Pacific region. In 1997, regional port authorities inspected 12,957 vessels from 102 countries.⁵¹ The estimated number of vessels in the Tokyo MOU region

⁴⁶ Tokyo Port State Control MOU, section 2.4, sentences 2 and 3.

⁴⁷ Tokyo Port State Control MOU, section 2.5 and see KASOULIDES, *op.cit.*n.21 at 155-157.

⁴⁸ Paris Port State Control MOU, section 1.3.

⁴⁹ GERHARD KIEHNE, "Investigation, detention and release of ships under the Paris MOU on Port State Control: A view from practice", 11 *International Journal of Marine and Coastal Law* (1996) 217 at 219.

⁵⁰ Tokyo Port State Control MOU, section 3.3.

⁵¹ Annual Report 1997, *supra* n.34.

was 24,779, thus approximately 52 per cent of vessels using ports in the region were inspected.

4.4. Deficiencies and detention

Under the Tokyo MOU detailed procedures have been adopted and are applied regarding the conducting of vessel inspections. Understanding the commercial nature of ocean trade and the cost factors involved in extensive port time, the Tokyo MOU provides that inspection activities are to be conducted so as "to avoid unduly detaining or delaying a ship".⁵² Another consideration regarding detention of visiting vessels is the potential of lawsuits by the vessel owner where a port authority inappropriately detains a vessel.⁵³

In the case of deficiencies, inspecting authorities are to secure rectification and provide information to other port authorities on the results of inspections. Only where a deficiency is "clearly hazardous to safety, health or the environment" may a port authority require removal of the hazard prior to allowing a vessel to depart.⁵⁴ Thus, vessel detentions are to be rare.

Of the 12,957 vessels inspected pursuant to the Tokyo Port State Control MOU in 1997, 58 per cent (7,518) of the vessels were found to have deficiencies.⁵⁵ However, only 830 vessels from 53 states were actually detained. Thus, only 11 per cent of vessels with deficiencies were detained and only 6.4 per cent of all vessels inspected were detained.

5. CONCLUSION

The legal jurisdiction exercised by port authorities over foreign vessels voluntarily in port pursuant to regional port state control MOUs is consistent with the international law of the sea. A port state could exercise even greater authority over visiting vessels than that suggested under the regional port state control MOUs and not be in violation of international law. However, the regional port state control MOUs are an attempt to balance the legal capacity of a port state with the economic needs and traditional expectations of the global shipping industry and to avoid competition among ports.

How effective have regional port state control MOUs been in reducing marine environmental pollution and the number of sub-standard vessels? The results appear to be favourable, although mixed. Regarding reducing marine environmental pollution, Dr. EDGAR GOLD attributes the 99.9995 per cent safe

⁵² Tokyo Port State Control MOU, section 3.11, first sentence.

⁵³ This issue is commented upon briefly by JOHN HARE, "Port State Control: Strong medicine to cure a sick industry" 26 *Georgia Journal of International and Comparative Law* (1997) 571 at 590-592.

⁵⁴ Tokyo Port State Control MOU, section 3.7.

⁵⁵ Annual Report 1997, *supra* n.34.

arrival of oil to its destination, in part, to enhanced port state controls.⁵⁶ RONALD B. MITCHELL attributes tanker owner compliance with international vessel standards to the increased probability of detection and detention arising in large measure from regional port state control arrangements.⁵⁷ However, Professor JOHN HARE has observed that vessel losses have not decreased, which might be an expected outcome from effective port state control and the reduction of sub-standard shipping.⁵⁸ Based on a detailed study of the workings of the Paris Port State Control MOU, PETER B. PAYOYO noted that the number of sub-standard vessels had not gone down, but had in fact increased.⁵⁹ PAYOYO was optimistic, however, that as aged fleets were replaced and regional port state control MOUs became more wide-spread, that "truly dramatic results" would occur.

Based on the favourable, but mixed, evidence of the effectiveness of regional port state control MOUs to the present, all observers agree that there is an important future for regional port state control initiatives like the Tokyo Port State Control MOU and that ultimately the results will be safer ships and cleaner seas.

⁵⁶ GOLD, *op.cit.*n.3 at 317-318: "Ship-source marine pollution has been reduced to the lowest-ever level through a combination of stricter coastal and port state controls, better shipboard technology and operations and overall value of the product."

⁵⁷ RONALD B. MITCHELL, *Intentional oil pollution at sea: Environmental policy and treaty compliance* (Cambridge: MIT Press, 1994), at 267.

⁵⁸ HARE, *loc.cit.*n.53 at 592-593.

⁵⁹ PETER BAUTISTA PAYOYO, "Implementation of international conventions through port state control: An assessment", 18 *Marine Policy* (1994) 379 at 392.

MARITIME JURISDICTION OVER VESSEL-SOURCE POLLUTION IN THE EXCLUSIVE ECONOMIC ZONE: THE CHINESE EXPERIENCE

Zou Keyuan*

The issue of marine environmental protection in the exclusive economic zone (EEZ) has only recently emerged after the establishment of the EEZ regime under the 1982 United Nations Convention on the Law of the Sea (the LOS Convention). Since about 90% of the marine living resources is to be found in the EEZ and most of the human maritime activities also take place near the shore, environmental protection has become a critical aspect of the comprehensive management of the EEZ. According to the LOS Convention, a coastal state has the right to take necessary measures to prevent and control vessel-source pollution in its EEZ.¹ This raises maritime jurisdictional issues in the context of the following questions: to what extent can a coastal state exercise its legitimate right in laying down laws and regulations to protect the natural resources within its EEZ, and in taking measures to combat vessel-source marine pollution including the punishment of the offending vessel?

China is a big coastal state with a coastline of more than 18,000 kilometres along its mainland and thousands of islands scattered in the China seas. At the time of its ratification of the LOS Convention in May 1996, China made a statement declaring its intention to establish an EEZ. On 26 June 1998 China promulgated the Law on the EEZ and the Continental Shelf,² although the exact outermost limits of China's EEZ is still unknown. The present paper attempts to examine and assess the jurisdictional rights of a coastal state in terms of control of vessel-source pollution in its EEZ and, in particular, the Chinese practice in regard to the above two questions.

* Faculty of Law, Peking University, Beijing; East Asian Institute, National University of Singapore. The author is grateful to Prof. JOHN WONG for his helpful editorial suggestions on a previous version of this paper.

¹ Arts.56, 211.

² Adopted by the Third Session of the Ninth National People's Congress held in June 1998. *People's Daily* [in Chinese], 27 June 1998. English translation in *Law of the Sea Bulletin* No.38 at 28-31; somewhat different translation by the present author in *The MIMA* [Malaysian Institute of Maritime Affairs] *Bulletin*, Vol.7 (1999) No.1 at 27-29.

1. VESSEL-SOURCE MARINE POLLUTION AND INTERNATIONAL LEGISLATION

Marine pollution is defined in the LOS Convention as:

“the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.”³

In terms of its sources, marine pollution is generally divided into six categories according to its source: land-based sources, sea-bed activities subject to national jurisdiction, pollution from the International Sea-Bed Area; dumping of waste at sea; pollution from or through the atmosphere; and pollution from vessels.⁴ Vessel-source pollution consists mainly of pollution from ship cargoes,⁵ and is either operational or accidental. It is estimated that the marine environment is polluted by about 5 million tons of oil, of which 47% is from ships. Operational pollution is a function of the manner in which ships operate. Oil tankers, for example, traditionally wash their oil tanks and dispose of oil residues at sea, causing significant pollution.⁶ More serious is the deliberate discharge from vessels at sea. According to BIRNIE, 3.5 tons of oil per annum are deliberately discharged or result from accidental spills globally – half from marine-based sources, mainly shipping.⁷

China borders on four seas, i.e., the Bohai Sea, the Yellow Sea, the East China Sea and the South China Sea. The state of the marine environment is generally good, but according to recent trends the quality of the sea water will get worse if no more effective measures are taken immediately. While the main pollution of the China seas, or about 80% of the total, is land-based pollution, vessel-source pollution cannot be ignored, since all the seas involved are categorized as semi-enclosed under the definition of the LOS Convention, with a heavy concentration of shipping routes.⁸ One of the major pollutants in the

³ LOS Convention Art.1(4). Text of the Convention in, *inter alia*: *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (United Nations, 1983). The Convention entered into force on 16 November 1994.

⁴ LOS Convention Arts.207-212.

⁵ DOUGLAS BRUBAKER, *Marine pollution and international law: principles and practice* (1993) 34.

⁶ PATRICIA W. BIRNIE & ALAN E. BOYLE, *International law and the environment* (1992) 263.

⁷ PATRICIA BIRNIE, “Pollution and fisheries in the North Sea”, in GEIR ULFSTEIN *et al.* (eds.), *The regulations of fisheries: legal, economic and social aspects* [proceedings of a European workshop] (1986) 200.

⁸ EDGAR GOLD and DOUGLAS JOHNSTON, “Pollution control in the semi-enclosed seas of East Asia”, in CHOON-HO PARK AND JAE KYU PARK (eds.), *The law of the sea: problems from the East Asian perspective* (1987) 96-97.

China seas is oil, originating mainly from maritime transportation. According to incomplete statistics, from 1979 to 1984 there were 18 oil tanker incidents each spilling more than 100 tons of oil in China's sea areas, with a total spill of 21,000 tons.⁹ The normal discharge of waste oil from vessels into the sea around China is 46,000 tons annually, accounting for 52% of the total quantity of oil discharged into the sea.¹⁰ It is predicted that in the next one or two decades, oil pollution will increase with the development of the off-shore petroleum industry as well as maritime transportation, and that there will be a similarly increasing potential threat from vessel-source oil pollution.¹¹ In the year 2000, more than 360,000 tons of oil pollutants will go into the sea, double the quantity in the 1980s,¹² causing severe damage to the marine environment. It was reported in May 2000 that the quality of China's marine environment had been deteriorating continuously despite the implementation of the Law on Marine Environmental Protection for nearly 20 years.¹³ For these reasons, it is important for China to exercise jurisdiction over vessel-source pollution in its EEZ.

The efforts to lay down international legislation on the control of oil pollution from vessels began in 1926 when the United States sponsored a diplomatic conference on the issue. The conference produced a draft convention which, however, was not adopted. Related efforts made by the League of Nations in 1934 were also to no avail. The first treaty on the control of oil pollution from ships was the International Convention on Prevention of Oil Pollution at Sea which was adopted in London on 12 May 1954.¹⁴ The Convention affirmed the exclusive jurisdiction of the flag state over vessel-source oil pollution. The basis for this rule was provided by the generally accepted idea at that time that a ship was deemed to constitute part of the territory of the flag state, and the cardinal principle of freedom of navigation. However, the rule has proved to be inadequate in protecting the marine environment of the EEZ, for the following reasons:

(1) The EEZ is a sea area *sui generis*, where the coastal state enjoys sovereign rights and jurisdiction over the protection and preservation of the marine environment. Excessive emphasis on the exclusive jurisdiction of the flag state would be detrimental to the interests and rights of the coastal state.

⁹ *Marine technological policy* [China Blue Paper on Science and Technology, No.9, National Commission of Science and Technology, in Chinese] (1993) 254.

¹⁰ WANG WEIJIE and WU CHANGJIANG, "The harm from marine oil pollution for the fishery and its countermeasures", *Ocean and Coastal Zone Development* [in Chinese] Vol.11(1994) No.1:33.

¹¹ *Series on the Chinese Natural Resources: Ocean* [Compiling Committee of the Series on the Chinese Natural Resources (CCSCNR), in Chinese](1995) 129.

¹² *Strengthening the comprehensive management and improving the marine ecological environment* [Report of investigation of the management of China's marine ecological environment, Department of Management and Monitoring, State Oceanic Administration, in Chinese] (November 1995) 19. (on file with the author)

¹³ *People's Daily* 19 May 2000; see *infra* n.42.

¹⁴ 327 UNTS 3.

(2) If a vessel causes pollution in the EEZ of another state and the flag state fails to exercise its jurisdiction by ensuring adequate laws and regulations and their enforcement with respect to the vessel, the consequence would be that the offending vessel would escape its responsibility and liability.

(3) It is doubtful whether the flag state is able to exercise effective jurisdiction over vessels navigating far from the flag state.

(4) The rule does not guarantee the effective exercise of jurisdiction by a 'flag of convenience' state over vessels flying its flag, while enabling a vessel to avoid the effective jurisdiction of any state by flying a 'flag of convenience'.¹⁵

Partly due to the above reasons, the 1958 Convention on the High Seas set certain limitations to the jurisdiction of the flag state in its Articles 6, 24 and 25, with some exceptions, such as the right of the coastal state to lay down anti-pollution laws and regulations.¹⁶

Because of the *Torrey Canyon* incident in 1967¹⁷, the world community began to consider the question whether a coastal state which finds itself threatened with oil pollution damage of such magnitude should be entitled to take control of the situation, even against the will of other interested states or persons.¹⁸ As a result, two international conventions were adopted in Brussels in November 1969, among which was the International Convention Relating to the Intervention on the High Seas in Case of Oil Pollution Casualties (commonly known as the Public Law Convention). It acknowledged the jurisdiction of the coastal State over marine pollution on the high seas. Its Article 1 grants the coastal State the right after a marine casualty to "take such measures on the high seas as may be necessary to prevent, mitigate or eliminate" grave danger to their coastlines or related interests from threats of or actual oil pollution.¹⁹ Accordingly, the Convention was called 'epoch-making'.²⁰ The jurisdiction of the coastal state, however, was limited to cases of marine oil pollution, while other hazardous substances such as radioactive substances were not included in the Convention. The later International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)²¹ somewhat remedied the deficiency and covered not only oil pollution but also pollution by other hazardous substances.

¹⁵ Cf. ZOU KEYUAN, "Jurisdiction of the coastal state over vessel-source pollution in its exclusive economic zone", *Journal of the Southern Central Institute of Political Science and Law* [in Chinese] Vol.11 (1987) No.4:61.

¹⁶ 450 UNTS 11. The People's Republic of China is not a party to this Convention. The English language version of the Convention uses the words "pollution of the seas", whereas the Chinese version refers to "pollution of the high seas". Both are authentic texts. The difference could cause different interpretations that could affect the exercise of jurisdiction.

¹⁷ *Dictionary of international law* [Japanese Society of International Law, Chinese edition] (1985) 267-268.

¹⁸ DAVID W. ABECASSIS, *The law and practice relating to oil pollution from ships* (1978) at 84.

¹⁹ 970 UNTS 211; 9 ILM (1970) 25. The Convention entered into force on 6 May 1975.

²⁰ HIROBE WANO, "Marine pollution and international conventions", *Foreign Legal Science* [in Chinese] 1980 No.5:25.

²¹ 12 ILM (1973) 1319 and 17 ILM (1978) 546. On 1 July 1983 China notified the International Maritime Organisation that China acceded to MARPOL 73/78, without its Annexes III, IV and

As we can see from the foregoing, the jurisdiction of the coastal state over vessel-source pollution was not recognized under the traditional international law of the sea and was only achieved through constant efforts and demands of the coastal states. The establishment of such jurisdiction was no doubt revolutionary and a reflection of the modern requirements of science and technology.²² Nevertheless, the jurisdiction of the flag state remained superior to that of the coastal state, and the contradiction between the conflicting interests and contrary views of the maritime powers and coastal states could not be solved until the Third United Nations Conference on the Law of the Sea (UNCLOS III).

UNCLOS III AND THE LOS CONVENTION

UNCLOS III ushered in a new era with regard to the enhancement of the jurisdiction of the coastal state over vessel-source pollution, particularly in the EEZ, which was a new concept formulated and adopted by the Conference. As early as 1972, Kenya submitted a proposal on the EEZ to the UN Seabed Committee, suggesting that the coastal state should have exclusive jurisdiction in its EEZ for the purpose of preventing and controlling marine pollution.²³ On 31 July 1974 ten countries led by India and the Philippines submitted a joint proposal to UNCLOS III, concerning regional measures for marine environmental protection including a provision relating to the EEZ, to the effect that the coastal state should have jurisdiction to make and enforce laws and regulations as well as to take administrative and other measures regarding activities of all natural or legal persons, vessels, installations and other entities, in order to protect the marine environment of the EEZ.²⁴ Finally, the following two main theses may be derived from the various proposals on the EEZ in relation to vessel-source pollution that were put forward by the developing countries at UNCLOS III: (1) the coastal state is entitled to make laws and regulations on vessel-source pollution apart from the international rules and standards; and (2) the coastal state enjoys jurisdiction over the polluting vessel.

On the other hand, the maritime powers insisted on the traditional rule of the exclusive jurisdiction of the flag state, in accordance with their own interests and in order to maintain the freedom of navigation. They feared that if the coastal state were given jurisdiction over a polluting vessel in its EEZ, it would have a pretext to interfere in the freedom of navigation. As a consequence,

V. Accession to Annex III took place on 13 Sep.1994, to Annex V on 21 Nov.1988. The 1978 Protocol came into force on 2 October 1983. See 6 *AsYIL* (1996) 241.

²² Compare CHEN ZHIFANG, speech on marine environmental protection in the Third Committee of the Seabed Committee, 2 Aug.1972, in *Collected materials on the law of the sea*, edited by Peking University, Department of Law, Division of Int'l Law [in Chinese] (1974) 39-40.

²³ A/AC.138/SC.II/L.10, or see ZHAO LIHAI, *New developments of the law of the sea* [in Chinese](1984) at 167.

²⁴ UN Doc.A/CONF.62/C.3/L.6 (1974).

“such regulation, at best, would impose an unwarranted impediment on ocean traffic by reason of the complexity of a system of differing national regulations; and, at worst, it would be employed as a subterfuge aimed directly at restricting traffic, perhaps discriminatorily, for economic or political reasons”.²⁵ The Soviet Union took a reserved stand towards the idea of jurisdiction exercised by the coastal state, and stated that unilateral measures would only result in conflict. It proposed to apply international norms and standards instead of laws and regulations of the coastal state to vessel-source pollution.²⁶ At the Sixth Session of UNCLOS III, for example, the Soviet Union suggested that the jurisdiction of the coastal state would be limited to vessel-source pollution in its EEZ resulting from discharges, excluding other kinds of pollution by foreign vessels.²⁷ In a word, the attitude of the maritime powers towards the jurisdiction of the coastal State was negative. They preferred uniform international rules and standards while emphasizing the jurisdiction of the flag State.

It should be pointed out that some of the developed countries were on the side of the developing countries during UNCLOS III. A typical example was Canada, which was one of the ten states endorsing the joint proposal mentioned earlier. It had advanced domestic legislation on jurisdiction over vessel-source marine pollution. As early as 1970, Canada had promulgated the Prevention of Arctic Pollution Act,²⁸ which claimed Canadian jurisdiction over marine pollution cases up to 100 nautical miles from the Canadian coast. Any vessel which did not comply with the Act would be prohibited to enter the Arctic waters and be subject to inspection and detention. Against the opposition from the United States, Canada stated that it “cannot accept the right of innocent passage if that right is defined as precluding the right of a coastal state to control pollution in such cases. The law is underdeveloped on this question but if that is the case, we propose to develop it”.²⁹ Through the efforts of Canada and other countries the 1970 Canadian Act became the basis for the formulation of Article 234 of the LOS Convention.³⁰

²⁵ J. HARGROVE, “Environment and the Third Conference on the Law of the Sea” in BURNS H. WESTON *et al* (eds.), *International law and world order: A problem-oriented coursebook* (1980) at 902.

²⁶ See ZHAO, *supra* n.23 at 169-170.

²⁷ *Ibid.* at 172.

²⁸ Act of 17 June 1970, 9 ILM (1970) 543.

²⁹ T.L. GILL, “Marine pollution and international law”, in RAM P. ANAND (ed.), *Law of the sea: Caracas and beyond* (1980) at 324.

³⁰ Art.234 provides that “coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and the pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence”.

China regarded herself as a developing country and naturally stood on the side of these countries. First, China explained her position on marine environmental pollution at the Conference to the effect that "each State has the right to formulate its environmental policy and take all necessary measures to protect its marine environment and prevent pollution in the sea areas under its national jurisdiction. In so doing, the coastal States should of course have regard for the interests of all and those of its neighbouring countries". When the marine environment was damaged by outside pollution, the coastal state should have the right to ask compensation from the country of the polluter.³¹ China emphasized the jurisdiction of the coastal state and regarded the measures taken by the coastal State to protect its marine environment and natural resources from foreign pollution as the natural extension of the right of preservation of the coastal State according to international law. China supported the practice of expanding the maritime jurisdiction of the coastal state in its environmental area, such as the Canadian expansion of its maritime jurisdiction by the 1970 Arctic Waters Pollution Act.³²

Second, China was against substituting international standards for coastal state jurisdiction and thus weakening the role of that state in the prevention and control of marine pollution. At the same time China deemed it necessary to establish a legal regime on the global or regional level to protect and preserve the marine environment.³³ On the question of the prevention of vessel-source pollution, the Chinese delegation to UNCLOS III defended the right of coastal states to establish and enforce their national laws, regulations, and standards to prevent such pollution in its EEZ and above its continental shelf in accordance with actual circumstances.³⁴ The Chinese delegation also criticized the words "enforce through international rules and standards made by the competent international organization or general diplomatic conferences" contained in Article 21(4) of the Revised Composite Negotiation Text (RCNT), pointing out that it would weaken the jurisdiction of the coastal state over the prevention of pollution within its sea areas. A single international rule or standard would be impractical and difficult to meet the requirements for marine environmental protection of different countries. If the coastal states were forced to implement uniform international rules and standards, it would protect vessels, but bring harm to the marine environment, or protect one part of the marine environment, but damage other parts of it. It would thus be neither favourable for the maintenance of the maritime interests of the coastal state, nor beneficial for the effec-

³¹ CHEN, *supra* n.22 at 40-41.

³² UN Doc. A/AC 138/SC III/SR 25 (1972).

³³ LUO YURU, speech on the marine environment in the Third Committee of UNCLOS III, in *Collected documents of the Chinese delegation to relevant UN Conferences* [in Chinese](1974) at 299-300.

³⁴ Speech of the Chinese delegate on the prevention of vessel-source pollution at the 32nd Meeting of the Third Committee, 15 Sep.1976, UNCLOS III, 5th Session, 6 *Collected Documents of the Chinese delegation to relevant UN Conferences*, July-December 1976 [in Chinese](1976) at 186.

tive protection of the marine environment.³⁵ After various discussions and revisions, China's views may finally be deemed reflected in Article 211(5) of the LOS Convention as the RCNT wording was revised and became "all generally accepted international rules and standards".

According to the LOS Convention, the coastal state has sovereign rights in its EEZ for the purpose of exploring and exploiting, conserving and managing all kinds of natural resources therein, and jurisdiction with regard to the protection and preservation of the marine environment.³⁶ This provision provides a legal basis for the coastal state to exercise its power in its EEZ with respect to the control of vessel-source pollution.

In regard to vessel-source pollution in particular, the LOS Convention (Art.211 para.5) provides that a coastal state may, for the purpose of enforcement, in respect of its EEZ adopt laws and regulations for the prevention, reduction and control of pollution from vessels, though under the condition of "conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference." If (Art.211 para.6) the international rules and standards "are inadequate to meet special circumstances" while a coastal state has reasonable grounds for believing that some part of its EEZ requires special mandatory measures for the prevention of pollution from vessels because of "recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic", the coastal state may, subject to consultation with other states and permission of competent international organizations, adopt laws and regulations, for the implementation of "such international rules and standards or navigational practices as are made applicable, through the organization, for special areas".³⁷ This is a further development of previous international regulations on marine pollution. The 1954 Convention on the Prevention of Pollution from Oil did not contain a provision on designation of special protected areas, while MARPOL 73/78 does contain provisions on special areas, but confined itself to oil discharge and specifically listed sea areas, such as the Mediterranean, the Baltic, etc.³⁸

With regard to the exercise of jurisdiction by a coastal state over vessel-source pollution the LOS Convention contain the following relevant rules:

1. States shall take all measures consistent with the Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source (Art.194 para.1). States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does

³⁵ Ibid. p.187.

³⁶ LOS Convention Art.56 para.1.

³⁷ LOS Convention Art.211 paras 5 and 6.

³⁸ MARPOL 73/78 Annex I Art.10.

not spread beyond the areas where they exercise sovereign rights in accordance with the Convention (Art.194 para.2). Article 194 (3) provides that “the measures taken ... shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimise to the fullest possible extent: (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels”. Article 220 further provides that “[w]hen a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may ... institute proceedings in respect of any violation of its laws and regulations adopted ... for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State”.

2. Where there are clear grounds for believing that a vessel navigating in the eez or the territorial sea of a state has, in the eez, committed a violation of applicable international rules and standards or laws and regulations of that state conforming and giving effect to such rules and standards, that state may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred (art.220 para.3).

3. Where there are clear grounds for believing that a vessel navigating in the EEZ or the territorial sea of a state has, in the EEZ, committed a violation resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel if the vessel has refused to give information or the information supplied is manifestly at variance with the evident factual situation (Art.220 para.5).

4. Where there is clear objective evidence that a vessel navigating in the EEZ or the territorial sea of a State has, in the EEZ, committed a violation resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or the EEZ, that State may, institute proceedings, including detention of the vessel (Art.220 para.6).

5. Article 230(1) provides that “monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards committed by foreign vessels beyond the territorial sea”.

These rules are clearer and more detailed in comparison with similar provisions contained in previous relevant conventions. They basically reflect an advanced approach to the matter and generally satisfy the demands from the coastal states with respect to jurisdiction over vessel-source pollution.³⁹

³⁹ See SHAO JIN, “Legal nature of the exclusive economic zone”, *Study on Maritime Issues* [in Chinese] 1983 No.2:32.

As we know, however, the LOS Convention is the result of compromise after many years of multilateral consultations and negotiations. Particularly, the provisions on the jurisdiction of the flag state or the coastal state over vessel-source pollution reflect a compromise between the developing countries and the maritime powers. Therefore, the jurisdiction of the coastal state is made the subject of a number of restrictive stipulations. On the one hand, the coastal state has a right to make laws and regulations for its EEZ, but, on the other hand, such laws and regulations must conform to the generally accepted international rules and standards.⁴⁰ That is equivalent to prohibiting the coastal state to adopt stricter laws and regulations than the international rules and standards. Moreover, the adoption of enforcing measures, visit, inspection, notification and institution of proceedings including the detention of the vessel may only be conducted if major damage or threat of such damage to the coastal State has really occurred and only if the coastal State has 'clear grounds' and 'evidence so warrants'. These limitations are reflected in Article 220 paragraphs 2, 5 and 6 of the Convention described above. Besides, the penalty to be imposed by the coastal state upon the polluting vessel is confined to 'monetary penalties' (Art.230). This means that the coastal state is not entitled to impose the sterner punishment which is available in case of pollution incidents which occur in its territorial sea. In addition, Section 7 of Part XII of the Convention (Articles 223-233) provides detailed safeguard measures which practically restrict the exercise of the coastal state's jurisdiction in case of vessel-source pollution. For example, Article 228 prescribes, albeit subject to exceptions, the suspension of "proceedings to impose penalties in respect of any violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution from vessels committed by a foreign vessel beyond the territorial sea of the State instituting proceedings" upon the taking of proceedings in respect of corresponding charges by the flag State within six months of the institution of the earlier proceedings by the coastal state. This provision in fact puts the jurisdiction of the flag State above that of the coastal State.⁴¹ In addition, the LOS Convention grants jurisdiction to the port state by way of counterbalance *vis-a-vis* the coastal state. Consequently, we can conclude from the foregoing that the jurisdiction of the coastal state over vessel-source pollution in its EEZ is limited.

Notwithstanding these limitations, the provisions of the LOS Convention on the jurisdiction of the coastal state in its EEZ are most meaningful as a further development of the achievements of previous conventions in favour of coastal state jurisdiction. It indicates an epochal trend and is testimony of the significant contributions made on this issue by the developing countries.

⁴⁰ LOS Convention Art.211(5).

⁴¹ As ATTARD noted, "[u]nder the 1982 Convention, a coastal State has little prescriptive competence over vessel-source pollution in the EEZ independent of, or in addition to, the measures originating from an international organisation or diplomatic conferences". DAVID JOSEPH ATTARD, *The exclusive economic zone in international law* (1987) at 98.

3. CHINESE LEGISLATION AND PRACTICE

During UNCLOS III, the Chinese delegation stressed the necessity and importance of the jurisdiction of the coastal State over vessel-source pollution in its EEZ. In implementing the LOS Convention that acknowledged such jurisdiction China enacted the Marine Environment Protection Law (MEPL) in 1982, effective 1 March 1983.⁴² It was the first basic law on marine environmental protection in China. Its Article 2 clearly stipulates: “This Law applies to the internal sea and territorial sea of the People’s Republic of China and all other sea areas under the jurisdiction of the People’s Republic of China”, while it enjoins all vessels to comply with it. It should be noted that at the time China had not yet established its EEZ, so that the words “other sea areas under the jurisdiction of the PRC” could only potentially refer to the EEZ. Before the actual establishment of the EEZ the words could apply only to the waters above the continental shelf. However, the article further provides in its paragraph 3 that “[t]his Law also applies to the discharge of harmful substances and the dumping of wastes done beyond the sea areas under the jurisdiction of the People’s Republic of China but causing pollution damage to such areas”. This means that, even if China could not exercise its jurisdiction over the vessel-source pollution in a potential, not yet existing, EEZ, it still could invoke the third paragraph of Article 2 of the Law to take necessary measures against a vessel that is causing damage to China on the high seas. The Law on the EEZ and the Continental Shelf of 26 June 1998⁴³ affirmed China’s jurisdiction over marine pollution in its EEZ. Article 10 of the Law provides that “[t]he authorities in charge ... shall have the right to take necessary measures to prevent, reduce and control marine pollution, and to protect and preserve the marine environment in the exclusive economic zone and the continental shelf”.

The MEPL contains several other pertinent provisions regarding the vessel-source pollution in the EEZ:

- No vessel shall discharge oils, oil mixtures, wastes and other harmful substances into the sea areas under China’s jurisdiction in violation of the law (Art.26). In case a vessel is involved in a marine accident which has caused, or is likely to cause, serious pollution damage to the marine environment, the Harbour Superintendency Administration has the power to take mandatory measures to avoid or minimise such pollution damage (Art.35).
- In the event of pollution caused by vessels that navigate, berth or operate in a sea area under Chinese jurisdiction, officers from the Harbour Super-

⁴² Chinese text and English translation in *Collection of the sea laws and regulations of the People’s Republic of China* [Office of Laws and Regulations, Department of Ocean Management and Monitoring, State Oceanic Administration, ed.] (1991) 69-93; English translation in *The laws of the People’s Republic of China 1979-1982* [Standing Committee of the National People’s Congress, Legislative Affairs Commission, ed.] 296.

⁴³ See *supra*, n.2.

intendency Administration or other officers under the latter's authority may board the vessel in question to examine and handle the case (Art.37).

- In case of a violation of the Law that has caused, or is likely to cause, pollution damage to the marine environment, the offender may be ordered to remedy the pollution damage within a definite time, and to pay a discharge fee, the cost for clean-up, and compensation for the losses sustained by the state. A fine may also be imposed on the offender (Art.41). In case of a violation of the law resulting in pollution damage to the marine environment and causing heavy losses to public or private property or deaths or injuries to persons, those who are directly responsible may be prosecuted for criminal responsibility (Art.44).

As we have seen the MEPL establishes Chinese jurisdiction over vessel-source pollution, generally in accordance with the relevant provisions of the LOS Convention.⁴⁴ It reflects the preservation of the rights and interests of China as a coastal State, and affirms the obligations of China deriving from the LOS Convention. Besides, the MEPL can also be seen as aiming at harmony with the relevant provisions of MARPOL 73/78.⁴⁵

The enforcement of the law in respect of prevention and control of vessel-source pollution in China principally rests with the Harbour Superintendency Administration, which is in charge of navigational matters. It was established in 1950 and has branches in major ports such as Shanghai, Tianjin, Qingdao, and Dalian.^{46 47}

In order to implement the MEPL China promulgated the Regulations Concerning the Prevention of Pollution of Sea Areas by Vessels.⁴⁸ The Regulations have elaborated the provisions of the MEPL, and apply to Chinese and foreign vessels within the sea areas and sea ports under China's jurisdiction, as well as to shipowners and other individuals (Art.2). The Regulations prescribe, *inter alia*, that in case of pollution accidents, vessels shall immediately take steps to control and eliminate the pollution, and report to the nearest Harbour Superin-

⁴⁴ An opposite view holds that China's claim to jurisdiction over vessels outside its territorial sea contradicts the general principles of international law. See MITCHELL A. SILK, *Marine environmental protection law: the dragon creeping in murky waters* [Occasional Papers/Reprints Series in Contemporary Asian Studies, School of Law, University of Maryland] No.6 (1985) 17.

⁴⁵ YAN JINSEN, "Guiding thoughts and principles of the Marine Environmental Protection Law", *Study on Maritime Issues* [in Chinese] 1983 No.1 at 20-21.

⁴⁶ For details, see ZOU KEYUAN, "The establishment of a marine legal system in China", 13 *International Journal of Marine and Coastal Law* (1998) 38.

⁴⁷ However, since 1983, vessels and aircraft of the China Marine Surveillance, under the direction of the State Oceanic Administration (SOA) have been dispatched to patrol the sea areas under Chinese jurisdiction for the purpose of pollution monitoring. On numbers of patrols and violations of the law, see *Working summary of twelve years implementation of the Law on the Marine Environmental Protection* [State Oceanic Administration (SOA), discussion paper, in Chinese], December 1995 at 2 (on file with the author).

⁴⁸ Regulations of 29 Dec. 1983, *Collection of the sea laws*, *supra* n.42 at 127.

tendency Administration (Art.6). In case of severe environmental damage, the latter may take whatever compulsory steps are necessary to avoid or mitigate any pollution damage, including compulsory clean-up and compulsory towage (Art.7), oblige the polluting vessel to pay the cost of eliminating the pollution and to compensate for the losses suffered by the state (Art.39), and give warnings or impose a fine (Art.46). As to foreign vessels, the Regulations take account of the international relations of China by granting them treatment on the flexible basis of reciprocity.⁴⁹

In addition to the above Regulations, the Ministry of Communications promulgated the Regulations Governing the Investigation and Settlement of Maritime Traffic Accidents in 1990.⁵⁰ Though the definition of the term "maritime traffic accidents" does not specifically refer to vessel-source pollution, it is assumed that the Regulations also cover vessel-source pollution, in light of the following wording of the definition of the term in Article 4: "(1) collision, striking between vessels or installations, swell damages; (2) striking a reef or running aground; (3) fire or explosion; (4) sinking; (5) damage or loss of machine parts or important instruments affecting the seaworthiness in the course of navigation; (6) other maritime accidents causing property damage or injury and loss of life".

China may exercise its jurisdiction over vessel-source pollution, including in the sea areas beyond its territorial sea through the aforementioned laws and regulations.⁵¹ In the early 1980s, the most serious vessel-source oil pollution accident since the foundation of the People's Republic of China occurred in a sea area beyond the Chinese territorial sea. The *Nanyang*, an oil tanker belonging to a Hong Kong-based ocean transport company but flying the Somalian flag, while navigating from Qingdao towards Zhanjiang with 16,488 crude oil, collided with a Dutch freighter (owned by another Hong Kong-based ocean transport company), as a result of which the *Nanyang* sank in the sea area near Haifeng County of Guangdong Province. A large quantity of oil spilled over, polluting a large surrounding area. In connection with the accident, a Chinese court began judicial proceedings under the 1974 Provisional Regulations on the Prevention of Pollution in the Offshore Areas of the People's Republic of China and the 1969 International Convention Relating to the Intervention on the High Seas in Case of Oil Pollution Casualties. The owner of the Dutch freighter initially raised objection to the jurisdiction of the Chinese court on the ground that the accident had occurred outside the Chinese territo-

⁴⁹ Article 53 provides that "all foreign vessels shall, besides observing these Regulations, be subject to the same treatment as those accorded to Chinese vessels by the foreign countries concerned". *Collection of the sea laws etc.*, *supra* n.42 at 147.

⁵⁰ *Collection of the sea laws etc.*, *supra* n.42 at 268.

⁵¹ In implementing the MEPL and regulations, the Harbour Superintendency Administration in the past years dealt with more than 6,800 incidents of vessel-source pollution, of which 1,300 were related to foreign vessels. Since 1986, 38,923 inspection teams have been sent on board vessels to check the international certificates of oil pollution prevention and oil records. See *Working summary*, *supra* n.47 at 4.

rial sea. The Chinese court dismissed the objection, holding that under the 1969 Convention, the coastal state was entitled to intervene in oil pollution accidents on the high seas, to take necessary measures to prevent potential damage to the marine environment caused by the accident, and to inspect, detain and institute proceedings against the vessel which has caused severe damage. The court finally decided that the damage inflicted upon the Chinese marine environment amounted to 7,923,216 Chinese yuan, of which the Dutch freighter had to bear 65% and the *Nanyang* side 35%. In addition, the two parties were to bear the costs accruing from salvage and the settlement of maritime matters.⁵²

The above case provides an example of the way in which China asserted its jurisdiction over its potential EEZ area even before the establishment of such a zone. However, the case left over a number of questions. First, there is the question of the legal basis for the decision. The report does not refer to the exact time of the incident. We assume that the 1982 MEPL and the 1983 Regulations on Vessel-Source Pollution had not yet come into being or entered into force, and that, consequently, the court could only rely upon the 1974 Provisional Regulations. The uncertainty is reinforced by the fact that the court invoked the 1969 Intervention Convention, to which China was not yet a party at the time.⁵³ The reference to the Convention was, therefore, unjustified unless the relevant provisions of the Convention must be deemed to have become customary international law. *In casu*, however, the parties did not raise objections to the grounds taken for the court's decision. Finally, we do not know how the court has calculated the damage resulting from the incident. There should have been some evaluation procedure. It may be assumed that the evaluation procedure in Chinese judicial practice consists of the following elements:

- (1) determination of the precise nature of the pollution in question, which is distinguished from other forms of pollution in order to establish its relative seriousness; and
- (2) determining the appropriate courses of action for the purpose of minimizing the pollution damage or restoring the environment in its original state before the pollution.⁵⁴

In fact, the relevant courts seem to acknowledge that the evaluation of the consequences of environmental pollution in legal proceedings is an enormously lengthy process which require a great deal of human resources.⁵⁵

⁵² "After the sinking of the *Nanyang* in the Shan Wei sea area ...", *Democracy and Law* [in Chinese] 1984 No.9: 23-24.

⁵³ China acceded to the Convention on 23 February 1990. See 6 *AsYIL* (1996) 238.

⁵⁴ WANG MAO SHEN *et al.*, "The normal procedure of assessment of damage to the marine environment in Chinese judicial practice", in COLIN M. DE LA RUE (ed.), *Liability for damage to the marine environment* (1993) 30.

⁵⁵ WANG *et al.*, *ibid.* at 30-31.

4. FUTURE PROSPECTS

Changing situations and new developments require the introduction of new legal concepts into the existing legal framework of marine environmental protection and, consequently, the addition to or amendment of existing rules. The *Ocean Agenda 21* of China⁵⁶ has laid down a number of aims in developing and improving the existing legal framework. They include the following three objectives: (1) “establish and improve the legal and standard systems for the marine environmental protection”, (2) “establish and improve the marine environmental protection law enforcement system, and the supporting and supervising mechanism”; and (3) “develop the mechanism for the communication among marine administration units, marine environmental protection institutions and the public”.⁵⁷

It was reported that the National Environmental Protection Administration regarded the revision of the law as the main item on its 1995 agenda.⁵⁸ In that year China decided to revise and amend the MEPL in order to cope with the changed situation and new developments. The amendment process is still going on and various institutions and entities at the central and local level will be involved in consultations.⁵⁹ It is expected that the prevention and control of vessel-source pollution will be further strengthened. On the other hand, international legislation on the matter has become tighter. The annexes to MARPOL 73/78 include amendments with stricter norms and standards for the prevention and control of vessel-source pollution.⁶⁰ As a party to MARPOL 73/78, China has to consider accepting the new requirements. Finally, the International Maritime Organisation (IMO) has recently introduced the Vessel Traffic Services (VTS),⁶¹ which is optional for the coastal State to adopt. With it the IMO has lent its support to a mandatory ship reporting system that has been developed in state practice. It is worthwhile for China to consider these new developments which could serve the prevention and control of vessel-source pollution in its EEZ.

In the field of enforcement, recent years have witnessed the equipment of oil-water separators aboard ships of all types in accordance with relevant regulations. On the other hand, equipment for oil-polluted water treatment, includ-

⁵⁶ *China Ocean Agenda 21* [State Oceanic Administration, ed.](1996).

⁵⁷ *Ibid.* at 94.

⁵⁸ *China Environmental Yearbook 1996* [in Chinese](1996) at 169.

⁵⁹ *People's Daily* [in Chinese], 15 May 1998.

⁶⁰ See “Major international instruments relating to the marine environment”, on: http://www.un.org/Depts/los/los_me2.htm#offshoreregion (access date: 7 May 1998).

⁶¹ A VTS is any service implemented by a competent authority, designed to improve safety and efficiency of traffic and the protection of the environment. It may range from the provision of simple information messages to extensive management of traffic within a port or waterway. See *Guidelines for Vessel Traffic Services* (IMO, 1985), cited in ERIK FRANCKX, “Coastal state jurisdiction with respect to marine pollution – some recent developments and future challenges”, 10 *International Journal of Marine and Coastal Law* (1995) at 262 n.58.

ing emergency treatment, has been installed at all sea ports in China. This equipment can help dispose of 3.7 million tons of oil-polluted water from vessels and recover 42,000 tons of waste oil annually. In addition, a Crash Programme to Combat Ships' Oil Pollution has been formulated.⁶² Despite these efforts, however, there are still gaps in enforcement. For example, in view of the development of offshore oil exploitation and oil transportation it is most desirable to set up an oil-spill emergent response system. Most of the developed coastal States already have such systems, but are not yet available in China.. According to the *Ninth Five-Year Plan and Long-Term Plan towards 2010 for China's Marine Environmental Protection*, a model project of the oil-spill response system in the Bohai Sea is planned as a matter of urgency.⁶³ Further, the recently released White Paper on Marine Development has determined the following as among the measures for the protection of China's marine environment: the enhancement of investigation, monitoring and control of marine pollution by improving the monitoring network, strengthening of surveillance by satellites, ships and offshore monitoring stations, and perfecting the law enforcement system.⁶⁴ The establishment of an EEZ has greatly expanded the maritime jurisdictional area and the corresponding task of enforcement. Further integration of the enforcement system would certainly increase its effectiveness.

An effective exercise of jurisdiction over vessel-source pollution in the EEZ also depends upon regional co-operation in East Asia. At present, there are two regional programmes on marine environmental protection in the region. One is the East Asian Seas Programme, the other the Northwest Pacific Regional Seas Programme. China has participated in the activities of these two programmes since their inception. The former is jointly sponsored by the IMO, the United Nations Development Programme, the Global Environmental Facility and the World Bank. Its overall objective is to support the efforts of the participating countries in the prevention and management of marine pollution at both the national and sub-regional levels on a long-term and self-reliant basis.⁶⁵ One of the objectives of the latter programme, which is sponsored by the United Nations Environment Programme (UNEP), is to develop and adopt a harmonious approach towards the integrated management of the coastal and marine environment and its resources, in a manner which combines protection, restoration, conservation and sustainable use.⁶⁶ The two programmes will no doubt facilitate the Chinese efforts to prevent and control pollution in its EEZ. The fact that the China seas are all semi-enclosed and bordered on by more

⁶² "Marine Development White Paper", *China Daily*, 29 May 1998:4.

⁶³ State Oceanic Administration, *The ninth five-year plan and long-term plan towards 2010 for China's marine environmental protection* [in Chinese], January 1995, at 30-32 (on file with the author).

⁶⁴ *China Daily*, 29 May 1998.

⁶⁵ "Fighting pollution in the East Asian Seas", *IMO News* 4/97, on: <http://www.imo.org/imo/news/3&497/drchua2.htm> (access date: 27 February 1998).

⁶⁶ UNEP, *Action Plan for the protection, management and development of the marine and coastal environment of the Northwest Pacific region*, NOWPAP Publication No.1, 1997 at 5.

than two countries make international cooperation even more pressing. The Chinese EEZ is part of these seas and borders to those of other countries. The LOS Convention requires the coastal states bordering on semi-enclosed seas "to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment".⁶⁷ It is, therefore, suggested that some kind of joint arrangements be made in exercising coastal jurisdiction over vessel-source pollution in the EEZs in East Asia.

During UNCLOS III, China was an enthusiastic supporter of the idea of establishing jurisdiction of the coastal State over vessel-source pollution in the EEZ without condition. However, after two decades and a rapid growth of its economy, China has developed one of the largest merchant fleets in the world. By the end of 1997, the number of merchant ships under Chinese flag had increased to 32,000 with a total dead-weight tonnage of close to 50 million, of which more than 23 million consisted of ships involved in foreign trade transportation.⁶⁸ In view of such change in its situation, China might like to reconsider its previous position of emphasizing jurisdiction of the coastal state in contradistinction to that of the flag state. China is now confronted with the delicate problem of balancing the two contrary views in light of its interests.

The LOS Convention has created three types of jurisdiction over vessel-source pollution in the EEZ. Consequently, potential conflicts of jurisdiction may be expected to arise between the coastal state and the flag state or the port state.⁶⁹ The possibility of such conflicts raises the need for a procedure of dispute settlement such as provided by the LOS Convention. It is to be assumed that China has accepted arbitration in accordance with the relevant provisions of the LOS Convention.⁷⁰ Disputes concerning navigation and marine environmental protection in the EEZ are subject to compulsory settlement procedures.⁷¹ As to overlapping jurisdictions over vessel-source pollution in the EEZ

⁶⁷ LOS Convention, Art.123 item (b).

⁶⁸ *China Daily*, 29 May 1998.

⁶⁹ The complexity of this regime may imply the increased risk of disputes between the coastal state and other states about the respective competences in matters of marine pollution. See FRANCISCO ORREGO VICUÑA, *The exclusive economic zone: regime and legal nature under international law* (1989) at 88.

⁷⁰ Art.287 provides (para.1) that "[w]hen signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein."

It further provides (para.3) that "a State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII".

⁷¹ As BOYLE noted, "the inclusion of navigation and protection of the environment within compulsory jurisdiction was intended mainly to restrain coastal state claims to 'creeping jurisdiction'

Article 292 of the LOS Convention is most relevant in regard to the prompt release of vessels and crews.⁷² In such circumstances China, as a coastal state exercising its jurisdiction, may be compulsorily sued before the International Tribunal for the Law of the Sea or an alternative arbitral tribunal. In view of this possibility, China may prefer to be more cautious and careful in exercising its jurisdiction over foreign vessels in its EEZ, since the LOS Convention rules are relatively favourable for the flag state.

over shipping, and it reinforces the balance established by Parts V and XII in favour of freedom of navigation. ALAN E. BOYLE, "UNCLOS, the marine environment and the settlement of disputes", in HENRIK RINGBOM (ed.), *Competing norms in the law of marine environmental protection* (1997) at 249.

⁷² The article prescribes that "[w]here the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree." For reference, see RAINER LAGONI, "The prompt release of vessels and crews before the International Tribunal for the Law of the Sea: A preparatory report", 11 *International Journal of Marine and Coastal Law* (1996) at 147-164.

NOTES

SOME REMARKS ON BIMST-EC: A NEW INTERNATIONAL-LEGAL INSTRUMENT FOR CO-OPERATION IN ASIA

Maria Magdalena Kenig-Witkowska*

On 6 June 1997, a new sub-regional economic co-operation group called BIST-EC (consisting of Bangladesh, India, Sri-Lanka, Thailand), linking South-East Asia and South Asia for the first time, was officially inaugurated in Bangkok.¹ Myanmar attended the meeting as an observer and became a member in December that year, after which the grouping's name was changed to BIMST-EC.

The grouping has been restricted to the five countries as they together constitute a contiguous geographical sub-region around the Bay of Bengal. In their Joint Statement of 22 December 1997 the member states agreed that the geographical limitation focused on the Bay of Bengal rim would be one of the key criteria for full membership. Observers and guests would be invited to attend appropriate meetings and participate in various BIMST-EC activities, and criteria for such participation will be drawn up.² Some countries from the Asia-Pacific region have already shown their interest. Nepal has sent an official request to become a member while Bhutan, Indonesia, Malaysia and Pakistan have expressed interest in the organization. Although the said Joint Statement set a moratorium on new membership for five years in order to allow for a requisite period of consolidation, permitting the expeditious implementation of the Co-operative Work Programme, the member countries agreed to consider inviting certain countries from the region, as well as international organizations, to participate in BIMST-EC work.

In 1994 Thailand for the first time introduced the idea of establishing an organization grouping countries around the Bay of Bengal. The response from other countries was not enthusiastic, mainly because of prevailing political tensions in the region. As a result, India and Sri Lanka were the only countries which joined Thailand in preparing the organization's terms of reference. In the

* University of Warsaw.

¹ See the Declaration on the Establishment of the Bangladesh-India-Sri Lanka-Thailand Economic Co-operation (BIST-EC), Bangkok, 6 June 1997, later referred to as the BIST-EC Declaration. Text by courtesy from the Department of Information of the Thai Ministry of Foreign Affairs, reproduced *infra* at 532.

² Joint Statement of the BIMST-EC Ministerial Meeting, Bangkok, 22 Dec. 1997, text released by the BIST-EC Working Group.

meantime a water-sharing agreement has been concluded between India and Bangladesh and Myanmar has become an ASEAN member. These events changed the political landscape in the region and eventually led to the establishment of BIMST-EC.

Studies to identify sectors for mutually beneficial economic co-operation have been commissioned and actual projects have been identified for implementation. The Joint Statement of the BIMST-EC Ministerial Meeting of 22 December 1997 reflects the member countries' determination to move the organization into an operational phase of these projects.³ Based on a study prepared by the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), the BIMST-EC countries agreed to establish a forum with the participation of public and private sector representatives to pursue closer economic co-operation.⁴

The establishment of BIMST-EC affirms a very clear trend during the last thirty years in this part of the Asia-Pacific region, of creating sub-regional institutions in order to overcome protectionism, declining terms of trade and small domestic markets. Mention may be made of the Association of South-East Asian Nations (ASEAN), the ASEAN Free Trade Area (AFTA), and the South Asian Association for Economic Co-operation (SAARC).

Though such institutions, especially those under SAARC auspices, seem not to be very successful so far, developments of the past few years have stimulated the process. All the institutions in question have survived so far, despite the not quite favourable original prospects for successful co-operation between the states concerned, due, *inter alia*, to the fact that in their external economic relations the member states were mainly oriented toward third countries. As to the BIMST-EC, it may be assumed that the new grouping springs from an idea that must have been in the minds of the politicians in the two sub-regions for quite a long time, i.e. to link the potential economies of South Asia with the relatively developed economies of South-East Asia. Such a linkage makes the economies concerned more complementary, might bring ASEAN and SAARC closer to each other, and deepen bilateral economic relations among the member states.

BIMST-EC is based on the idea of co-operation, which is a key-word for many economic institutions operating in the Asia-Pacific region. The concept of co-operation is not sharply defined in the theory of international relations and its normative system. A review of various Asian instruments pertaining to co-operation would demonstrate that the notion refers to a broader concept that can denote any form of agreement aimed at enhancing the common interests of the parties involved.⁵ A similar conclusion may be drawn from the BIST-EC Declaration which enriches the concept of co-operation by adding the bonds of

³ *Bangkok Post*, 7 July 1997 and 31 December 1997.

⁴ *BIST-EC Development Programme Overview and Sectoral Co-operation* (UN ESCAP, 1997).

⁵ M.M.KENIG-WITKOWSKA, *International law and development. Some Asian perspectives* (Bangkok, 1996) *passim*.

friendship to the common interests and the matters of common concern. Furthermore, the Declaration to some extent also refers to the notion of collective self-reliance by stating that the countries concerned share a primary responsibility for the strengthening of the economic and social stability of their sub-region and for ensuring peaceful and progressive national development. The Declaration also points out that the sub-region to which the BIMST-EC activities refer is bound by ties of history and culture, which will foster a greater understanding for meaningful co-operation.

The BIST-EC Declaration is a short document of a general character giving much more attention to form rather than to 'technical' organizational issues. As such it may hold the risk of becoming an organism under permanent construction, similar to ASEAN.

The Declaration contains four paragraphs preceded by a kind of preamble. In the first, very short, paragraph, the parties declare the establishment of the Bangladesh-India-Sri-Lanka-Thailand Economic Co-operation, henceforth to be known as the BIST-EC. It is interesting to notice that the above phrase nothing was said about the operational or institutional side of the grouping nor about the character of the venture.

The second, and longest, paragraph defines the aims and purposes of the organization, as follows: (1) to create an enabling environment for rapid economic development through identification and implementation of specific co-operation projects in the sectors of trade, investment and industry, technology, human resource development, tourism, agriculture, energy, infrastructure and transportation; (2) to accelerate the economic growth and social progress in the sub-region through joint endeavours in a spirit of quality and partnership; (3) to promote active collaboration and mutual assistance on matters of common interest in the economic, social, technical and scientific fields; (4) to provide assistance to each other in the form of training and research facilities in the educational, professional and technical spheres; (5) to co-operate more effectively in joint efforts that are supportive of and complementary to national development plans of member states, which result in tangible benefits to the people in raising their living standards, including through generating employment and improving transportation and communication infrastructure; (6) to maintain close and beneficial co-operation with existing international and regional organizations with similar aims and purposes; (7) to co-operate in projects that can be dealt with most productively on a sub-regional basis among the members states and that make best use of available synergies.

The above aims comprise a vast spectrum of possible domains of co-operation which may look trivial compared to other such instruments, such as the ASEAN Declaration of 1967 or the SAARC Charter. On the other hand, the emphasis laid by the BIST-EC Declaration on specific fields of sub-regional collaboration is certainly remarkable.

Although the aim to maintain close and beneficial co-operation with existing international and regional organizations with similar aims and purposes can be found in other, similar, documents, their inclusion in the BIST-EC Declara-

tion gives a special meaning to that co-operation. The conclusion suggests itself that BIMST-EC has been considered by its creators as a bridge between the two already existing organizations — a missing element in the South — South-East Asia collaboration.

The principles of BIMST-EC closely resemble those of SAARC, if not to say that the Declaration has copied the SAARC Charter⁶ in this respect. The third paragraph of the BIST-EC Declaration states that in all its activities BIMST-EC will observe the following principles: (1) sovereign equality; (2) territorial integrity; (3) political independence; (4) non-interference in internal affairs; (5) peaceful co-existence; (6) mutual benefit. As to co-operation within the group, BIMST-EC will constitute a supplement to, rather than a substitute for bilateral, regional or multilateral co-operation involving the member states. One may assume that by these words, the BIMST-EC member states meant to express their adherence to the principle *pacta sunt servanda*, even if they did not formulate it *expressis verbis*.

The BIMST-EC principles should be perceived in the light of the document as a whole, including its preamble by which they acquire a special accent. In this context reference may be made to the invocation of ideals of peace, freedom and economic well-being, which refer to classic principles of universal international law and can be looked at as the consequence or concretization of these latter principles. Besides, the BIST-EC Declaration contains principles that seem to be a kind of a novelty, such as the principle of political independence and the principle of mutual benefit. While the political and socio-economic motives for their inclusion may be clear enough, the legal motivation as well as their legal purport may raise some doubts, especially in the case of the principle of mutual benefit. The inclusion of these principles in the Declaration is to be appreciated as an instance of participation by the member states in the process of progressive development of principles of international law. The future practice of states on the matter will demonstrate to what extent the BIMST-EC states have contributed to that development.

The institutional mechanisms for BIMST-EC have been established in the last, fourth, paragraph of the Declaration, as follows: (a) the Annual Ministerial Meeting, to be hosted by member states on the basis of alphabetical rotation; (b) the Senior Officials Meeting, to be held on a regular basis as well as whenever required; (c) the Working Group, under the chairmanship of Thailand and having as its members the ambassadors of the other member states accredited to Thailand, or their deputies, to carry on the work in between the Annual Ministerial Meetings; (d) the specialized task forces and other mechanisms as may be deemed necessary by the Senior Officials, to be coordinated by the member states as appropriate.

Noticeably the mechanisms for the implementation of the objectives of BIMST-EC are quite limited in scope, with neither functions nor competencies being determined in the Declaration. Nor is anything said about the decision-

⁶ Text in 3 AsYIL 473.

making process. However, it is to be expected that, as is the case with other Asian institutions, the consensus model will be adopted.

Furthermore, nothing has been mentioned in the BIST-EC Declaration about the technical/secretarial support to its activities, which appears to be necessary if co-operation is to work. There are quite many ways of solving this problem which is known from the theory as well as the practice of international institutions. As far as BIMST-EC is concerned, one can only try to guess which pattern, if any, will be followed, having in mind the Asian experience. Would it be the ASEAN's or the SAARC's or some other? It may be expected that in the near future the fourth paragraph of the Declaration will be followed by successive regulations, enabling BIMST-EC to pursue its activities.

The BIMST-EC structure resembles the early stage of the ASEAN structure, as laid down in its Declaration of 1967, and also the SAARC pattern. It continues the loose model of an international instrument which has adopted co-operation as its *raison d'être*. As the history of ASEAN and SAARC shows, however, this kind of structure has not always been effective, and substantial corrections may subsequently be required.⁷ It also shows that professional support from technical services at the national level would improve the efficiency of the organization. One can learn from the theory and practice of international institutions, that a horizontal structure of institutional mechanisms without clearly divided competencies usually leads to overlaps and confusion in the functioning of the institution.

An interesting legal question that arises in respect of the character of the BIST-EC Declaration is, whether the Declaration is a treaty according to international law. Under the Vienna Convention on the Law of Treaties of 1969, a treaty is an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Consequently, the BIST-EC Declaration should not give rise to any doubt. However, when it comes to analyzing the BIST-EC Declaration against the backdrop of the ASEAN Declaration of 1967 and its further evolution, the answer may not be so clear-cut.

The opinions on whether the ASEAN Declaration of 1967 is to be considered an international treaty, are divided. The lack of a ratification procedure and the fact that the Declaration has not been registered with the United Nations Secretariat, has resulted in the view that the ASEAN Declaration does not enjoy sufficient 'weight' to be classified as a treaty. Especially in light of, and compared with, the later Treaty of Amity and Co-operation of 1976, which has provided a more solid legal foundation to ASEAN and which has been registered with the UN Secretariat. Others are of the opinion that the 1967 ASEAN Declaration can certainly be considered as an international treaty since the ASEAN countries refer to that Declaration as a treaty with binding force.⁸

⁷ Op.cit.n.5 at 38-48.

⁸ H.H.INDORF, *ASEAN: Problems and Prospects*, ISEAS, Occasional Paper No.38 (Singapore,

In the case of the BIST-EC Declaration there is no relevant information about the member states' opinion as to the legal validity of the Declaration. The lack of a requirement of ratification does not necessarily mean that we do not deal with a treaty within the meaning of international law, neither does its name or the fact that it has not been registered with the UN Secretariat. As long as the member states consider the Declaration legally binding and the foundation of their co-operation, and if there are no signs of a different practice, nothing seems to prevent the BIST-EC Declaration from being considered a treaty.

The founding instruments of ASEAN, SAARC and BIMST-EC show quite close similarities between them and reveal the role of the 1967 ASEAN Declaration as an example for the other instruments. This, however, may only be proved by subsequent practice. In the meantime it can not be said that we are witnessing just another instrument similar to the already existing ones dealing with co-operation in Asia. On the other contrary, we are undoubtedly witnessing another Asian contribution to the progressive development of international law, marked by particular, regional Asian, characteristics.

In the Joint Statement, which was released at the conclusion of the special Ministerial Meeting in December 1997 and which contains the Co-operative Work Programme, the member states of BIMST-EC reaffirmed the aims and principles contained in the Bangkok Declaration on the Establishment of BIST-EC. They underlined the importance of Asian solidarity, and enhanced South-South co-operation and coordination among developing countries in the face of challenges that are being posed by the globalization of the international trading and financial system. It was also stated that BIMST-EC had the potential to be a key building block in the architecture of peace, stability and economic well-being in Asia. Once again the member states of BIMST-EC reaffirmed their intention to work closely together in order to strengthen various infrastructural linkages between them, especially in the transport and communication sectors, that would reinforce complementarities arising from the BIMST-EC focus on the Bay of Bengal rim. They also decided to enhance intra-regional energy co-operation through an action plan for the development and utilization of natural gas, wind, solar and water resources. A Working Group on Tourism was established to develop an action plan for co-operation in the tourism sector. Further, the member states agreed on the promotion of co-operation in fisheries through the conduct, in co-ordination with FAO, of a comprehensive study on marine resources and their processing and marketing.

Whether BIMST-EC will be able to achieve the goals contained in the Bangkok Declaration depends mainly on the political will of its members and their economic potential. Finally, although BIMST-EC is an example of South-South co-operation, it will certainly need the participation of the wider international community to expedite many of its large projects.

ENFORCEMENT OF HONG KONG SAR COURT JUDGMENTS IN THE PEOPLE'S REPUBLIC OF CHINA

Kong Qingjiang*

1. INTRODUCTION

On 1 July 1997 Hong Kong entered a new era. It was transformed from a British colony into a Special Administrative Region (SAR) of the People's Republic of China (PRC). The far-reaching impact of the handover of Hong Kong is not to be easily overstated. Although, for the time being, the impact may lie more in political status than in institutions, it will in the long run certainly prove also in the sphere of institutions.

The judicial system has long been the heart of Hong Kong's legal order which plays an important role in maintaining the stability of Hong Kong. With this perception in mind, the Chinese government, whose long-term interest lies in the stability and prosperity of Hong Kong, committed itself, in both the Sino-British Joint Declaration¹ and the Basic Law of Hong Kong Special Administrative Region (the Basic Law),² to maintain that judicial system. It was even strengthened with the vesting of the power of final adjudication in the Hong Kong SAR³. Correspondingly, the enforcement of court decisions in Hong Kong should be secured.

It goes without saying that the enforcement of judgments is primarily a matter for the Hong Kong SAR courts themselves. There is, however, one important aspect which deserves specific attention: the enforcement of judgments

* Institute of Commerce, Hangzhou, China. I am indebted to Professor KO SWAN SIK and Dr. PETER MACALISTER-SMITH for their invaluable comments on earlier versions of this article. I am also grateful for the editorial assistance provided by the *Yearbook* Editors.

¹ Part III of the Elaboration by the Government of the People's Republic of China of its Basic Policies regarding Hong Kong, constituting Annex I to the Sino-British Joint Declaration, states: "After the establishment of the Hong Kong Special Administrative Region, the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication".

² Art. 81 para. 2 of the Basic Law states: "The judicial system previously practised in Hong Kong shall be maintained except those changes consequent upon the establishment of the Court of Final Appeal".

³ See n. 2. Contrary to the situation before the handover, when the United Kingdom Privy Council served as Hong Kong's final appeal judicial organ, the judicial system in Hong Kong SAR will become an independent and separate system, with its own court of final appeal.

of the Hong Kong SAR courts in the rest of the PRC (hereinafter referred to as 'mainland China' or 'the mainland'). Before the handover the question was relatively simple: Hong Kong being under British rule, the recognition and enforcement of Hong Kong judgments in China was treated by reference (*canzao*) as recognition and enforcement of foreign judgments⁴. After 30 June 1997, these judgments must in principle be deemed to be municipal judgments, but because of the system of autonomy under the 1984 Joint Declaration and the Basic Law, the Hong Kong SAR is to be considered a separate jurisdiction from the judicial point of view. Thus a number of questions arise: Are the judgments of Hong Kong SAR courts to be treated as foreign judgments if they are to be enforced on the mainland? In other words, will the judicial assistance rendered be classified as international assistance or domestic co-operation? Obviously, these questions are by no means of theoretical interest only. The present article will deal with this issue of enforcement of Hong Kong judgments in mainland China, in the field of civil and commercial cases.

2. ECONOMIC IMPLICATIONS OF PROPER ENFORCEMENT OF HONG KONG JUDGMENTS

In view of the economic links between Hong Kong and the mainland, the question of the enforcement of Hong Kong judgments should be looked at from the angle of the significance of Hong Kong's judicial system for the economic prosperity of Hong Kong. The more so since a proper enforcement of judgments forms the final and decisive part of a fair and effective judicial system.

Hong Kong's prosperity depends on its linkage with other economies, among which the mainland has a large share. The mainland is in fact the largest trading partner of the Hong Kong SAR. Conversely, the Hong Kong SAR has become the second largest trading partner of the mainland. Hong Kong is a major services centre for the mainland and particularly for the neighbouring province of Guangdong, providing such supporting infrastructural facilities as seaport and airport as well as institutional services like banking and insurance. Hong Kong is the most important source of external investment on the mainland, accounting for nearly three-fifth of the total external direct investment there. On the other hand, the mainland is the second largest source of inward direct investment in Hong Kong, accounting for 20 percent of the total⁵. Financial transactions between the Hong Kong SAR and the mainland have grown

⁴ The Chinese attitude towards the 'question of Hong Kong', was based on the 'unequal treaties' hypothesis. Hong Kong judgments, like anything else deriving from the 'unequal treaties', were not officially viewed as 'foreign'. Yet they were treated by reference to the factual, international, relationship.

⁵ The figures can be obtained from the Internet web site of the Hong Kong SAR Government Information Centre.

substantially over the past years. All of the four specialized national banks⁶ of the mainland as well as other banks have their presence in Hong Kong, with the Bank of China being the second largest bank there. Conversely, there is an increasing presence of Hong Kong banks in mainland China. Even more importantly, the Hong Kong SAR is used as a major funding centre by the mainland.⁷ In addition, it is common for multinational enterprises wishing to develop relations with mainland China to establish regional headquarters in Hong Kong. With the expanding economy of the mainland, it is to be expected that most Hong Kong-incorporated companies as well as Hong Kong-based subsidiaries of multinational enterprises will at some time develop closer links with the mainland.

In this regard, it is important to point out that Hong Kong's external economic relations and its judicial practice interact. Though more study is needed to define this linkage, it is plausible to make an argument that a fair and efficient judicial system is by nature commerce-friendly. On this assumption it is relevant to examine the importance of adequate enforcement of judgements of Hong Kong courts in mainland China for the external economic position of Hong Kong.

The existence of extensive external economic relations implies prospective disputes. Hong Kong has earned fame for its rule-based commercial environment and its fair and efficient judicial system, including efficient and equitable means of dispute settlement. In such a system the proper enforcement of judgments is indispensable and is, consequently, conducive to Hong Kong's economic prosperity.

The close economic links between Hong Kong and the mainland inevitably give rise to disputes between mainland-based and Hong Kong-based parties, irrespective of whether the latter is a company incorporated in Hong Kong or a Hong Kong subsidiary of a foreign company. The Hong Kong SAR courts may have jurisdiction over such disputes in accordance with the recognized principles of territorial or personal jurisdiction. Moreover, the parties to a business transaction may have chosen the court of the venue of the transaction as the competent court and the law of that venue as the applicable law for prospective disputes. Accordingly many prospective and *fait accompli* disputes are referred to the Hong Kong courts because of the good reputation of these courts. This practice is heightened by the fact that the laws of Hong Kong are more developed and predictable than the laws of the mainland.

Against this backdrop, there will be cases which have been adjudicated by Hong Kong courts and of which the resulting judgments have to be enforced in

⁶ They are Bank of China, the Industrial and Commercial Bank of China, the Agriculture Bank of China and the China Construction Bank.

⁷ Most of the fund-raising activities in the territory are related to syndicated loans. Since mid-1993, an increasing number of the largest state-owned enterprises of the mainland have H-shares listed at the Hong Kong Stock Exchange.

mainland China because the person or property subject to the enforcement is or is located on the mainland. An inadequate regulation of this matter would not only give rise to individual injustice, but would impair a proper execution of the judicial decision and thus be detrimental to the reputation of the Hong Kong judicial system, which would, in its turn harm Hong Kong's status as an international economic centre.

3. ENFORCEMENT OF JUDGMENTS IN THE PRC

How are municipal and foreign judgments enforced in the PRC?⁸

3.1. Enforcement of municipal judgements

According to Article 207 of the current Civil Procedure Law (CPL) of the PRC, a final judgment is enforced by the court ('People's Court')⁹ that has entertained the case in first instance ('*diyì sheng fǎ yuán*')¹⁰. This rule applies irrespective of whether the final and legally effective judgment was rendered by that court or, in appeal, by a higher court. Although it is correct to hold that the court in question has competence to enforce the judgment even outside its jurisdiction, pursuant to Article 210 of the CPL the enforcement may be delegated to the court of another locality in case the subject of the enforcement is in that other place. It is within the discretion of the first instance court to opt for executing the enforcement itself or delegating it to another court.¹¹ In the latter case, the delegated court is under an obligation to enforce the award without examining or reviewing the judgment concerned. Yet, in practice the original court seems to prefer to enforce its own decisions, even where the subject of

⁸ According to the Civil Procedure Law (CPL) of the PRC, there are two types of judicial awards: judgments (*panjue*) and decisions (*caijue*). However, the distinction makes no difference to their enforcement. In the present article, no distinction is made for the sake of convenience.

⁹ See, for a brief survey of the Chinese judicial system, Li Shuangyuan and Lü Guoming, "The law of international civil procedure in China", 6 *AsYIL* (1996) 135 at 137.

¹⁰ CPL Art.207 para.1.

¹¹ CPL Art.210 reads: "If the person against whom [a judicial award] is to be enforced or the property, which is the subject of enforcement, is located at another place [outside the court's jurisdiction], the enforcement may be delegated to the local court [of that other place]. The delegated court shall, within fifteen days of the receipt of the letter of delegation, start enforcement, and shall not refuse to do so. After the enforcement is completed, the delegated court shall notify the delegating court in written form about the result of the enforcement. In case the enforcement is not completed within thirty days, the notification shall contain the particulars of the enforcement". "If the delegated court fails to execute the enforcement within fifteen days of the receipt of the letter of delegation, the delegating court may request the court superior to the delegated court to direct the delegated court to enforce the judicial award."

enforcement is located outside its jurisdiction, primarily in order to keep the authority inherent in the enforcement in its own hands.^{12 13}

3.2. Enforcement of foreign judgments in the PRC

According to Article 267 of the Civil Procedure Law¹⁴, where a legally effective judgment rendered by a court of a foreign country needs to be recognized and enforced by the a court of the PRC, the interested party may directly apply for recognition and enforcement to the Intermediate People's Court (*zhongji renmin fayuan*)¹⁵ which has jurisdiction. A similar request may also be made by the foreign court,¹⁶ in accordance with relevant international treaties or by virtue of reciprocity¹⁷.

The enforcement of foreign judgments differs from enforcement of municipal ones on the basis of delegation in four respects: First, it is based, apart from reciprocity, on an existing treaty binding the PRC and the foreign country involved, while the enforcement of a judgment of another municipal court is an obligation of the delegated court without any precondition; secondly, whereas

¹² In dealing with cases involving parties from other jurisdictions, the local court is often seen biased in favour of the local parties, either driven by the interests of, or under the pressure from, the locality.

¹³ It should be borne in mind that enforcement of judgments is among the most controversial issues of the judicial system of the mainland today. The people's courts are not always able to enforce their judgments in civil and commercial cases. China being a country where the administrative power has traditionally dominated the political and social affairs of the country, the rule of law is more a function of the political environment and the interests of the political leadership in having the law either or not properly implemented than a logical consequence of the legal norms. Thus, it is not uncommon for enforcement of court decisions to be obstructed by interference from influential authorities and to have to rely on the prestige and authority of the judges concerned, so as not to become the victim of bias and remain ineffective. Consequently, the people's courts do not enjoy the same high status as their counterparts in Hong Kong.

¹⁴ Art 267 reads: "If a legally effective judgment or decision by a foreign court requires recognition and enforcement by a people's court of the People's Republic of China, the party concerned may directly apply for recognition and enforcement to the competent Intermediate People's Court. The foreign court may also, in accordance with the provisions of the international treaties concluded or acceded to by that foreign country and the People's Republic of China, or with the principle of reciprocity, request recognition and enforcement by a people's court".

¹⁵ See *loc.cit.*n.9.

¹⁶ *Ibid.* at 163.

¹⁷ Cf. *loc.cit.*n.9 at 163. As to which Intermediate People's Court has jurisdiction, reference is here made to Arts.22 and 243 of the Civil Procedure Law. Art.22 determines that the people's court of the place where the defendant has his domicile is competent. Article 243 further provides that, where the defendant has no domicile in the PRC, the competent court is the people's court within whose jurisdiction the contract was signed or performed, or the object of the lawsuit is located, or the defendant's distrainable property is located, or the torts have been committed, or the defendant's representative office is located.

review is not allowed in case of delegated enforcement of municipal judgments, review of the foreign judgment on its merits is the general rule; thirdly, enforcement of foreign judgments falls exclusively within the jurisdiction of Intermediate People's Courts¹⁸; fourthly, in the case of foreign judgments the interested party or the foreign court initiates the enforcement, while the delegated enforcement of a municipal judgement does not need the involvement of an interested party.

Article 268 of the Civil Procedure Law sets forth the requirements to be fulfilled by a foreign judgment in order to be eligible for recognition and enforcement in the PRC: (1) the judgment must be final and legally effective; (2) the judgment is in compliance with the basic principles of the law of the PRC and not detrimental to its sovereignty, security and social and common goods.¹⁹ The provision mandates the people's court to review the judgment of the foreign court on compatibility with the relevant international treaties to which the PRC is a party, or, in the absence of such a treaty, with the principle of reciprocity, with a view to ensure that the above requirements are fulfilled. No recognition shall be accorded to, nor shall enforcement take place of, judgments that are considered to be contradictory to the basic principles of the law of the PRC or detrimental to its sovereignty, security, social and common goods.²⁰

4. THE LEGAL STRUCTURE OF THE RELATIONSHIP BETWEEN THE HONG KONG SAR COURTS AND THOSE OF THE MAINLAND UNDER THE BASIC LAW

In the Elaboration by the Government of the People's Republic of China of its Basic Policies regarding Hong Kong, attached to the Sino-British Joint Dec-

¹⁸ The court system of the PRC may be illustrated as follows: The Supreme People's Court (SPC) is the court of final appeal although it also adjudicates certain categories of cases falling under its direct jurisdiction. Under the SPC there are 31 Higher People's Courts (HPC) at the provincial level; under each HPC there are a number of Intermediate People's Courts (IPC); finally, under each IPC there are the Basic-level People's Courts (BPC) the number of which is normally in line with the administrative zoning of the country.

¹⁹ Art 268 reads: "In the case of an application or request for recognition and enforcement of a legally effective judgment or decision of a foreign court, the people's court shall, after examining it in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity, and arriving at the conclusion that it does not contradict the basic principles of the law of the People's Republic of China nor violates the sovereignty, security and social and common goods of the country, recognize the validity of the judgment or written order, and, where it [the judgment or decision] is to be enforced, issue a writ of enforcement in accordance with the relevant provisions of this Law ...".

²⁰ It should be noted that Art.268 treats recognition differently from enforcement. In the event of recognition of foreign judgments no writ is needed; in the event of enforcement the people's court is to issue a writ of enforcement.

laration as its Annex I, the Chinese government committed itself to assist or authorize the Hong Kong SAR Government to make appropriate arrangement for reciprocal judicial assistance with foreign states.²¹ Understandably, it does not refer to judicial assistance between Hong Kong SAR and mainland China. The Basic Law of Hong Kong, though, contains a vaguely worded stipulation in this regard. Article 95 states: "The Hong Kong Special Administrative Region, may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render each other assistance". The provision leaves much to be clarified.

First, it fails to provide an answer to the question whether the Hong Kong courts may enforce their final judgments on the mainland by themselves. Since the Basic Law clearly stipulates that as a rule no law of mainland China will apply to Hong Kong,²² the provision of the Civil Procedure Law on the enforcement of judgments of municipal courts may also not qualify to be invoked for judgments of Hong Kong courts. On the other hand, unless an arrangement is made to the effect that the mainland courts can reciprocally enforce their judgments in Hong Kong SAR themselves, it seems not likely that the Hong Kong SAR courts will be given such authorization. In fact, such a reciprocal arrangement appears not quite desirable for the Hong Kong SAR.

Secondly, the provision is not clear on the issue whether the Hong Kong SAR courts are to deal through consultation with the courts on the mainland individually for assistance on a case-by-case basis. Given the thousands of courts at various levels across the mainland²³, this would be a great burden on the part of the Hong Kong courts and, in view of the politicized atmosphere referred to earlier, would not hold any assurance for an adequate enforcement.

Thirdly, the provision fails to elaborate on the law which would govern the arrangement to be made between the Hong Kong SAR courts and those on the mainland.

Lastly, the provision fails to specify whether the mainland people's courts are to review the Hong Kong judgments before recognizing and enforcing them.

5. A PROPOSAL FOR AN AGREEMENT TO FACILITATE THE ENFORCEMENT OF HONG KONG SAR JUDGMENTS IN MAINLAND CHINA

It should be made clear from the outset that the absence of an arrangement as envisaged earlier does not mean that a Hong Kong judgment cannot be enforced on the mainland. The practice of such enforcement before and after the

²¹ Elaboration, Part III para.7.

²² Except those referred to in the Basic Law, see Art.18 Basic Law.

²³ See n.18.

handover so far serves as an example. The working relationship that has developed on a case-by-case basis between the Hong Kong and mainland courts has been the only basis for the Hong Kong courts to have their judgments enforced on the mainland. The requested people's court would recognize and enforce the Hong Kong judgment after reviewing it and having concluded that it does not contravene the basic principles of the law of the PRC and is not detrimental to the sovereignty, security and social and common goods of the PRC. It is not difficult to see that the Hong Kong judgments have been treated as foreign judgments.

The advantages of a more explicit arrangement are obvious:

- (1) An appropriate arrangement would oblige the mainland people's courts to respect the judicial process of the Hong Kong SAR courts and to honour the Hong Kong SAR judgments, thus limiting the possibility of the people's courts to review the Hong Kong judgments on their merits and avoiding a retrial of the case.
- (2) An arrangement would ensure a simpler and a more expeditious procedure of enforcement, e.g. by prescribing direct enforcement of a Hongkong SAR judgment by the competent mainland court, making a review of the judgment and an execution order, required in the case of the enforcement of a foreign judgment, redundant.
- (3) An explicit arrangement would to a large extent reduce, if not eradicate, the possibility of manipulation of the enforcement of the judgments by local courts on the mainland.²⁴

It is no easy task to formulate such an arrangement. Since, understandably, from a Chinese perspective matters relating to Hong Kong are domestic affairs, a 'treaty' on mutual judicial assistance between the Central People's Government and the Hong Kong SAR Government is not feasible. Nevertheless, some kind of joint arrangement appears desirable: First, it is in the interest of the mainland and in accordance with its commitments not to be a mere silent partner of the Hong Kong SAR, nor a paternalistic superior, but a genuine partner. Secondly, it is up to the Central People's Government to safeguard the autonomy of the Hong Kong SAR, including its independent judicial system. More specifically, the Central Government is under an implicit obligation to ensure that Hong Kong SAR judgments be enforced without alteration, not only in foreign countries, but also in the other jurisdictions of the PRC. It could be argued that, unless the Standing Committee of the National People's Congress (NPC) provides an adequate and elaborative interpretation of Article 95 of the Basic Law²⁵, other ways must be found to achieve the desired goal.

²⁴ See CPL Art.268.

²⁵ It should be noted that, according to Art.158 of the Basic Law, the power of interpretation of that Law is vested in the Standing Committee of the National People's Congress. The Hong Kong SAR courts are authorized, for the purpose of 'adjudicating cases', to interpret the provisions of the Basic Law "which are within the limits of the authority of the [Hong Kong SA] Region". It is not clear whether the enforcement of judgements falls within the scope of 'adju-

One alternative is to continue the present working relationship between the courts of Hong Kong and those of mainland China on a case-by-case basis without any underlying legal framework.

A second alternative is to have an agreement between the two sides on the specific issue of enforcement of Hong Kong SAR judgments on the mainland. The Supreme People's Court (SPC) and the Department of Justice of the Hong Kong SAR Government would agree on an informal joint memorandum under which an order of enforcement must be obtained from a Higher People's Court enabling (and directing?) the Intermediate People's Court to carry out the enforcement of a judgment of the Hong Kong court. Under such an arrangement, the Higher People's Court would be designated as the authority responsible for accepting delegation for enforcement of final judgments of the Hong Kong courts.

Under a third alternative the Supreme People's Court and the Hong Kong Department of Justice would issue complementary internal directives on the enforcement of each other's judgments.²⁶

With respect to the first alternative, it should be borne in mind that a working relationship, regardless of however well elaborated and organized, will always be subject to arbitrary unilateral suspension, and the judgments of Hong Kong courts would be prone to manipulative treatment by the mainland courts. Therefore, a *de facto* working relationship between the two sides seems inadequate to ensure the adequate enforcement of Hong Kong SAR judgments in mainland China.

The second alternative is a more formal mode of co-operation. It requires some co-ordination between the two sides in respect of public policy, e.g., sovereignty, security and social and common goods. It is expected to be a slow and inefficient procedure, involving additional expenses for the parties concerned and, consequently, not suitable to Hong Kong's business-friendly environment.²⁷

dicating cases'. As a matter of fact, the provision leaves room for a potential constitutional crisis. A good example was provided by the recent case before the Court of Final Appeal concerning the right of abode of persons of Chinese nationality born outside Hongkong of parents who are Hong Kong SAR permanent residents. See, on the case, the Hong Kong Government Press Releases on www.info.gov.hk/jud.

²⁶ In the Chinese set-up the Ministry of Justice is responsible for the negotiation of judicial assistance agreements with foreign countries, but has no power to issue binding orders for the courts. It is up to the Supreme People's Court to issue such orders.

²⁷ On 30 March 1999 the Arrangement regarding Mutual Requests for Assistance in the Service of Judicial Documents between the Mainland and Hong Kong SAR was simultaneously promulgated by the Supreme People's Court (SPC) of the PRC and the High Court of Hong Kong. It covers only the mutual assistance in service of judicial documents between the courts of the Hong Kong SAR and the mainland, leaving open the mutual assistance in enforcement of judgments. Further negotiations are reportedly being held for the purpose of mutual assistance in the field of the enforcement of judgments. The Arrangement is by its nature an agreement between the SPC and the High Court of Hong Kong. However, in the accompanying explanatory speech

The third alternative seems to be the most favourable one. An arrangement along these lines would have the same effect as the second alternative, while being more efficient. It could be made even more attractive by proscribing the requested and enforcing court not to review the other side's judgment.

by a Vice President of the SPC it was referred to as an internal directive. The Arrangement is similar to the approaches embodied in the second and third suggested alternatives in this article.

LEGAL MATERIALS

STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

INDIA

JUDICIAL DECISIONS*

Fundamental rights: right to life under the Constitution of India; Defence of sovereign immunity as a doctrine of municipal law not applicable; Relevant provisions of the International Covenant on Civil and Political Rights elucidating and effectuating fundamental rights are enforceable

Supreme Court, 5 February 1997
AIR 1997 SC 1203

B.P.JEEVAN REDDY, SUHAS C.JAIN JJ

PEOPLE'S UNION FOR CIVIL LIBERTIES (PUCL), Petitioner v. UNION OF INDIA & ANOTHER

A. The case

The case came before the Supreme Court in the form of writ petition (criminal) under Article 32 of the Constitution. The petition was filed for the issuance of a writ of mandamus or other appropriate order, *inter alia*, to direct appropriate action against police officials who had erred, and to award compensation for the fact that two persons were shot dead by the police while in custody.

B. The judgment

B.P.JEEVAN REDDY J delivered the judgment.

The Court referred to, *inter alia*, *Challa Ramkonda Reddy v. State of Andhra Pradesh*, AIR 1989 Andh Pra 235, dealing with the liability of the State where it deprived a citizen of his right to life guaranteed by Article 21 of the Constitution:

* Edited by KO SWAN SIK, General Editor

** Contributed by GOVINDRAJ HEGDE, Jawaharlal Nehru University, New Delhi.

"It was held, '[...] The State has no right to take any action which will deprive a citizen of the enjoyment of this basic right except in accordance with a law which is reasonable, fair and just'. The decision also dealt with the question whether the plea of sovereign immunity is available in such a case. The following observations are relevant: 'The question, however, arises whether it is open to the state to deprive a citizen of his life and liberty [...] and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State?'..."

The Court also referred to *Nilabati Behera alias Lalita Behera v.State of Orissa*, 1993 (2) SCC 764; AIR 1993 SCW 2366 and observed that in that case

"... this Court held that award of compensation in a proceeding under Article 32 [of the Constitution] by the Supreme Court or under Article 226 by the High Court is a remedy available in public law based on strict liability for contravention of fundamental rights. It is held that the [municipal law] defence of sovereign immunity does not apply in such a case even though it may be available as a defence in private law in an action based on tort.

[...]

The reference to and reliance upon Article 9(5) of the International Covenant on Civil and Political Rights, 1966, in *Nilabati Behera* ... raises an interesting question, viz., to what extent can the provisions of such international covenants/conventions be read into national laws ...

It is not clear whether our Parliament has approved the action of the Government of India ratifying the said 1966 Covenant. Assuming that it has, the question may yet arise whether such approval can be equated to legislation and invests the Covenant with the sanctity of law made by Parliament. As pointed out in *S.R.Bommai v. Union of India*, (1994) 3 SCC 1; 1994 AIR SCW 2946, every action of Parliament cannot be equated to legislation. Legislation is no doubt the main function of the Parliament but it also performs many other functions all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state that the provisions of the Covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights and have, enforceable as such. So far as multilateral treaties are concerned, the law is, of course, different – and definite."

Accordingly the petition was allowed and disposed of with an award of compensation of [...] to the families of the deceased.

Right to privacy coming within the ambit of the right to life; Rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law; Constitution Art.51; In case of conflict the Courts give effect to municipal law over international law; As far as its language permits preference for a construction of municipal law which allows its provisions to be in harmony with international law

Supreme Court, 18 December 1996
AIR 1997 SC 568

KULDEEPH SINGH, S.SAGHIR AHMAD JJ

PEOPLE'S UNION FOR CIVIL LIBERTIES (PUCL), Petitioner v. UNION OF INDIA & ANOTHER

A. The case

The case came before the Supreme Court in the form of writ petition (civil) under Article 32 of the Constitution. The petition challenged the constitutionality of Section 5(2) of the Indian Telegraph Act, 1885 enabling telephone-tapping by the government authorities.

B. The judgment

KULDEEPH SINGH J delivered the judgment. The Court held, *inter alia*:

"The word 'life' and the expression 'personal liberty' in Article 21 [of the Constitution] were elaborately considered by this Court in Karak Singh's case (AIR 1963 SC 1295). The majority read 'right to privacy' as part of the right to life under Article 21 of the Constitution. ...

We have, therefore, no hesitation in holding that right to privacy is a part of the right to 'life' and 'personal liberty' enshrined under Article 21"

The Court observed that India is a signatory to the International Covenant on Civil and Political Rights, 1966, referred to Article 17 of the Convention and Article 12 of the Universal Declaration of Human Rights, and continued:

"International law today is not confined to regulating the relations between the States. [Its] scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals.

It is [an] almost accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.

Article 51 of the Constitution directs that the State shall endeavour to, *inter alia*, foster respect for international law and treaty obligations in the dealings of organised peoples with one another."¹

The Court here referred to SIKRI C.J. in *Kesavananda Bharathi v. State of Kerala*, 1973 Supp.SCR 1; AIR 1973 SC 1461. The Court also referred to KHANNA J's minority opinion in *A.D.M. Jabalpur v. S. Shukla*, AIR 1976 SC 1207, which contained the following paragraph:

"Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of

¹ Art.51 reads as follows: "The State shall endeavour to

(a) promote international peace and security;

(b) maintain just and honourable relations between nations;

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and

(d) encourage settlement of international disputes by arbitration."

any treaty obligations on the other, the Courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the Courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law on treaty obligations. Every statute, according to this rule is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations on the established rules of international law, and the Court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language."

Accordingly, the writ petition was allowed.

JAPAN

JUDICIAL DECISIONS*

Competence of Consul under the Soviet-Japanese Treaty on Consular Relations and general international law

*Tokyo High Court, 22 February 1994*²

Hanrei Taimuzu [Law Times Reports] No.862 (1995) 295

RUSSIAN FEDERATION (SOVIET UNION) v. Y

In this case the validity of the declaration of interdiction made by the Soviet Consul in Tokyo on a Soviet national residing in Japan was disputed.

The High Court, dismissing the appeal by the Soviet Union (which was later succeeded by the Russian Federation in the High Court proceedings), essentially repeated the arguments of the District Court.

The Court ruled, first, that the powers of a Consul are limited to those which have been agreed between the sending and the receiving state. Second, the Vienna Convention on Consular Relations can not be invoked as Japan's consent to the competence concerned, because it does not refer to the declaration of interdiction, and because the Soviet Union was not a party thereof. Third, the Soviet-Japanese Consular Treaty of 1967 does not contain any provision granting competence to declare interdiction in the territory of the receiving state. Although the appellant relied on Article 29(1) of the Treaty which stipulated that the Consul may perform "other functions not contrary to the laws and regulations of the receiving state", the Court held that these functions included only supplementary functions which are regarded in the laws and regulations of the receiving state as being part of the functions of a consul by their very nature, and that the making of a declaration of interdiction, as an exercise of state authority, was not contained in those 'other functions'.

* Contributed by MATSUDA TAKEO, Osaka City University, Osaka; member of the Study Group on Decisions of Japanese Courts Relating to International Law.

² Through appeal from Tokyo District Court, judgment of 20 Dec.1991, 4 AsYIL 249.

The Russian Federation appealed to the Supreme Court.

The obligation on the part of the accused of alien nationality to bear the litigation cost defrayed to interpreter; International Covenant on Civil and Political Rights, Article 14(3)(f)

*Urawa District Court, 1 September 1994*³

Hanrei Taimuzu [Law Times Reports] No.867 (1995) 298

RE X

X, a foreign national, was convicted of violating the Immigration Control and Refugee Recognition Act and was obligated, in the same judgment, to bear the costs of litigation. The costs consisted only of the expenses for the interpreter. X did not appeal, but after the term for appeal had expired, refused to pay on the ground that Article 14(3)(f) of the International Covenant on Civil and Political Rights recognizes the right of the accused to have the free assistance of an interpreter as an absolute and unconditional right, guaranteed irrespective of the financial capacity of the accused.

The objection was dismissed, mainly for procedural reasons. The Court held, in addition, that Article 14(3)(f) of the Covenant guarantees the right to free assistance of an interpreter in the proceedings on the determination of the well-foundedness of a criminal charge, and that, consequently, it is not prohibited to obligate a person to bear the costs for the interpreter after his/her conviction.

No appeal was made against the decision.

Fishing operation by Japanese corporation in coastal waters of Northern Territories, occupied by the former Soviet Union without fishing permit from the Japanese authorities; Scope of application of the Japanese Fishery Regulations

*Supreme Court, 26 March 1996*⁴

Hanrei Jiho [Judicial Reports] No.1564 (1996) 140; Hanrei Taimuzu [Law Times Reports] No.905 (1996) 136, Keishu [Supreme Court Reports:Criminal Cases] Vol.50:460

X v. STATE OF JAPAN

The Supreme Court rejected X's argument that the Hokkaido Rules for the Regulation of Ocean Fisheries, being part of municipal Japanese law, were not applicable to his fishing activities conducted in the Soviet exclusive economic zone arounds Shikotan Island which had actually been under Soviet - later Russian - occupation since the end of World War II, in spite of Japanese claims since the 1960s to recover it as part of its territory.

The Court held that, though the purpose of the Hokkaido Rules was to protect and preserve the marine resources and establish orderly fishing in the Japanese territorial sea and the high seas off Hokkaido, the realization of that purpose requires the regulation of

³ This decision provides an interpretation of Art.14(3)(f) of the ICCPR contrary to that of the Tokyo High Court in its judgment of 3 Feb.1993, 6 AsYIL 220.

⁴ Through appeal from Sapporo High Court, judgment of 16 April 1992, 4 AsYIL 248.

the fishing activities by Japanese nationals in the waters beyond, but adjacent to the waters referred to by the Rules; and that, therefore, the Rules should be construed as being applicable, on the basis of personal jurisdiction, to Japanese nationals conducting fishing activities in Soviet territorial waters or their adjacent exclusive economic zone. The fishing activities of the appellant were considered punishable under the Rules since the waters around Shikotan Island were regarded as such an area, irrespective of the dispute about title over the island.

The appeal was dismissed.

The right of foreign nationals permanently residing in Japan to vote in local elections; The meaning of 'the people' in Article 15(1) and 'the residents' in Article 93(2) of the Japanese Constitution; The meaning of 'the citizens' in Article 25 of the International Covenant of Civil and Political Rights

*Nagoya High Court, Kanazawa Branch, 26 June 1996*⁵

Hanrei Jiho [Judicial Reports] No.1582 (1997) 30; Hanrei Taimuzu [Law Times Reports] No.918 (1996) 266

X ET AL. v. STATE OF JAPAN ET AL.

After the original decision was delivered by the District Court in 1994, the Supreme Court gave an authentic interpretation of the relevant articles of the Japanese Constitution in its judgment of 28 February 1995 in another case concerning the right of foreign nationals to vote in local elections (Minshu [Supreme Court Reports:Civil Cases] Vol.49 (1995) 639). The Supreme Court ruled, in conclusion, (1) that Article 15 of the Constitution provides for the right to vote in behalf only of persons possessing Japanese nationality; (2) that Article 93(3) of the Constitution guarantees the right to vote in local elections only for people who possess Japanese nationality and reside in the local public entities concerned; (3) that it is not unconstitutional to grant the right to vote in local elections to foreign nationals who meet some specific requirements, but whether to do so is a matter of legal policy. These interpretations were essentially identical with those adopted by the Fukui District Court in 1994.

The Kanazawa Branch of the Nagoya High Court, consequently, following the Supreme Court interpretations, confirmed the original judgment of the Fukui District Court, and dismissed the appeal by the plaintiffs.

The appellants made a final appeal to the Supreme Court.

Compensation for Japanese prisoners of war detained in the USSR after World War II; Non-applicability of the rules embodied in Articles 66 and 68 of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949; The non-customary character of the rule of "Compensation by the Power on which the prisoner depends"; Municipal applicability of international law; No legal obligation for the State of Japan to settle credit balances due to the repatriated prisoners of war

⁵ Through appeal from Fukui District Court, judgment of 5 Oct.1994, 6 AsYIL 221.

Supreme Court, 13 March 1997⁶

Hanrei Jiho [Law Cases Reports] No.1607 (1997) 11; Hanrei Taimuzu [Law Times Reports] No.946 (1997) 70; Minshu [Supreme Court Reports:Civil Cases] Vol.51 No.3 (1997) 1233

X ET AL. v. STATE OF JAPAN

The Supreme Court supported without further consideration the judgment of the High Court to the effect (1) that the Geneva Convention cannot be applied retroactively to the claims of the appellants whose status of POW was terminated before the entry into force of the Convention between Japan and the Soviet Union, and (2) that the so-called "Rule of compensation by the state on which the POW depends", which is contained in Articles 66 and 68 of the above Convention, was not established as a rule of international customary law at the time when the appellants were detained in the USSR.

The appeal was dismissed.

Effect on prior fishery accord of the adoption of straight baselines for the delimitation of the territorial sea; Duty of prior consultation in international agreement; Priority of international agreement over municipal law under Japanese Constitution

Matsue District Court, Hamada Branch, 15 August 1997

Hanrei Jiho [Law Cases Reports] No.1656 (1997) 59

STATE OF JAPAN ET AL. v. X

On 9 June 1997 a fishing boat sailing under the flag of the Republic of Korea (hereafter referred to as 'South Korea') was seized for fishing activities in the Japanese territorial sea without licence, and its captain X, a South Korean national, was indicted for the violation of the Law Regulating the Fishing Activities by Foreigners. The point where the boat was seized, approximately 18.9 miles north-west of Hamada, Shimane Prefecture, was located outside the Japanese territorial sea until Japan adopted straight baselines (effective from 1 January 1997) between Gotu, off Shimane Prefecture, and Mishima Island, off Yamaguchi Prefecture for the delimitation of its territorial sea.

The following facts are relevant to the present case. In 1965 Japan and South Korea concluded an Agreement on Fisheries which established, in Article 1, exclusive fishery zones to a limit of 12 miles measured from each party's coastal baselines. At that time, Japan took three miles as the breadth of its territorial sea, and the two states in principle used coastal baselines for measuring the breadth of their territorial sea. The Agreement also provided, in the same Article: "In case either Contracting Party uses straight baselines in establishing its fishery zone, such straight baselines will be determined upon consultation with the other Contracting Party".⁷ The Agreement also established a joint

⁶ Through appeal from Tokyo High Court, 5 March 1993, 5 ASYIL 245.

⁷ Art.1(1) of the Agreement reads as follows: "The Contracting Parties mutually recognize that each Contracting Party has the right to establish within twelve miles measured from its coastal baseline a sea zone in which it will have exclusive jurisdiction with respect to fisheries (hereinafter referred to as 'fishery zone'). However, in case either Contracting Party uses a straight baseline in establishing its fishery zone, such straight baseline will be determined upon consultation with the

regulation zone outside the territorial waters and the exclusive fishery zones of the contracting parties (Article 2). However, enforcement jurisdiction in the waters outside the fishery zones was stipulated to be exercised only by the party to which the fishing vessel belongs (Article 4).⁸

In 1977 Japan extended its territorial sea from 3 to 12 miles by enacting its Law on the Territorial Sea and Contiguous Zone, though keeping the coastal baselines untouched in the Enforcement Order for that law.⁹ South Korea also enacted a Territorial Sea Act in 1977 and a Presidential Decree to enforce that Act in 1978. In it the breadth of its territorial sea was defined to be 12 miles, and straight baselines were drawn along the coast facing Cheju Island.

In December 1995, just before its ratification of the UN Convention on the Law of the Sea in 1996, South Korea revised its Territorial Sea Act and the related Presidential Decree, by which straight baselines were applied at most of the west and south coasts of the Korean Peninsula. Japan also revised its Law and Enforcement Order in 1996, in conjunction with its ratification of the LOS Convention, and also adopted straight baselines along most of its coast (162 straight lines in total).¹¹ As a result the outer limit of Japan's territorial sea was moved seaward significantly, with Japan's territorial waters expanding from 380 to 430 thousand square kilometres although the breadth of the territorial sea was not altered. Prior consultation with the South Korean government in determining these straight baselines (including the one at issue in the present case) were not held. The straight baselines and the resulting expansion of the territorial waters entered into effect on 1 January 1997; the seizure of X's fishing boat took place on 9 June in an area which had become part of the Japanese territorial sea.

Counsel for X argued (1) that the straight baselines had no legal effect for South Korean fishermen because they were established without prior consultation with the government of South Korea, and (2) that X's fishing activities were conducted in an area outside the 12-mile exclusive fishery zone, that is, in an area where Japan could not exercise enforcement jurisdiction.

other Contracting Party".

At the time of the conclusion of the Agreement, notes were exchanged between the foreign ministers of both Parties to recognize the straight baselines drawn by South Korea in certain parts of the Korean Peninsula.

⁸ Art.4(1) reads as follows: "Enforcement (including stopping and boarding the vessel) jurisdiction in the waters outside the fishery zone shall be carried out and exercised only by the Contracting Party to which the fishing vessel belongs".

⁹ Japan maintained a 3-mile breadth of the territorial sea in five channel areas including Tsushima West Channel (called the 'Great Korea Channel' in South Korea) between the Tsushima Islands and the Korean peninsula. With regard to this channel South Korea also retained the 3-mile breadth of its territorial sea in its 1978 Presidential order.

¹⁰ In 1977 Japan also enacted a Law on the Fishery Zone (Temporary Measure) which, however, did not establish such a zone in places facing South Korea, and South Korean fishermen were exempted from the application of that Law. Fishery relations between Japan and South Korea remained to be governed by the 1965 Agreement on Fisheries.

¹¹ In 1996 both Japan and South Korea enacted laws on exclusive economic zone which have become effective. Since then negotiations have been held, but not yet completed, between the two states for the demarcation of their exclusive economic zones. On 23 January 1998 Japan notified South Korea of its intention to terminate the Fisheries Agreement in accordance with its Art.10(2). The termination would become effective after one year.

Responding to these arguments, the public prosecutor contended, first, that prior consultation was not required in determining the baselines for the territorial sea since the Japan-South Korean Fisheries Agreement dealt exclusively with the exclusive fishery zone and not with the territorial sea. It was the understanding of the Japanese government that it had adopted straight baselines for the territorial sea, not for the exclusive fishery zone. Secondly, the public prosecutor asserted that 'the fishery zone' as stipulated in Article 4 of the Agreement refers to an area outside the internal waters and the territorial sea and, consequently, that the Article does not contain restrictions upon the exercise of enforcement jurisdiction by either Party in the area which came to be included in the territorial sea.

The court quashed the indictment on the following considerations. First, it is generally understood from Article 98(2) of the Japanese Constitution, which requires the faithful observance of the treaties concluded by Japan and of established international law, that "in principle, treaties and established international law always prevail over domestic laws regardless of when they were established". It, therefore, follows that even within the Japanese territorial waters the exercise of enforcement jurisdiction by Japan would be impermissible if so prescribed in the Japan-South Korean Fisheries Agreement.

Second, the Court rejected the Prosecutor's interpretation of the notion of 'fishery zone' in Article 4 of the Fisheries Agreement, and held that the fishery zone should be deemed to overlap the territorial waters, so that the scope and legal status of the fishery zone cannot be affected by Japan's expansion of its territorial waters. It means that Japan cannot exercise enforcement jurisdiction against South Korean nationals in waters which were beyond the 12-mile fishery zone at the time of the conclusion of the Agreement, even when they subsequently became territorial waters. The Court held that the Agreement would be meaningless if a Contracting Party can unilaterally expand its territorial waters beyond the 12-mile limit of the fishery zone and can fully exercise enforcement jurisdiction in those waters.

The public prosecutor appealed to the Hiroshima High Court.

MALAYSIA

JUDICIAL DECISIONS*

Determination of the place where an alleged libel addressed to a person in another country is deemed to have taken place; Jurisdiction; Forum non conveniens

High Court (Johor Bahru), 5 December 1996
[1997] 4 MLJ 65

Haidar J

* Selected in cooperation with LOO LAI MEE, *Malayan Law Journal*, Kuala Lumpur.

YING CHENG ANG v. TARO IMANAKA

The plaintiff (IMANAKA) had filed an action in libel against the defendant (YING) at the sessions court, Johor Bahru. The defendant applied, *inter alia*, for the claim to be struck out on the grounds that (1) the alleged libel was committed outside Malaysia as it was addressed to a Japanese citizen resident in Japan, (2) at the material time the defendant was residing in Singapore, and (3) there was no publication of the libel in Malaysia. Consequently the court would have no jurisdiction. The plaintiff opposed the application on two grounds: (1) the publication of the libel was written and sent from Johor Bahru so that the court had jurisdiction; (2) the defendant had submitted to the jurisdiction by, *inter alia*, entering an unconditional appearance.

The sessions court dismissed the defendant's application and ordered (27 April 1995) the defendant to file his statement of defence on an amended statement of claim of the plaintiff. The defendant appealed to the High Court against the order.

The High Court allowed the appeal and set aside the above order:

"The issues for my determination were essentially of law. The issues are: (1) Jurisdiction. (2) Forum non conveniens.

Jurisdiction

...

[T]here has been no affirmative facts that both parties resided in Singapore.

...

[I]n a defamation action there must be publication to a third party ... In this case ... the alleged letters were all addressed to one T.Nagai in Japan. Nowhere was it pleaded ... that the alleged letters were sent to others than this T.Nagai in Japan. Clearly therefore such letters could not possibly be publicized for the purpose of libel ...

...

It would seem that the tort, if any, was committed in Japan and not here. It follows therefore that the court here has no jurisdiction ...

...

Even if the letters were sent from Johor Bahru, the answer is provided in the case of *Diamond v. Bank of London & Montreal Ltd* [[1979] 1 All ER 561], that is the alleged tort was committed in the place where the publication took place, namely Japan.

Forum non conveniens

Apparently the damages, if any, arising out of the alleged tort of libel, in my view, would be in Japan where the alleged defamatory publication was sent to. Assuming that the alleged defamatory publication was addressed to T.Nagai by virtue of his position in Nagai Chemical Industry Ltd vis-a-vis Singapore Nagai Pte Ltd, the damages, if any, would at most be in Singapore. Either way it could not possibly have been committed in Malaysia. Hence the forum non (sic) conveniens would be either Japan or Singapore."

Determination of whether assets form the subject matter of a trust created in another country; Forum non conveniens and applicable law

High Court (Pulau Pinang), 14 March 1997
[1997] 4 MLJ 389

JEFFREY TAN J

BARKATH ALI BIN ABU BACKER v. ANWAR KABIR BIN ABU BACKER & OTHERS

Plaintiff's mother (settlor), an Indian national domiciled in India, had created a trust deed in 1985 and had appointed plaintiff as lawful attorney. In the trust deed the settlor had declared that the trust was a 'wakaf-au-aulad' and shall not fall within the jurisdiction of the wakaf board. She passed away in 1989. The plaintiff applied to the court to 'determine' whether the settlor's assets in Malaysia and Singapore, on the construction of the deed of trust, the grant of power of attorney, and the settlor's written instructions, form the subject matter of a valid and subsisting trust, or whether those assets 'were never validly transferred' to the trust whilst the deceased was alive and are therefore a part of the settlor's residuary estate to be distributed amongst her beneficiaries in accordance with Islamic religious law.

In spite of the arguments of one of the Parties the Court held that it and not the syariah court had jurisdiction. However, the second defendant contended that even if the High Court had jurisdiction, the Court should not exercise that jurisdiction as the appropriate forum and proper law to determine the matter was India and the law of India, and consequently urged the Court to stay the proceedings.

The Court summarized the arguments put forward by the second defendant. It referred to the decision of the Singapore High Court in *Eng Liat Kiang v. Eng Bak Hern & Others* [1995] 1 SLR 577¹² where reference was made to "the principles guiding the discretion of the court whether to sustain or to repel the plea forum non conveniens" defined in *Spiliada Maritime Corp. v. Cansulex Ltd (The Spiliada)* [1987] 1 AC 460. The Court also referred to DICEY & MORRIS on *Conflicts of Laws* (11th Edn) and to *Chellaram & Others v. Chellaram & Others* [1985] 1 Ch 409, and then considered:

"One important factor that a Malaysian court must consider in connection with forum non conveniens is 'whether it would be unjust to the plaintiff to confine him to remedies elsewhere' (per Peh Swee Chin FCJ in *American Bank Ltd v. Mohamed Toufic Al-Ozeir & Another* [1995] 1 MLJ 160 at 167)."

The Court summarized the facts which were not in dispute, viz. (1) that the settlor was an Indian national domiciled in India, (2) that the trust deed and power of attorney were prepared and executed in India, (3) that the settlor had designated the 'trust' as a trust in Koothanallur, India, (4) that the second defendant was a citizen of India, (5) that the terms 'dhargas', 'wakaf board' and 'wakaf-au-aulud' require, in a proceeding in Malaysia, explanation from expert witnesses, (6) that the beneficiaries would be those domiciled in India, (7) that the trustees named by the settlor are Malaysians, (8) that the settlor designated all her Malaysian shares as the subject matter of her charitable trust.

On the question of the applicable law the Court referred to 8 *Halsbury's Laws of England* (4th Edn) cited by the second defendant, but said:

¹² Cf. *infra* p. XX.

"However, the latter alone could not settle the applicable law. The place of administration of the trust, in the absence of the settlor's express designation, must necessarily be interpreted from: (i) the settlor's designated name for the trust – the Hadjabe Trust in Koothanallur, India; (ii) the settlor's place of residence – Koothanallur; (iii) terminology 'dhargas', 'wakaf-au-aulad' and 'wakaf board'. They point to Koothanallur, India as the place where the object of the trust is to be fulfilled." [The Court here referred to *James Capel (Far East) Ltd v. YK Fung Securities Sdn Bhd* [1996] 2 MLJ 97¹³, and to *Woh Hup (Pte) Ltd v. Property Development Ltd* [1991] 3 MLJ 82].

With reference to *Chellaram & Others v. Chellaram & Others* the Court then continued:

"Therefore, even if the trust is to be administered in Malaysia, by reason of the situs of part of the subject matter and the residence of the trustees, it does not follow simpliciter that the rights and duties of the trustees are governed by Malaysian law and that Malaysian law is the proper law (because the rights of beneficiaries are to be ascertained by a different law, a case of the beneficiaries following the trustees), unless Malaysian law is indeed the proper law.

...

It is obvious that the settlor intended that the trust, even though for rustic and charitable purposes, shall be managed by her family. However, Malaysian law would not only be unable to give effect to the settlor's wish of a charitable trust managed by her family, as the Enactment [i.e. the Administration of Islamic Religious Affairs Enactment of the State of Penang 1993, Ed.] vests in the Majlis Agama Pulau Pinang [Religion Council of the Island of Penang, Ed.] all wakaf properties and the management of wakaf properties, but would also carry through what the settlor had no wish for – i.e. to fall within the jurisdiction of the wakaf board, on the basis that the wakaf board is the comparable equivalent of the Majlis Agama, Pulau Pinang. On the wishes of the settlor, it would not be unjust to the plaintiff to confine him to remedies elsewhere.

Furthermore, considering that: (i) the proper forum to grant letters of administration for the estate of the settlor is in India; (ii) the witnesses to the instruments, the trust deed and power of attorney are from India; (iii) the subject matter is not entirely in Malaysia; (iv) the witnesses to explain the terminology in the settlor's instrument would most reasonably be from India; (v) the beneficiaries who would benefit from the trust would be in Koothanallur, this court is therefore satisfied that an Indian court is the available appropriate forum to determine the plaintiff's application as it is eminently more suitable to hear and determine the plaintiff's application, in the interests of all the parties and the ends of justice. Malaysia is not the natural or appropriate forum, while India is distinctly more appropriate, and all factors point to it being so.

...

Accordingly, ... it is hereby ordered that this proceedings be stayed."

Proper law of the contract; Factors to be taken into account for the determination of that law

Court of Appeal (Kuala Lumpur), 17 March 1997

¹³ For Court of Appeal, *see infra*.

[1997] 2 MLJ 621

SHAIK DAUD, N.H.CHAN AND MAHADEV SHANKAR JJCA

Y.K. FUNG SECURITIES SDN BHD v. JAMES CAPEL (FAR EAST) LTD

The defendant (Fung) was a securities dealer based in Ipoh, Malaysia, and holding a business licence stipulating that its business had to be conducted only at its Ipoh address and that it had to comply with all the rules and regulations of the Kuala Lumpur Stock Exchange (KLSE). The plaintiff (James Capel) was a Hongkong company dealing in securities in Singapore. The defendant contracted to purchase certain amounts of shares from the plaintiff, with payment and delivery to take place at a certain future date. The defendant imposed the terms of the KLSE on the contract. The defendant then entered into contracts to sell the shares to companies in Singapore, stating the payment and the delivery date to be at the same future date referred to earlier. To fulfill the contracts with the defendant, the plaintiff bought the shares from a third party. When the plaintiff attempted to deliver the shares to the defendant and obtain payment, the defendant refused to honour their bargain, stating that it did not have the money.

The plaintiff filed a writ in the Ipoh High Court for breach of contract. The defendant submitted that it was not liable to pay on the ground, *inter alia*, that the proper law of the contracts was Singaporean law under which the contracts (forward contracts) were illegal. The trial finally ended in favour of the plaintiff. The trial judge ([1996] 2 MLJ 97) found, *inter alia*, that Malaysian law was the proper law of the contracts.

The defendant appealed, contending again that the proper law of the contracts was Singapore law. In order to sustain their submission, much of the defendant's submission was directed to show that the acceptance element of those contracts took place in Singapore and the contracts were therefore made in Singapore. The defendant stated that the contracts were made as a result of a telephone call, and relied on the principle stated in *Entores LD v. Miles Far East Corp* [1955] 2 QB 327, which held that a contract made by telephone is deemed to be made at the place where the offerer hears from the offeree that his offer has been accepted. However, on the basis of the available evidence the Appeal Court rejected the defendant's submission and held that the trial judge was correct in holding that the contracts were made in Ipoh.

The Court held, *inter alia*:

"In addition to the material which the learned trial judge spelt out in coming to his conclusion that the proper law of this contract was Malaysian law (with which we entirely agree), we want to draw close attention to two other features.

...

The second point which bears emphasis is the first condition of the defendant's dealer's licence, which was mandatory. The words are:

... such business shall only be carried on at 65 Clarke Street, Ipoh; and (2) shall not establish any branch.

This restriction explains why the defendant was so adamant about refusing the plaintiff's attempt to apply the SSE [Singapore Stock Exchange] rules and insisting that the KLSE rules alone should apply except where inconsistent.

The inference is thus open that the defendant made an implied choice of Malaysian law to govern these contracts because the only place where it could legally deal in securities was at their given address in Ipoh. The requirement in their contract notes that the shares should arrive duly stamped in Ipoh and the attempted delivery and

actual part payment out of Ipoh all taken together established that these transactions had their closest and most real connection with the system of law in Malaysia.

...

To avoid confusion, we think it would be useful to remind ourselves that there is a clear distinction between jurisdiction and the issue of proper law. In the present case, the jurisdiction of the Malaysian court was not and cannot be challenged. Nor was it ever suggested by the defendant that Ipoh was a *forum non conveniens*.

...

Even so, the territory where the contract was made is only one of the relevant factors in the determination of the proper law of these contracts. In addition to those listed by the trial judge, we consider the following factors equally relevant, namely: (i) the defendant could only legally make them in Ipoh; (ii) the documents exchanged indicate an implied choice of Malaysian law; and (iii) the circumstances show that delivery and payment were required to be made and were in fact made in Ipoh where the breach occurred."

The appeal was dismissed.

Immunity of United Nations Special Rapporteur from legal process; 'expert on mission'; Words spoken or written and acts done in the course of the performance of the mission; Immunity and privileges for the performance of duties and functions within the scope of the mandate; Restrictive theory of immunity; Immunity dependent from the nature of the act; Probative status of a certificate from the United Nations Secretary-General and from the national executive; Notion of 'jurisdiction'; Convention on the Immunities and Privileges of the United Nations 1946 section 22; Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 Article 12

High Court (Kuala Lumpur), 28 June 1997
[1997] 3 MLJ 300

ZAINUN ALI JC

MBF CAPITAL BERHAD & ANOTHER v. DATO'PARAM CUMARASWAMI

The plaintiffs, a public-listed company and a licensed stock-broking company respectively, instituted defamation proceedings against the defendant. The latter was an advocate and solicitor of the High Court of Malaya, and was also appointed as a UN Special Rapporteur for a three-year period. The action was in relation to an article which appeared in a magazine called "International Commercial Litigation". The article appeared under the caption "Malaysian Justice on Trial", was written by one David Samuels. The article among other things reproduced, in direct quotes, words spoken by the defendant. The plaintiffs claimed that the defendant had thereby injured their reputation.

The defendant applied to strike out the plaintiffs' writ on the basis that the statements attributed to the defendant were made in his capacity as a UN Special Rapporteur on the independence of judges and lawyers and that it was made in the course of his mission as such. The defendant claimed that he was immune from legal process of every kind and that the court had no jurisdiction to hear the plaintiffs' action and based this claim on section 22 of the Convention on the Privileges and Immunities of the United Nations

1946 and Article 12 of the (municipal) Diplomatic Privileges (United Nations and International Court of Justice) Order 1949.

On behalf of the defendant, certificates issued by the UN Secretary-General and the Malaysian foreign ministry (certificate under s.7(1) of the International Organization (Privileges and Immunities) Act 1992) were produced.

The plaintiffs argued that by making the alleged defamatory statement against the plaintiffs to a private magazine, the defendant had acted outside his mandate and therefore was not entitled to immunity.

The Court held, *inter alia*:

"The defendant's claim that immunity attached to him and that therefore this court had no jurisdiction as against him in the writ, would necessitate a brief on the position of a United Nations Special Rapporteur."

Referring to HENRY G.SCHERMERS and NIELS M.BLOKKER's writings and to *Satow's Guide to Diplomatic Practice* 5th Edn. the Court continued:

"Thus far, it appears that there is more than a semblance of a work ethics involving rapporteurs. This is relevant, for it is contended by the plaintiffs that the defendant had departed from the straight and narrow path of reporting to the commission [i.e. the UN Commission on Human Rights, Ed.] as envisaged by the mandate given to him when he spoke to ... the magazine.

It was the plaintiffs' case that the defendant's mandate was a functional, limited and a qualified one in its scope; that for as long as he performed his duties and functions *within the scope* of his mandate, he enjoyed the privileges and immunities under s 22 of the Convention. It was further contended by the plaintiffs that ... the defendant had clearly acted outside his mandate and therefore was not entitled to immunity.

The matter seemed further exacerbated since the defendant had yet to complete his findings and report his conclusions to the Commission on Human Rights, in accordance with his mandate – yet in what is perceived by the plaintiffs to be a hostile move – the defendant spoke and published the alleged defamatory words in the magazine.

...

Whilst there is a dearth of the legal definition of the term 'expert on mission', the International Court of Justice ('the ICJ') had pointed out that international practice displayed a multitude of activities – increasingly varied in nature – being 'missions' for the United Nations within art.VI [of the 1946 Convention, Ed.] without depending on specific qualifications.

It is common ground that in so far as the defendant was concerned, he was, as a Special Rapporteur to the United Nations, construed and styled as an 'expert on mission'.

To set the matter in its perspective, it was pivotal to this application to ascertain the extent of the immunity afforded to experts on mission under s 22 of the Convention."

The Court for this purpose referred to the advisory opinion of the ICJ of 15 December 1989 on the applicability of Article VI, s 22 of the 1946 Convention (*'Mazilu's case'*).

"The ICJ's observation in *Mazilu's case* seemed to be in accordance with contemporary thinking that the doctrine of absolute immunity as established in the long line of authorities such as *Thai-Europe Tapioca Service Ltd v. Government of Pakistan*

[1975] 1 WLR 1485, is *passé*. In fact, as case laws have shown, what has emerged is that the restrictive theory holds the field.

...

The defendant's unwillingness to shed his mantle of immunity seemed fortified by the letters from officials of the United Nations in support of his status and performance ... culminating in the certificate issued by no less than the Secretary-General of the United Nations himself ... The certificate reads as follows:

In connection with Civil Suit No.S3-23-68 of 1996 by MBf Capital Bhd and MBf Northern Securities Sdn Bhd against Dato'Param Kumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato'Param Kumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato'Kumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under arts VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation.

In accordance with s 22 of art VI of the Convention, 'experts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions ...' Section 22(b) of the Convention further provides that 'they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind'. As such, the Special Rapporteur on the independence of judges and lawyers is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato'Param Kumaraswamy is immune from legal process with respect thereto.

Under s 34 of the Convention, the Government of Malaysia has a legal obligation to 'be in a position under its own law to give effect to the terms of this Convention'. The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato'Param Kumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

...

Given that the Secretary-General holds down what is probably one of the most important positions in the World Order today, the certificate issuing from him should not be presumed to be made in cavalier fashion nor be cast aside at will.

However, it stands viewed as an opinion and has no more probative value than a document which appears wanting in material particulars.

It would indeed be a naive supposition if it is to be construed as being conclusive, since can one be heard to say 'c'est fait' and therefore, that is the end of the matter. Surely not.

It might be asked whether allowing the certificate to hold sway, would in effect, tantamount to subordinating the competence of this court to deal with any dispute that may arise, although the general notion is that national courts should not assume the function of arbiters of conflicts such as is evident in this case."

Soon after the UN Secretary-General's certificate the Court received a certificate from the Minister of Foreign Affairs, issued pursuant to section 7 of the International Organizations (Privileges and Immunities) Act 1992.¹⁴

The Minister's certificate reads thus:

"I, Datuk Abdullah bin Hj Ahmad Badawi, Minister of Foreign Affairs, Malaysia by virtue of the power granted to me under s 7(1) of the International Organizations (Privileges and Immunities) Act 1992 hereby certify that Dato' Param Kumaraswamy was appointed by the United Nations in 1994 for a period of three years as Special Rapporteur on the independence of judges and lawyers, whose mandate is as follows:

- (a) to inquire into any substantial allegations transmitted to him and report his conclusions;
- (b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provisions of advisory services or technical assistance when they are requested by the State concerned; and
- (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

Under the Convention on the Privileges and Immunities of the United Nations 1946 and under the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 Dato' Param Kumaraswamy shall enjoy the privileges and immunities as are necessary for the independent exercise of his functions. He shall be accorded immunity from legal process of every kind only in respect of words spoken or written and acts done by him in the course of the performance of his mission.

...

The certificate would appear to be no more than a bland statement as to a state of fact pertaining to the defendant's status and mandate as a Special Rapporteur and appeared to have room for interpretation.

...

This court certainly holds the view that the Minister's certificate, in as much as the Secretary-General's certificate is concerned, was carefully issued and was certainly not borne out of caprice.

...

A quick look at the cases have shown that the state merely transmits the claim for immunity, leaving it to the court to examine the truth of the allegation of fact on which it was based.

...

Thus, given the differing views expressed, the matter appeared to be rather fluid and therefore the issue which needed to be addressed was whether the certificate bore scrutiny.

¹⁴ The provision reads: "(1) The Minister may give a certificate in writing certifying any fact relating to the question whether a person is, or was at any time or in respect of any period, entitled, by virtue of this Act or the regulations, to any privileges or immunities.

(2) In any proceedings, a certificate given under this section is evidence of the facts certified".

At the risk of being unwittingly drawn at this stage into the question of the probative status of both the Secretary-General's and the Minister's certificate, I find that there is compelling ground to resist judicial self-restraint.

So, the question as to whether the defendant's act was or was not within the scope was an elusive inquiry, to be answered only when matters of evidence was before this court. Thus, in that regard, this court would have to consider the whole context in which the claim against the defendant was made, with a view to deciding whether the relevant act upon which the plaintiff's claim was based should, in that connection, be contemplated as fairly within the area of activity of his mandate or otherwise.

It is of course axiomatic that the defendant's immunity hung very much on the nature of the act and not on its purpose.

...

I shall merely indicate that I am not shackled by any constraint and so would proceed to state that it was open for me to examine the question whether I had jurisdiction to decide this matter.

Since the nub of the matter was the issue of jurisdiction, it would be useful to define the term. 'Jurisdiction' is the right of the court to enter upon the inquiry as to whether or not a cause of action exist in the plaintiff's writ and if a cause of action does exist, to grant, or if the relief is discretionary, to withhold the relief sought.

On the other hand, lack of jurisdiction is the absence of any right in the court to enter into upon such an inquiry at all.

For a more comprehensive approach to this subject, it would be useful to see when a properly-constituted court would lack jurisdiction. It may lack jurisdiction on four grounds – as clearly indicated by Lord Diplock in *Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong* [1970] AC 1136, PC.

The four grounds are:

- (1) because the condition precedent to its entering upon the inquiry had not been fulfilled – for e.g., a requirement such as existed in some countries that notice be given to the Government before starting an action against it; ? for e.g. ?
- (2) because of the status of one of the parties to the action – for eg, an action brought against a foreign sovereign or ambassador who had not consented to the jurisdiction;
- (3) because of the subject matter of the dispute in respect of which the relief was sought – for eg, a dispute involving the title to foreign land;
- (4) because of the nature of the relief sought, for eg an injunction against the Crown.

Lack of jurisdiction may be due to any one or more of those grounds.

It is evident from the above that the position in the present case was based on the second ground.

...

Having regard to the matter in its entirety, it is inevitable that I need to postulate that in this interlocutory stage, it is not for me to determine whether the said words imputed to the defendant are defamatory or not. Only the question of jurisdiction looms large.

Towards that end, I must assume that all the allegations as enclosed in the statement of claim are true without deciding it to be so.

To do this, I have to see whether the facts placed before me and the relevant laws cited to me oust the jurisdiction of this court.

It is a fact that the defendant is a Special Rapporteur with the United Nations. It is a fact that he made the statement to the magazine.

Even assuming for a moment that the statement was damning and consequently defamatory, I would have to ascertain whether it would exclude the defendant from the jurisdiction of the court.

On the first point there was no dispute. Even on the second, the court's jurisdiction was not ousted even if *Mazilu's case* point otherwise, since the ICJ's decision was not binding on this court on a point of public international law and in any event, on the facts made available to me at this interlocutory stage, there was no evidence to suggest that the test set out in *Mazilu's case* had been met.

Therefore hackneyed as it may sound, I must reiterate that for purposes of determining jurisdiction, I must assume that the allegation in the plaintiff's statement of claim was true ...

...

In the circumstances, I am unable to hold that the defendant was absolutely protected by the immunity he claimed.

That did not mean however, that the defendant was estopped from adducing further evidence at trial to support his claim.

...

All I am deciding for the moment is that on the evidence before me, I have jurisdiction to hear this application ..."

The application was dismissed.

Immunity of United Nations Special Rapporteur from legal process; Special Rapporteur as 'expert on mission' within the meaning of section 22, Convention on the Immunities and Privileges of the United Nations 1946; Scope of the immunity concerned; Requirement of acting 'in the exercise of their functions', 'in the course of the performance of their mission', 'in their capacity', 'within the existing mandate'

*Court of Appeal (Kuala Lumpur), 20 October 1997*¹⁵
[1997] 3 MLJ 824

GOPAL SRI RAM, AHMAD FAIRUZ and DENIS ONG JJCA

DATO' PARAM CUMARASWAMY v. MBF CAPITAL BHD & ANOTHER

GOPAL SRI RAM JCA delivered the judgment of the Court:

"...

The issues in the appeal

...

[A]fter the dust of conflict had settled, it became plain that the appeal really turned upon two issues. They may, we think, be conveniently summarized in the form of the following two questions:

(1) Was the judicial commissioner entitled, as a matter of law, to defer the question of the defendant's immunity?

(2) Even if she was, ought she to have done so on the facts of this case?

¹⁵ Appeal from High Court (Kuala Lumpur) 28 June 1997, *supra*.

The first question concerns the existence of a discretion. The second concerns the correctness of the exercise of that discretion by the learned judicial commissioner. If, as contended by the defendant, the law vests no discretion in a High Court to postpone the determination of his immunity from suit, then the first question must be answered in his favour. However, even if the first question is resolved against the defendant, that is not an end of the matter. For, he is yet entitled to succeed if the High Court was wrong in exercising discretion to postpone its decision on the question of the defendant's immunity until it had tried the action.

It is with these matters in mind that we now turn to consider the two issues that lie at the heart of this appeal.

The first issue: is there a discretion?

It is the defendant's argument that the judicial commissioner was wrong in failing to determine the claim of immunity in a summary fashion upon the summons before her. He says that the law gave her no choice in the matter. It is submitted that the learned judicial commissioner erred in postponing her determination of the defendant's immunity until the trial of the action. Her decision in this respect, the defendant argues, goes against the weight of authority.

To properly appreciate these arguments, it is necessary to examine the relevant rule of court. It is O 12 r 7. And it reads as follows:

- 7 (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.
- (2) An application under this rule must be made by summons.

It was submitted on the defendant's behalf that there is no power in the High Court under r 7(1) of O 12 of the Rules to postpone the determination of the question whether the court has jurisdiction over the person of a defendant.

In other words, the defendant's claim of immunity must be answered either in his favour or against him upon his application to set aside the writ. Counsel for the defendant also submitted that that is the way in which the rule has been previously applied.

In support of these arguments, he referred us to *Juan Ysmael & Co Inc v. Government of the Republic of Indonesia* [1954] 3 All ER 236. He read the following passage in the advice of the Privy Council, delivered upon that occasion by Earl Jowitt (at p 239):

[...]

Plainly, if the foreign government is required as a condition of obtaining immunity to prove its title to the property in question, the immunity ceases to be of any practical effect. The difficulty was cogently expressed by Lord Radcliffe in *Dollfus Mieg [United States of America v. Dollfus Mieg et Compagnie, SA]* [1952] 1 All ER 572] where he said (at p 588):

'... a stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and, indeed, to require him [ie, the foreign sovereign] to establish his interest before the

court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do.'

...

Counsel for the defendant has argued that the present case comes within the scope of the proposition formulated by Lord Radcliffe in the *Dollfus Mieg's* case and quoted by Earl Jowitt in *Juan Ysmael*. Here too, says counsel, is a case where immunity is claimed but not established. To insist that the defendant's immunity be established at the trial of the action is to do the very thing which the court ought not to do.

The short answer to counsel's argument is that both *Dollfus Mieg* and *Yuan Ysmael* were cases that concerned sovereign immunity which is absolute in nature. It is trite law that a foreign sovereign may not be impleaded in the domestic forum. And the decision of the House of Lords in *Dollfus Mieg* and that of the Board in *Yuan Ysmael* are merely explanatory of the expression 'impleaded' in the context of an assertion of proprietary or possessory rights. For the purpose of the doctrine of sovereign immunity, a foreign government is considered to be impleaded if property of which it is the owner or of which it is in possession or control is made the subject either: (i) of an action in rem; or (ii) of an action in personam by the judgment in which its proprietary or possessory rights might be affected (see *The Cristina* [19381 AC 485 at pp 490, 507; *United States of America v. Dollfus Mieg et cie*).

However, it is to be noted from the authorities upon the subject that even a plea of sovereign immunity in relation to possessory or proprietary rights may not always lie beyond curial investigation (see, for example, *Haile Selassie v. Cable & Wireless Ltd* [1938] Ch 839, in particular the judgment of Sir Wilfrid Greene MR). The test is whether the property which is claimed is proved or admitted to belong to the foreign sovereign or is lawfully in his possession. Thus, in *Juan Ysmael*, the Privy Council subjected the evidence led on both sides to critical examination and came to the conclusion that the title claimed by the Republic of Indonesia to the vessel in question was, to use the words of Earl Jowitt, 'manifestly defective' (see p 242 of the report). The quality of evidence available on record before the Board in that case made possible such a finding. However, it is difficult to envisage what may have happened if the evidence required further investigation.

It is therefore not surprising to find that in *Dollfus Mieg*, Lord Radcliffe was extremely careful in his choice of words when he laid down the governing principle. When he used the phrase 'normally to be granted or refused' while referring to an application to stay proceedings under O 12 r 7, he undoubtedly had it in mind that cases may occur which, by the very nature of their peculiar facts, would not be 'normal' and would therefore fall to be decided differently.

The present appeal falls well outside the scope of the doctrine of sovereign immunity. The defendant is not a foreign sovereign. The immunity he claims, as conceded by his counsel, is not absolute. It is circumscribed by the terms of the mandate conferred upon him.

...

If O 12 r 7 of the Rules receives the interpretation canvassed by the defendant, it would mean that in no case would the court be in a position to say whether a Special Rapporteur had acted within the scope of his mission. It would place the rule in a strait-jacket and afford no flexibility whatsoever to its application. However abnormal a

case may be, the High Court must, if counsel is correct in his submissions, resolve an immunity question summarily.

We are here dealing with a rule of court-, not a statute enacted by Parliament. Rules of court are formulated to assist in the attainment of justice; not its obstruction. Hence, it is a settled principle that a rule of court must receive a construction that would not result in unfairness or produce a manifest injustice. See *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292 at p 296.

An acceptance of the approach suggested by counsel would produce an unjust result. It would prohibit the court from dealing with each case according to its peculiar facts when dealing with an application under O 12 r 7 of the Rules. Justice will not be achieved by a rigid and unbending approach to the terms of that rule of court.

We must therefore dissent with the propositions advanced by counsel. In our judgment, the learned judicial commissioner was not duty bound to decide the defendant's application in a summary fashion. She was, if the facts merited further investigation, entitled, as a matter of law, to put off the determination of the defendant's immunity until after she had had the benefit of viva voce evidence upon that issue. Whether she was correct in doing so in the present instance goes to exercise of discretion. It falls within the scope of the second question to which we now turn.

The second issue: was discretion correctly exercised?

The alternate submission made in support of the appeal by Dr Das, of counsel for the defendant, is that even if O 12 r 7 permits a postponement of the immunity issue, the judicial commissioner was wrong in doing so in the present case. This argument, as we observed a moment ago, goes to the exercise of discretion by the judicial commissioner.

.....

As to the test that is to be applied in determining whether a postponement is proper in any given case under O 12 r 7, counsel on both sides stand upon common ground. They submit that the correct approach is to determine whether there are any serious questions that call for a trial. We agree.

.....

.... Where the facts upon which challenge to jurisdiction is made are themselves in dispute, then, those facts must be established in the usual way. If the affidavit evidence in an *interlocutory* matter is of such a quality that renders a trial unnecessary, a court may proceed to make findings based upon that evidence. But, in an *interlocutory* application, where the court feels it unsafe to make any definite findings, it is perfectly entitled to say so and order the matter to be determined at trial. It may be added for completeness that where jurisdiction is challenged, the facts as pleaded in the statement of claim must be assumed to be true. See *Rediffusion (Hong G Kong) Ltd v. A-G of Hong Kong* [1970] AC 1136.

The extent of the disagreement between the disputants before us is focussed upon a single question. It is whether there are serious issues to be tried.

....

For the purpose of addressing the question at hand, it is necessary, as a first step to identify some of the salient issues that form the axis of the dispute between the parties.

For the purposes of the present appeal, three I are readily identifiable. They are as follows:

- (1) Whether the defendant spoke and published the words complained of while on mission, that is to say, in his capacity as Special Rapporteur;
- (2) Whether it is the court or the Secretary General who should determine whether the defendant exceeded the terms of his mandate when he spoke and published the alleged defamatory words; and
- (3) If it is the court and not the Secretary General who should make the determination, then, whether the defendant did in fact exceed the terms of his mandate.

Although each of these questions flows from one to the next, it is preferable to deal with them separately.

The capacity in which the defendant spoke

Dr Das argues that the question of capacity is capable of summary determination, and, because the evidence in relation to it has not been credibly denied, it ought to be resolved in the defendant's favour. Accordingly, submits counsel, the judicial commissioner erred in reserving this issue to trial.

.....

These rival contentions amount, in our judgment, to a serious question. We are of the view that it would be patently unsafe to determine, in a summary fashion, the capacity in which the defendant uttered the impugned words.

Suffice to say that the article in itself does not expressly declare that the defendant was interviewed and spoke the alleged defamatory words as Special Rapporteur. What his counsel has done is to invite this court to infer, from the tenor of the language employed by the author of the article, that the defendant spoke solely as Special Rapporteur.

With respect, we must decline this invitation. The issue under discussion is substantially an issue of fact. Like any other fact, it must be determined at trial,

....

.... In the circumstances of the present case, and in fairness to both sides, it would have been most unwise of the judicial commissioner to embark upon a summary resolution of the point at issue. In our judgment, she was entirely correct in reserving her decision until after the trial of the action.

Who decides excess of mandate?

Dr Das has argued that it is for the Secretary General of the United Nations to decide whether the defendant exceeded the mandate granted him. If the Secretary General took the view that the defendant had exceeded the terms of his mandate, the former would have waived the latter's immunity. This did not happen. [see, for the text of the letter of the Secretary general, the decision of the Court below, *supra*. Ed.]

.....

Five days later, that is to say, on 12 March 1997, the Minister issued his certificate under s 7(1) of the International Organizations (Privileges and Immunities) Act 1992 ('the Act') [see, for the text, the decision of the Court below, *supra*. Ed.].

.....

Relying upon these two documents, Dr Das submitted that the defendant's immunity from suit for the words spoken was beyond argument. He drew our attention to the relevant provisions in the Convention on the Privileges and Immunities of the United Nations ('the General Convention'), the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 ('the 1949 Order') and the Act.

.....

With respect, we are unable to agree with Dr Das' submission that the defendant's immunity from suit is a matter beyond peradventure because the Secretary General has already expressed his view that the words complained of were uttered by the defendant (to quote from his letter) 'in the course of his mission'. We are also unable to agree with his argument that the Minister's certificate, which is evidence of the facts therein stated, concludes the matter in the defendant's favour. Our reasons are as follows.

First, so far as the Secretary General's letter is concerned, neither the General Convention nor the 1949 Order, nor indeed the Act, confers any power or authority upon him to declare that the words complained of were spoken by the defendant in his capacity as Special Rapporteur.

Indeed, counsel for the defendant has plainly failed to demonstrate that the Federation of Malaysia has, by treaty or legislation, surrendered its sovereign judicial power to any organ of the United Nations to make a finding of fact of the nature that forms the core of the litigation in the instant case. It is axiomatic that the judicial power of the Federation of Malaysia, which is vested in its courts, is not to be lightly treated as having been excluded by treaty or even by municipal legislation.

The power vested in the judicial arm of government to review executive acts and to decide disputes inter se citizens and between citizens and the state is jealously guarded. Clear words in a statute are essential to exclude that power. Needless to say, such clarity of language is absent in the General Convention, the 1949 Order and the Act.

Accordingly, we are satisfied that the General Convention and the 1949 Order merely confirm the Secretary General's power to waive immunity. With respect to counsel for the defendant, there is absent any power in the Secretary General to make the kind of determination of fact he has made in his letter, namely, that the defendant spoke and published the words complained of in his capacity as Special Rapporteur. That is a question for our courts to decide. And the stage for making such a determination has not as yet arrived. The suggestion that the Secretary General may by the stroke of his pen exclude the power of the High Court to make the factual determination upon which the defendant's immunity is postulated is, with respect, an invitation to journey from the sublime to the ridiculous, which we must with respect, decline to accept. In our judgment, the learned judicial commissioner was plainly correct in refusing to act upon the mere ipse dixit of the Secretary General on the question of the capacity in which the defendant spoke the words complained of.

Second, in so far as the Minister's certificate is concerned, it adds nothing in the defendant's favour. That certificate is, as the second subsection to s 7 declares, 'evidence of the facts certified'.

.... [T]he Minister has not certified as *a fact* that the defendant spoke the words complained of in his capacity as Special Rapporteur. That fact is therefore still at large and must necessarily be determined by the judge at trial. All that the Minister's certificate does is to reproduce the extent of the defendant's immunity in general terms. In our judgment, the certificate does not conclude the matter to the extent contended by the defendant.

The reliance placed by defendant's counsel on the decision in *Engelke v. Musnmnn* [1928] AC 433 in this connection is, with respect, not well founded. ...

....

The present case does not concern diplomatic immunity. ...

....

It is clear that the capacity in which the defendant spoke the impugned words is intertwined with his mandate. The former is, as we have earlier said, a matter for the courts to decide. It follows that the latter must also be resolved in like fashion.

In our judgment, the question whether the defendant exceeded the terms of his mandate is not a matter for the Secretary General to decide. It is a question that the court must determine according to the evidence presented at the trial. The opinion expressed by the Secretary General did not therefore bind the learned judicial commissioner. She disregarded it. She was entitled to do so. Her decision in this respect is correct.

To reiterate, the question whether the defendant uttered the alleged defamatory words in his private capacity or as Special Rapporteur is one of fact to be determined at the trial of the action. If the trial court finds that the defendant spoke the alleged defamatory words in his personal capacity, no question of immunity can arise. For, neither the Secretary General nor the Minister may assert immunity on behalf of the defendant in respect of words uttered by him in his capacity as advocate and solicitor. If the court comes to the conclusion that the defendant did in fact speak as Special Rapporteur, it must go on and decide whether he acted within the terms of his mandate. Clearly, these are matters that amount to serious questions calling for a trial of the action.

However, before we move further, there is one other comment that we wish to make about the Secretary General's letter. It appears that the Secretary General has asserted the defendant's immunity in terms that clearly fall outside the scope of the General Convention and the 1949 Order.

Section 22 of art VI of the General Convention confers upon experts on mission immunity for acts done and words written or spoken 'in the course of the performance of their mission'. Article 12(b) of the 1949 Order, on the other hand, confers immunity upon persons employed on missions on behalf of the United Nations, 'in the exercise of these functions'. These words mean, of course, that persons, such as the defendant, are immune from suit or prosecution so long as their acts were done, or their words were spoken or written, in the exercise of their functions.

However, the Secretary General has, in his letter, taken the position that the defendant uttered the words complained of 'in the course of his mission', and is therefore immune from suit. We are however of the view that the phrase employed by the Secretary General in his letter is of much wider import than that appearing in either the General Convention or the 1949 Order. For, a person may be 'in the course of his mission' and yet commit acts that are not 'in the exercise of these functions'. The point comes into sharp focus in cases where it is shown that a defendant wears, so to speak, more than one hat. That appears to be the case here. The same would apply with equal force where

a trial court finds that acts were done or statements made in circumstances that prima facie fall outside the terms of a Rapporteur's written mandate.

We therefore agree with the submission of Dato' Lingam that the Secretary General's letter is not conclusive and that it appears to create a new class of immunity not contemplated by, and falling outside the scope of, the General Convention and the 1949 Order.

With that we turn to the third question.

Did the defendant exceed his mandate?

Dr Das argues that his client did not exceed the mandate given him. It is his submission that the mandate should be construed liberally and not strictly. If a strict construction is placed upon the terms of the mandate, it may unduly curb or impede the independence of the defendant as Special Rapporteur in the performance of his work. It is contended that the defendant, as Special Rapporteur, must not only interview people but also permit himself to be interviewed by journalists. Counsel accordingly submits that although the words were spoken by the defendant during an interview conducted by a journalist, the occasion nevertheless comes within the terms of the defendant's mandate.

Dato' Lingam submits that at this stage of the proceedings, the plaintiffs have prima facie demonstrated that the defendant exceeded the terms of his mandate when he spoke the words complained of. He argues that whether the defendant acted within the terms of his mandate is a serious question that must be determined at the trial of the action.

After careful consideration, we find ourselves in agreement with Dato' Lingam's submissions. Our reasons for accepting them in preference to those advanced by Dr Das are as follows.

First, the construction of the mandate.

In support of his argument for a wide construction of the mandate, counsel relies on the opening paragraph of s 22 of art VI of the General Convention which confers immunities upon experts on missions 'as are necessary for the independent exercise of their functions'. He submits that Malaysia, as a party to the General Convention, without reservation, was obliged to and did take steps to incorporate the General Convention into its municipal law by making the 1949 Order. It is Dr Das' submission that art 12 of the 1949 Order should be interpreted to bring it in line with s 22 of art VI. According to him, this is because the former intends to give statutory effect to the latter.

.....

In so far as is relevant to the case at hand, the principle that emerges is that reference to a treaty, such as the General Convention, for the purpose of interpreting a municipal statute, such as the 1949 Order, that seeks to give effect to the former is permissible only where the latter is ambiguous. But the proposition has no relevance whatsoever to a case where the provisions of the municipal statute that seeks to give effect to a treaty are plain and unambiguous.

....

Article 12 of the 1949 Order is clear and unambiguous in the provision it has made by its terms. There is therefore no necessity to have resort to s 22 of art VI of the General Convention for purposes of interpreting the municipal legislation in this case. As was pointed out to counsel during argument, art 12 of the 1949 Order is, by its terms, narrower than s 22. Our courts are therefore unconcerned with the language of s 22 of

art VI. They must, instead, confine themselves to the language actually used by art 12 of the 1949 Order.

It follows therefore that the terms of the defendant's mandate has, at this stage, to be construed with reference to art 12 and not s 22 of art VI of the General Convention. As earlier observed, art 12 renders the defendant immune only if he spoke and published the words complained of in the exercise of his functions as a Special Rapporteur. This involves the two elements. The first is the capacity in which the words were spoken. That, as we earlier said, is a question which falls to be resolved at the trial. The second element is the defendant's mandate, the question being whether he exceeded it on the facts peculiar to this case.

As a general rule, where a tortious act is committed in excess of authority, it may be inferred, in the absence of other facts, that the tortfeasor was on a frolic of his own and was therefore acting in his personal capacity. The cases of *Beard v. London General Omnibus Co* [1900] 2 QB 530 and *Hilton v. Thomas Burton (Rhodes) Ltd* [1961] 1 WLR 705 are illustrative of this proposition and go to demonstrate that, in the law of torts, the question whether an act was performed within the scope of a tortfeasor's authority is one of fact and of degree.

In the present instance, the defendant's mandate, which we have reproduced in full earlier in this judgment, is, in summary, confined to:

- (a) the making of inquiries into any substantial allegations transmitted to him and to report his conclusions thereon;
- (b) identifying and recording attacks on the independence of the judiciary, lawyers and court officials;
- (c) making concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and
- (d) studying important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

In short, the scope of the defendant's function is to inquire and report to the Commission on Human Rights upon matters that concern the independence of judges and lawyers. Nowhere by its terms does the mandate authorize interviews to members of the press. Thus, in our view, upon the very limited material available at this early stage of the proceedings, it is not entirely beyond dispute whether the words complained of were published by the defendant in the exercise of his functions as Special Rapporteur.

It follows from our interpretation of art 12 that the question of the independence of the defendant in the exercise of his functions as Special Rapporteur is a matter that must *ex necessitate rei* be determined with reference to the terms of his mandate. Accordingly, the question whether the defendant exceeded his mandate in the context of the immunity claimed by him under art 12 of the 1949 Order, as well as the construction of that Article, are matters for the trial judge to decide. Indeed, they are serious questions to be tried.

....

In our judgment, each case must be decided according to its own facts. There may be circumstances in which statements made by a Special Rapporteur during an interview come well within the scope of his mandate. On the other hand, a fact pattern may emerge that leads to the conclusion that what was said or done at such an interview was in excess of the authority given to a Special Rapporteur.

....

Exercise of discretion: an overview

....

Earlier in this judgment, we observed that the defendant's second and alternative submission that the judicial commissioner erred in postponing the determination of the defendant's immunity went to the exercise of discretion. The principles that govern appeals against the exercise of discretion are well settled and beyond argument.

....

In our judgment, the defendant has failed to demonstrate that the learned judicial commissioner has committed an error that warrants appellate interference. She asked herself the right questions, took into account all relevant considerations and directed herself correctly on the applicable law. Above all, the order she made has not resulted in any injustice to the defendant. There has been no ruling against immunity, the judicial commissioner taking much care to leave that issue open to be decided at the trial of the action. The defendant is entitled, at the conclusion of the trial, to a verdict in his favour in the event he establishes his claim to immunity on the facts.

The approach

....

[I]t must be borne in mind, by all concerned, that an assertion of immunity is not to be likened to the rubbing of the lamp by Aladdin. There is no magic in it. Any belief entertained to the contrary must be abandoned soonest.

Each case where immunity is asserted has to be dealt with on its own facts. Whether a particular fact pattern attracts immunity is for the courts to decide in the exercise of their constitutional function. If a court holds that immunity does not attach to an individual in a given set of circumstances, that is an end of the matter. The governing principles are well settled. But their application varies according to the peculiar circumstances of each case. The present appeal is merely one such instance.

We note with satisfaction that courts of other jurisdictions have adopted a similar approach. Thus, in *United States v. Melekh* (1960) 190 F Supp 67, the Federal District Court (Southern District of New York) denied immunity to an official of the United Nations despite a letter of verification. Similarly, the Court of Appeal of Paris, in 1961, in the case of *Ali Ali Reza c consorts Grimpei* denied the Saudi Arabian delegate's claim of immunity on the ground that the immunity conferred upon members who attended the Third Session of the General Assembly (held in Paris in 1948) by the equipollent French decree was limited to acts and words spoken and written in the exercise of their functions and had no application to a private contract made prior to the session and continued after its close. These and other examples are to be found in *The Digest of International Law* Vol 43 at p 32 et seq.

The issue of immunity has been considered very recently by the United States District Court for the Northern District of California in *Corrinet v. Ginns* (Case No C 97-0142 FMS, decided on 21 May 1997, unreported).

....

The result

For the reasons we have set out in this judgment, we are of the view that this appeal must fail. The orders made by the High Court are affirmed. ...

Appeal dismissed.

Jurisdiction in the field of divorce; Law Reform (Marriage and Divorce) Act 1976 section 48(1)(c); The concept of domicile

High Court (Melaka), 31 July 1997
[1997] 3 MLJ 467

SURIYADI J

ANG GECK CHOO v. WONG TIEW YONG

The petitioner was a citizen of Singapore, which was also her original place of domicile. She was lawfully married to the respondent at Melaka in 1987. Three children were born from the marriage which was, however, not a happy one and three attempts to reconcile the differences before a marriage tribunal failed. The wife was being assaulted by the husband and going to hospital to receive medical treatment was the norm due to the heavy hands of the husband. In 1995 she left for Singapore temporarily to seek employment, during which period she returned regularly to visit her children. Finally she was unable to bear further physical and verbal abuses and left again for Singapore in July 1996 with two of her children and did not return to Malaysia to visit her third child. She filed a divorce petition on 18 March 1997, nine months after she left Malaysia. The respondent filed a preliminary objection, raising the issue of the legality of the divorce petition by virtue of the petitioner not being able to fulfil the requirement of the place of domicile as required by s 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976.¹⁶

The Court held, *inter alia*:

"In a nutshell, one of the pre-conditions to be fulfilled before a court may grant a decree of divorce is that the domicile of the parties when the petition was presented was Malaysia."

¹⁶ Section 48 reads: "(1) Nothing in this Act shall authorize the court to make any decree of divorce except:

(a) ...

(b) ...

(c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

..."

The Court referred to the discussion of section 80(1)(a) of the Singapore "Women's Charter" (which is *in pari materia* with the above Malaysian provision) by the judge in *W.T.Berge v. Salamah bte Salim* ([1979] 1 MLJ 18):

"He opined that s 80(1)(a) was a mandatory requirement, a view which I totally agree with. Therefore, unless the contents of s 48(1)(c) are complied with then a High Court judge has no power to grant a decree of divorce for the applicant. ... There are too many authorities which have pronounced the impossibility of laying down an absolute definition of domicile. ... What is trite is that a place of domicile may be changed by several reasons, one of which is the metamorphosis to a domicile of choice by a person's own act from that of a domicile of origin by birth. This domicile of choice on the other hand may not be permanent as the person concerned may abandon it which results in the return to the domicile of origin until a fresh place of domicile is acquired. In other words, during the time when a person moves off to another place and takes up domicile there, the domicile of origin is held in suspension, with the latter to be reactivated only if the domicile of choice has been abandoned. It is no coincidence that it is not possible to have more than one domicile at one and the same time."

The Court referred to the suggestion of SCARMAN J in *Re Estate of Fuld, Decd (No.3)* ([1968] P 675 at 682; [1966] 2 WLR 717 at 723) for "an enlightening and simple approach to the meaning of domicile".

While the question of the domicile of the husband in the current case did not pose any problem, the Court said about the domicile of the wife:

"... the Act is none too helpful as there is no presumption provision that can save her position or intention despite her ten years' residence in this country. Therefore, direct and secondary evidence must be submitted by the applicant if the need arises."

The Court referred to *Melvin Lee Campbell v. Amy Anak Edward Sumek* ([1988] 2 MLJ 338) in which the court said: "There are two essential elements involved in determining the domicile of choice, and these are the factors of residence and the requisite intention to reside permanently for an indeterminate period in the country where it is alleged that the petitioner has adopted the domicile of choice". As to the defendant's suggestion that the petitioner's return to Singapore by conduct was a clear expression of her desire to abandon Malaysia as her place of domicile, the Court had this to say:

"How counsel arrived at that conclusion was difficult for me to accept as there were many other inferences that I could draw and arrive at by her choice of sanctuary. I could infer that she went to Singapore as that was the only place in the world where sanctuary was assured for her however temporary that may be. ... With the history of suffering behind her, no reasonable person would have blamed her as regards her wisdom of choice. Moving further, I am unable to detect any legal doctrine, either through case law or statutes, which presumes an abandonment of the place of domicile merely by being at her domicile of origin. ... [In contradistinction to known presumptions regarding the domicile of a Malaysian husband, an infant and, under outdated law, the married woman] But certainly I am unable to come across any presumption that just because a wife has returned to her place of original domicile ... merely to seek out financial sustenance, she should be viewed with prejudice and distortion. ... It will be fallacious to think of the terms 'domicile' and 'residence' as

being synonymous (see Lee Hun Hoe J at p 47 para h in *Majumder v. A-G of Sarawak* [1966] 1 MLJ 41).

... This truth [of the petitioner's statement of facts regarding her presently staying in Singapore] surely cannot be construed as a statement of declaration of her intention to abandon Malaysia. Even if she had indicated that she desired to give up Malaysia as her place of domicile, that factor proves nothing as it merely discloses the existence of animus without establishing the necessary factum [with reference to Lord HANDWORTH MR in *Boldrini v. Boldrini and Martini* [1932] P 9 – who referred to *Winans v. A-G* [1904] AC 287 – and to *Copinger-Symes v. Copinger-Symes & Another*] ... I am unable to find any evidence of her having undertaken any of those strong measures indicating her supposed desire to permanently move back to her country of birth. ... [T]o equate a change of address as factum certainly is an unsound argument. ... Even though her choice of place might invite a negative and distorted picture, to read into it a desire to abandon her domicile of choice would be stretching the facts too much. ... As much as temporary residence for the purpose of health or travel or business does not have the effect of changing the place of domicile, neither do I believe that by merely going to Singapore to work is proof of her desire to abandon Malaysia. ... [W]e have no other facts which may indicate her desire to return to Singapore permanently. On the other hand, we have these evidence which reflect otherwise, viz.:

- (1) she had willingly left Singapore to marry and settle down in Melaka;
- (2) she had been blessed with three children in Melaka;
- (3) she had resided here for a period of no less than ten years, a length of time which would have made her eligible to attain Malaysian citizenship;
- (4) she had contributed substantially for the deposit of their matrimonial home resulting in that property being registered under both names;
- (5) despite the bad deal of the marriage, she agreed to have the matter referred before a marriage tribunal at least three times;
- (6) she was literally driven out of the matrimonial home due to the savage attacks of the husband; and
- (7) despite knowing the probable consequences to her if she were to return to visit the children at the matrimonial home, she still took the risk. It was only after it became humanly unbearable that she left for Singapore which eventually resulted in the petition being filed.

... I am convinced that when she was in Malaysia she already had exercised her choice by making Malaysia her place of domicile. Furthermore, I am not convinced that merely by her remaining a Singaporean and seeking employment in Singapore during that temporary period she had abandoned Malaysia as her place of domicile. ... [T]he applicant's return to Singapore was due to the abusive behaviour of the respondent. In simple terms her act was never pursuant to a free choice and therefore cannot be construed as unequivocal.

... An assertion of a change of domicile must be proved unequivocally, implying falling back on accepted norms of our evidential system by submitting admissible and credible evidence. For the current case, had the stay been very long coupled with other convincing evidence that she had burnt her boats I would not have dwelt too long on the objections of the respondent. What has to be proved is no mere inclination arising from a situation thrust upon her by an external or temporary pressure but an intention formed to reside in a certain territory indefinitely with that intention proved by sufficient evidence to establish the act of abandonment of the domicile of choice. Mere inferences and circumstantial evidence unsupported by other convincing evidence will not be sufficient. ... Having considered the totality of the available evidence, I am satisfied that the respondent not only had not succeeded

in proving the animus but also the factum. Based on this conclusion, the preliminary objection of the respondent is dismissed."

Jurisdiction to hear application by a Malaysian mother for custody of children of foreign nationality who are in the country for a transient stay; Whether jurisdiction correctly exercised; Domicile of a married woman

Court of Appeal, 13 August 1997
[1997] 3 MLJ 768

MAHADEV SHANKAR, MOKHTAR SIDIN and DENIS ONG JJCA

NEDUNCHELIYAN BALASUBRAMANIAM v. KOHILA A/P SHANMUGAM

The respondent (the wife, K) was a Malaysian citizen and was married to the appellant (B) who was born in Sri Lanka but was a Canadian citizen. K had applied for and was granted permanent residence in Canada. The two children were born in Canada and were Canadian citizens. During a holiday stay of the family in Malaysia K filed an originating summons with the High Court at Ipoh, Malaysia, praying for an order that she be given custody of the children, and subsequently filed a divorce petition.

The judge granted interim custody pending outcome of the divorce petition. B applied to strike out the divorce petition on the ground that the court had no jurisdiction to entertain it. The judge struck out the petition and held that although K was a Malaysian citizen, she had taken up permanent residence in Canada and that by virtue of this and the fact that her husband was a Canadian citizen residing in Canada, she had a Canadian domicile. Section 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976¹⁷ precluded the entertainment of any divorce petition unless both parties to the marriage were domiciled in Malaysia at the time the petition was presented. B then applied for an order that the children be returned to him since the interim order was conditioned to be effective only up to the disposal of the divorce petition. However, the judge held on 3 May 1997 that the court had jurisdiction to hear the application for custody by K and granted custody and control of the two children to K. B appealed.

MAHADEV SHANKAR JCA delivered the judgment of the court:

"Jurisdiction

Jurisdiction over the person and property of infants is conferred on the High Court by s 24(e) of the Courts of Judicature Act 1964 read with art 121 of the Federal Constitution. ...

...

On the uncontested material before us, we are of the opinion [that] any Malaysian woman upon marriage will acquire her husband's domicile and until that marriage is lawfully dissolved, she will retain the domicile of her husband."

After referring to and quoting section 3 of the 1976 Act¹⁸ the Court continued:

¹⁷ See *supra*.

¹⁸ S.3 of the Act reads: "(1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia. (2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the

"Notwithstanding the fact that K holds a Malaysian passport and must therefore be presumed to be a citizen of Malaysia, it is our opinion that the evidence here has proved that she is not domiciled in Malaysia. In this case, there is the added factor that K freely elected to obtain permanent residence in Canada. When she applied for her Malaysian passport in 1993, she declared that her country of residence was Canada, and her passport ... says so. In her affidavit ... and also in her divorce petition, she avers that she is a Canadian permanent resident domiciled in Canada. The applicability of the Act therefore turns on the proper interpretation of s 3(1) [of the 1976 Act].

...

Our view is that in the present context, the expression 'ordinarily resident' is only relevant to the divorce jurisdiction of the court. The use of the word 'domicile', as opposed to physical presence, in the second limb of s 3(1) and in 3(2) militates against [the interpretation according to which the words 'all persons in Malaysia' must be read to mean all persons 'ordinarily resident' in Malaysia, and that the Act can have no application to tourists and other transient visitors]. The ordinary meaning of the first limb of s 3(1) therefore is that the Act applies to all persons physically present in Malaysia unless the Act otherwise provides. The Act also applies to persons resident outside Malaysia, provided they are domiciled in Malaysia but again only in those cases where the Act does not otherwise provide.

Since K is not domiciled in Malaysia but was in our view ordinarily resident in Canada, the second limb of s 3(1) does not apply to her. But K and her children were physically present in Malaysia at all times material to this application. They come within the first limb of s 3(1).

...

Was the jurisdiction correctly exercised?

...

Of course the basic rule is that the paramount consideration is the well-being of the infants. But where the children are Canadian nationals, the question is where do the children belong, where is the matrimonial establishment, and which is the proper court to decide the future of these Canadian nationals.

...

Admittedly, K retained her Malaysian citizenship, but *she* was the one who went to Canada to marry B there. She applied for permanent residence there. The simple meaning of this is that she declared to the Canadian authorities that for the rest of her foreseeable life she intended that Canada should be the country in which she would ordinarily reside. The very least that this court expects of K is that she will honour and abide by the laws of Canada which has, as an act of grace, conferred her with the status of permanent residence. She should therefore have referred her problems with regard to her Canadian children to the Canadian courts and abided by their decision.

...

For all the reasons aforesaid, we hereby set aside the order of the High Court ..."

SINGAPORE

Jurisdiction over matters concerning immovable property situated abroad; Forum non conveniens

Court of Appeal, 19 April, 11 August 1995
[1995] 3 SLR 97

YONG PUNG HOW CJ KARTHIGESU and L.P.THEAN JJA

ENG LIAT KIANG v. ENG BAK HERN

The appellant (father) and the respondent (son) had, together with another child of the appellant's and appellant's wife, interests in various companies and properties in Singapore and abroad. The respondent had filed a petition to wind up a Singapore company and a similar petition to wind up a Malaysian company, with the appellant as one of the respondents. The appellant subsequently filed an action claiming, *inter alia*, a declaration that the respondent held on trust for appellant shares in four companies and various parcels of land in Malaysia. The respondent filed a notice of motion for an order that the claims relating to the shares in the Malaysian companies and the land situated in Malaysia be stayed on the ground that the Singapore court had no jurisdiction in relation to foreign immovable properties, and alternatively, on the basis of forum non conveniens.

The trial judge held that since the appellant's claim rose in equity, the court had jurisdiction over the matter even though the proceedings were concerned with foreign immovable properties.¹⁹ The judge considered that if the reliefs sought by the appellant were granted by the court, they might require the respondent to do things which were impossible, thus putting him in eminent danger of contempt proceedings for non-compliance. Yet, since the main relief which the appellant sought was a declaration of his interest, there was no law in Singapore which made it impossible or illegal for such a declaration to be made.

As regards the alternative ground for the stay, the trial judge applied the principles as laid down in *The Spiliada (Spiliada Maritime Corp v. Cansulex Ltd.)*, and examined the factors connecting the action to the particular forum. Having considered all the factors the court below held that Singapore was not the natural or appropriate forum for the trial of the claims involving the Malaysian lands and shares and that the Malaysian court was clearly the more appropriate forum. Accordingly the judge allowed a stay. ([1995] 1 SLR 577) The appellant appealed.

L.P.THEAN JA delivered the judgment of the Court. The Court rejected the submission by the respondent's counsel that the exception on the rule concerning jurisdiction over proceedings on immovable property situated abroad (*see supra*) should not be applied for allegedly being a product of judicial chauvinism with no place in modern jurisprudence based on judicial comity:

¹⁹ Reference was made to rule 116 of Dicey & Morris on The Conflict of Laws (12th Ed.) Vol.2 stating the general rule that the court had no jurisdiction to entertain proceedings principally concerned with a question of the title to, or the right of possession of, immovable property situated out of England, except, *inter alia*, where the action is based on a contract or equity between the parties.

" ... On the question of jurisdiction, the respondent has not shown that the Malaysian court would not under any circumstances recognize a trust that is declared by a court other than its own and give effect to that order."

...

Accordingly, we are in entire agreement with the learned judge and reject the contention of the respondent that the court has no jurisdiction to determine the claims of the appellant involving the immovable properties in Malaysia."

Turning to the second main issue, that is, whether the jurisdiction to determine the claims should be declined on the ground on forum non conveniens, the Court held, *inter alia*:

" ... In relation to this issue there are two tests that have been laid down. The first is that as set out in *Spiliada Maritime Corp v. Cansulex Ltd* ... [W]e hope we would be doing an injustice to the very clear and learned exposition there, if we set them out in a compressed form as follows ... A stay will only be granted on the ground of forum non conveniens, where the court is satisfied that there is some other available and appropriate forum for the trial of the action. The burden of proof rests on the defendant, and the burden is not just to show that Singapore is not the natural or appropriate forum but to establish that there is another available forum which is clearly or distinctly more appropriate than the Singapore forum. The natural forum is that with which the action has the most real and substantial connection, and the court will consider what factors there are which point in that direction. If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. The court in this respect will consider all the circumstances of the case."

The Court then gave an exposition of the other available test which was propounded in the Australian High Court decision in *Oceanic Sun Lines Special Shipping Co Inc v. Fay* ([1988] 165 CLR 197). As to the submission by the appellant's counsel that the test in *Oceanic Sun* should apply, the Court said:

"On authority and on principle we cannot agree. The *Spiliada* has been considered and approved in *Brinkerhoff (Brinkerhoff Maritime Drilling Corp v. PT Airfast Services Indonesia* [1992] 2 SLR 776) and we can see no reason for departing from that authority. The underlying basis in this test is whether the local court is clearly an appropriate forum or not and whether there is another forum which is distinctly and clearly more appropriate. It has a more liberal approach which cut down local parochialism as regards judicial adjudication and attaches greater importance to consideration of international comity."

Reverting to the present case the Court considered the factors relating to the appellant's claim involving the lands and the shares respectively, and concluded:

"Having considered the factors, we are of the opinion that the respondent has discharged the burden of showing that Singapore is not the natural or appropriate forum and that the Malaysian court is clearly the more appropriate forum for the trial

of the claims involving the Malaysian properties. In the result, we dismiss the appeal."

Injunction restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction; Forum non conveniens

Court of Appeal, 24 April, 2 June 1997
[1997] 3 SLR 121

YONG PUNG HOW CJ, KARTIGHESU and L.P.THEAN JJA

KOH KAY YEW v. INNO-PACIFIC HOLDINGS LTD

The appellant was a Singaporean who had been residing in California since 1985 and who was granted permanent resident status to stay and work in the US in 1992. The respondent was a company incorporated in Singapore. The respondent had employed the appellant in California in 1990 to perform business activities for it in the US, and dismissed him in 1995. The appellant brought proceedings for unlawful dismissal in the Californian courts. An application by the respondent before the Californian courts to quash the service of proceedings of the complaint on the respondents and to dismiss the appellant's actions for lack of jurisdiction failed and an application to stay the proceedings was denied. Subsequently the respondent took out an originating summons in Singapore for an injunction restraining the foreign proceedings and a declaration that Singapore was the natural and proper forum for the resolution of the dispute between the parties. The trial judge granted the injunction and the declaration. The appellant appealed.

The Court's decision was delivered by YONG PUNG HOW CJ:

" ...

13. The law relating to the granting of injunctions restraining foreign proceedings is well settled and undisputed. It is derived principally from the Privy Council case of *Societe Nationale Industrielle Aerospatiale v. Lee Kui Jack* [1987] AC 871 (the *Aerospatiale* case). In that case, Lord Goff set down certain principles in relation to the law in this area. These principles have since been approved definitely by us in *Bank of America National Trust & Savings Association v. Djeni Widjaja* [1994] 2 SLR 816 (*Bank of America* case) and applied by Judith Prakash J in *Kishinchand Tiloomal Bhojwani & Another v. Sunil Kishinchand Bhojwani & Another* [1996] 2 SLR 682."

The Court then quoted from the *Aerospatiale* case as quoted by the court in the *Bank of America* case:

14. ...

The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history ... From an early stage, certain basic principles emerged which are not beyond dispute. First, the jurisdiction is to be exercised when the 'ends of justice' require it ... Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed ... Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an

injunction will be an effective remedy ... Fourth, it has been emphasized on many occasions that, since such order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution ..."

The Court continued quoting from the *Bank of America* case where L.P.THEAN JA elaborated the above cited principles:

"15. ...

Applying the principles here, if in this case the court of Singapore is the natural forum for the determination of the dispute, an injunction should only be granted if the pursuit of the proceedings by the respondent in Indonesia would be vexatious or oppressive and, in this connection, account must be taken of any injustice to the appellants if the respondent was allowed to pursue those proceedings and also of any injustice to the respondent if he was not allowed to do so ..."

Referring to the two questions of fact which were considered by the judicial commissioner in the *Bank of America* case, viz. (i) whether the respondent was amenable to the jurisdiction of the court, and (ii) whether the Indonesian proceedings were vexatious or oppressive, the Court held:

"16. We approved the learned judge's approach in that case. ... We would therefore apply the same in the present appeal in coming to a conclusion as to whether the injunction granted against the appellant should have been granted.

17. With regard to the first question of fact, L.P.Thean JA stated in the *Bank of America* case that, as long as a party submitted to the jurisdiction of the courts, by seeking relief in the local High Court or otherwise, this would answer the question whether the party was amenable to the jurisdiction of the court. In our opinion, the same would apply if the party was validly served with the required court documents ... Being amenable to the jurisdiction of the local courts simply means being liable or accountable to this jurisdiction. As such, so long as any local courts have in personam jurisdiction over a party, ... the first criteria would be satisfied.

18. However, in order to reach a conclusion on the second question of fact one would have to consider and analyse all the facts of the case objectively. In doing so, one would inevitably have to consider the natural and proper forum for the resolution of the dispute. ... Should it not even be found that a country or, to be more specific, a jurisdiction could satisfy this precondition, then an injunction could never be justified or upheld. Of course, the principles to apply here to determine the natural and proper forum would then be the principles as stated in the case of *The Spiliada; Spiliada Maritime Corp v. Cansulex Ltd* [1987] AC 460 ... since this case is the definitive case on the issue. We do not propose to go into an in depth analysis of the *Spiliada* case²⁰, save to say that it is necessary to locate 'connecting factors' in order to determine the more convenient forum for the dispute.

19. ... The natural and proper forum is but one of the factors to consider ... A court, when deciding on this second question of fact, should also look at all the circumstances of the case. ... One such example not previously considered would be the kind of remedy sought by the party proceeding in the foreign jurisdiction. ... Another could be the stage at which the foreign proceedings have progressed. ... Once all these other relevant circumstances have been considered, the court should then consider the injustice each party might suffer in determining whether the injunction should be granted or not. This would be the main consideration in deter-

²⁰ See *supra* at XXX.

mining whether or not the proceedings in the foreign court were vexatious or oppressive. Should the court then come to the conclusion that the foreign proceedings are indeed vexatious or oppressive, then the court should exercise its discretion to grant an injunction restraining the party who had commenced the foreign proceedings from continuing with it. ...

21. ... While it may [be] right to say that, if proceedings were commenced concurrently in two jurisdictions, one set of actions would be more likely than not to be vexatious or oppressive, this does not mean that an action commenced in one jurisdiction only could not be vexatious or oppressive. ...

22. Having said that, we have to remind ourselves that, while the same principles and approach apply to every case of this nature, each case turns strictly on its individual facts. Further, in dealing with cases such as the present one, where the appellant had only started proceedings in one jurisdiction, the courts should be more cautious than not in granting injunctions compared with situations, in which a party had commenced actions concurrently in two jurisdictions. In the latter situations, it is understandable that any court should feel uncomfortable about allowing both actions to go on. Not only would the same issue be litigated twice but there would also be the risk of having two different results, each conflicting with the other. ...

23. However, in the former scenario, as it is with the present case, the situation would be quite the opposite. The party who commenced the foreign proceedings would only have done so in one jurisdiction. He would have in no way abused the systems of justice of various jurisdictions to his advantage. It is the defendant in the foreign proceedings that is complaining about the action and wants the foreign proceedings stopped. In such a case, we think that as long as the party who commenced the foreign proceedings was entitled to do so, whether or not the foreign courts recognise this, then our courts should be extremely cautious in granting an injunction. ... For an injunction in these cases to be justified, there must be strong and compelling reasons why an action in the foreign courts should not be started or continued. ... A court's role is to achieve fairness and justice according to the law of the land. However, this does not include preventing a party from commencing or continuing his foreign proceedings simply on the basis that it would be more inconvenient for one party as compared to the other. Any party who has been aggrieved has the right to seek recourse to justice in any judicial system that is convenient for him. This is his natural right. It is not up to a plaintiff to bring an action in a court which is convenient for the defendant. ... The defendant has no right to choose which courts the dispute should be litigated in, unless it is clearly so unfair to him that no reasonable person would have agreed with it. All these must be subject to the fact that the plaintiff must have had good grounds for commencing an action in the place he has chosen. It would be ludicrous for a plaintiff to commence or continue an action in a jurisdiction which he has absolutely no connection with.

...

25. ... In our opinion, it must be only in the clearest of circumstances that the foreign proceedings are vexatious or oppressive before an injunction can be granted and justified. Otherwise any injunction so granted would ... [be] a deprivation of the rights of a party to sue in the jurisdiction which is most convenient for him and which he is clearly entitled to."

...

28. We now turn to the facts of the present appeal. Following the approach we set out earlier, the first question we had to consider was whether the appellant was amenable to the jurisdiction of our courts. The simple rationale for this requirement was that, if the appellant was not amenable to the jurisdiction of the courts and therefore not bound by what the local courts ordered, then it would be pointless to grant an injunction, as the injunction could never be enforced.

29. We could dispose of this matter relatively quickly and we answered this question in the affirmative. ... It is trite law that jurisdiction under the present Rules of Court is now founded either by the proper service of proceedings or submission to the jurisdiction. Whether the appellant was in Singapore or not is not a valid consideration in determining whether he was amenable to the Singapore courts. So long as he was served validly with the proceedings as required under the Rules of Court or that he submitted to the jurisdiction, then that would satisfy the criteria here.

30. In the present case, the appellant did not appear to have challenged the jurisdiction of the Singapore courts at any time or at all until the hearing of the appeal. ...

31. However, being amenable to the local jurisdiction is but the first step to the determination of whether an injunction should be granted or not. It is necessary to consider whether the foreign proceedings were so vexatious or oppressive so as to justify the grant of an injunction.

32. As we mentioned earlier, the starting point here would be to consider which jurisdiction was the natural and proper forum for the solution of the dispute. ...

33. In our view, there was no doubt that the facts of the present case pointed towards California as being the natural and proper forum ...

...

35. At this juncture, it was interesting to note that one of the arguments put forward by counsel for the respondents, and which incidentally was accepted by the learned judge in the court below in reaching the conclusion that Singapore was the natural forum, was that the respondents were a company which was solely incorporated and set-up in Singapore. ...

36. We rejected this argument outright as being misconceived. In the first place, we were unable to accept the contention that the respondents were essentially a Singaporean company with no external interests outside Singapore. ... The denial of having no foreign business interests must therefore necessarily fail. ...

37. We also considered the terms of the employment contract itself, to ascertain whether it was Singapore or the US that the contract was most closely connected with. Again, we came to the conclusion that the answer had to be in favour of the US, ... As the law governing the contract was not stated, we looked at all the terms contained within the employment contract itself and inferred from them what the applicable law of the contract was. This would then assist us in determining which jurisdiction the contract, and therefore the dispute, was most closely connected with.

...

39. ... Accordingly, taking the whole picture of the employment contract into account, we could not but come to the conclusion that the applicable law under the contract was Californian, and not Singapore, law.

...

41. ... We could not agree with counsel for the respondents that the present matter in dispute between the parties could be viewed so narrowly that it could only be said that Singapore was the country with which the dispute had the closest connection. In our view, the present dispute ... had to be looked in its totality. This ... would also include the issue of whether the appellant was lawfully dismissed from his employment in the first place ... And to examine that, it would then have been necessary to look into the performance of the appellant's work in the US. In such a situation, this would bring us back to the conclusion that California was still the jurisdiction with which the dispute had the closest connection. ...

42. There were also other factors which we took into account and which pointed to California as being the more appropriate forum to try the present dispute between the respective parties. ..."

The Court here referred to the fact that the appellant's employment was terminated in the US and that the employment contract was also executed and performed in California.

"43. Finally, we come to the last factor which we considered before we concluded that California was the most appropriate forum to try the dispute between the appellant and the respondents. This related to the convenience and expense factor as highlighted in the *Spiliada* case ..., and it involved examining the evidence which the respective parties would want to adduce should the dispute eventually reach a full trial ...

44. The respondents contended that this factor was of paramount importance ...

...

47. We ... did not think that the witness factor was helpful to us in determining the natural and proper forum. Although we did not dispute that this was a relevant consideration to take into account, the totality of all the factors that we have just considered must necessarily indicate that California was the natural and proper forum for the resolution of the dispute between the parties.

48. ... Accordingly, we ordered that the declaration that Singapore be the natural and proper forum for the resolution of the dispute between the appellant and the respondents be set aside.

49. That left us with the question of the injunction. As we have held earlier, since the present facts of the case left us with no other alternative conclusion but to find that California was the natural and proper forum for hearing the dispute, it would also follow that the injunction could not be justified. We therefore also made an order in favour of the appellant discharging the injunction.

..."

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. Volume 6 of the *Yearbook* included the cumulative and updated data contained in Volumes 1 to 5. In the present and following Volumes these data will be updated. This will be done by presenting the new data preceded by "Continued from Vol. 6". In case no new data are available, the title of the treaty will be listed with a mere reference to the data in Volume 6.

Due to the conversion of the manuscript from WordPerfect into Word, unfortunately a number of errors have slipped into the tables presented in Volume 6. These errors are corrected in the present Volume by inclusion of the correct data and addition of the words "Corrected [and updated] from Vol. 6". If the table concerned in Volume 6 contained more than three errors, the whole table is reproduced including the corrections. In that case the table is preceded by the words "Reproduced from Vol. 6, as corrected [and updated]".

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 1997 (ST/LEG/SER.E/16).
- No indication is given of reservations and declarations made.
- Sig. = signature; Cons. = consent to be bound.

TABLE OF HEADINGS

Antarctica	Human rights, including women and children
Commercial arbitration	Humanitarian law in armed conflict
Cultural matters	Intellectual property
Cultural property	International crimes
Development matters	International representation
Dispute settlement	International trade
Environment, fauna and flora	Health
Family matters	Judicial and administrative cooperation
Finance	

* Compiled by Karin Arts, Assistant Editor.

Labour	Road traffic and transport
Narcotic drugs	Sea
Nationality and statelessness	Sea traffic and transport
Nuclear material	Social matters
Outer space	Telecommunications
Privileges and immunities	Treaties
Refugees	Weapons

ANTARCTICA

Antarctic Treaty, Washington, 1959: *see* Vol. 6 p. 234.

COMMERCIAL ARBITRATION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
(Reproduced from Vol. 6 p. 234, as corrected and updated)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh		6 May 92	Malaysia		5 Nov 85
Brunei		25 Jul 96	Mongolia		24 Oct 94
Cambodia		5 Jan 60	Pakistan		30 Dec 58
China		22 Jan 87	Philippines	10 Jun 58	6 Jul 67
India	10 Jun 58	13 Jul 60	Singapore		21 Aug 86
Indonesia		7 Oct 81	Sri Lanka	30 Dec 58	9 Apr 62
Japan		20 Jun '61	Thailand		21 Dec 59
Kazakhstan		20 Nov 95	Uzbekistan		7 Feb 96
Korea (Rep.)		8 Feb 73	Vietnam		12 Sep 95
Kyrgyzstan		18 Dec 96			

CULTURAL MATTERS

Convention concerning the International Exchange of Publications, 1958: *see* Vol. 6 p. 235.

Convention concerning the International Exchange of Official Publications and Government Documents between States, 1958: *see* Vol. 6 p. 235.

International Agreement for the Establishment of the University for Peace, New York, 1980: *see* Vol. 6 p. 235.

Regional Convention on the Recognition of Studies, Diploma's and Degrees in Higher Education in Asia and the Pacific, Bangkok, 1983: *see* Vol. 6 p. 235.

Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, Beirut, 1948

(Corrected from Vol. 6 p. 234)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia		20 Feb 52

**Agreement on the Importation of Educational, Scientific
and Cultural Materials, Florence, 1950**

(Reproduced from Vol. 6 p. 234, as corrected and updated)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan	8 Oct 51	19 Mar 58	Philippines	22 Nov 50	30 Aug 52
Cambodia		5 Nov 51	Singapore		11 Jul 69
Iran	31 Dec 49	30 Dec 59	Sri Lanka		8 Jan 52
Pakistan	9 May 51	7 Jan 52	Thailand	22 Nov 50	18 Jan 51

CULTURAL PROPERTY

Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1954:
see Vol. 6 p. 236.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and
Transfer of Ownership of Cultural Property, 1970: *see* Vol. 6 p. 236.

**Convention for the Protection of Cultural Property
in the Event of Armed Conflict, 1954**

(Corrected from Vol. 6 p. 236)

(Status as at 1 June 1998, provided by UNESCO)

<i>State</i>	<i>Cons. (deposit)</i>
Uzbekistan	21 Feb 96

**Convention concerning the Protection of the World Cultural
and Natural Heritage, 1972**

(Continued from Vol. 6 p. 237)

(Status as at 1 June 1998, provided by UNESCO)

<i>State</i>	<i>Cons. (deposit)</i>
Papua New Guinea	28 Jul 97

DEVELOPMENT MATTERS

Charter of the Asian and Pacific Development Centre, 1982

(Reproduced from Vol. 6 p. 237, as corrected and updated)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh		9 Sep 82	China		18 Feb 83
Brunei		14 Feb 85	India		25 Apr 83

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia		7 Jan 83	Nepal		25 Apr 83
Japan		9 Sep 82	Pakistan		9 Sep 82
Korea (Rep.)		9 Sep 82	Philippines		15 Dec 82
Laos	9 Sep 82		Sri Lanka	9 Sep 82	
Macau (ass. member)		3 Jun 82	Thailand		27 Jun 83
Malaysia		9 Sep 82	Vietnam		9 Sep 82
Maldives		9 Sep 82			

Agreement to Establish the South Centre, 1994

(Continued from Vol. 6 p. 237)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Iran	30 Sep 94	11 Sep 97

DISPUTE SETTLEMENT

Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court, *see* Vol. 6 p. 238.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965: *see* Vol. 6 p. 238.

ENVIRONMENT, FAUNA AND FLORA

International Convention for the Prevention of Pollution of the Sea by Oil, as amended, 1954: *see* Vol. 6 p. 238.

International Convention on Civil Liability for Oil Pollution Damage, 1969: *see* Vol. 6 p. 239.

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971: *see* Vol. 6 p. 240.

Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1976: *see* Vol. 6 p. 239.

Protocol to amend the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1982: *see* Vol. 6 p. 240.

Amendments to Articles 6 and 7 of the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1987: *see* Vol. 6 p. 240.

Convention for the Protection of the Ozone Layer, 1985: *see* Vol. 6 p. 241.

Protocol on Substances that Deplete the Ozone Layer, 1987: *see* Vol. 6 p. 241.

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969

(Continued from Vol. 6 p. 238)

(Status as included in IMO doc. J/6783, as at 31 December 1997)

<i>State</i>	<i>Cons. (deposit)</i>	<i>E.i.f.</i>
Iran	25 Jul 97	23 Oct 97

**Convention on Wetlands of International Importance especially
as Waterfowl Habitat, 1971**

(Continued from Vol. 6 p. 240)

(Status as at 1 June 1998, provided by UNESCO)

<i>State</i>	<i>Cons. (deposit)</i>
Mongolia	8 Dec 97

**Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,
1972, as amended**

(Continued from Vol. 6 p. 240)

(Status as included in IMO doc. J/6783, as at 31 December 1997)

<i>State</i>	<i>Cons. (deposit)</i>	<i>E.i.f.</i>
Iran	13 Jan 97	12 Feb 97

**Protocol Relating to Intervention on the High Seas in Cases of Pollution
by Substances Other Than Oil, 1973**

(Continued from Vol. 6 p. 239)

(Status as included in IMO doc. J/6783, as at 31 December 1997)

<i>State</i>	<i>Cons. (deposit)</i>	<i>E.i.f.</i>
Iran	25 Jul 97	23 Oct 97

**Protocol Relating to the 1973 International Convention for the Prevention
of Pollution from Ships, as amended, 1978**

(Continued from Vol. 6 p. 241)

(Status as included in IMO doc. J/6783, as at 31 December 1997)

<i>State</i>	<i>Cons. (deposit)</i>	<i>Excepted annexes</i>
Korea (Rep.) annexes III and V:	28 Feb 96	
Malaysia	31 Jan 97	III, IV
Sri Lanka	24 Jun 97	

**Convention on the Control of Transboundary Movements of Hazardous Wastes
and Their Disposal, 1989**

(Corrected and Updated from Vol. 6 p. 242)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		13 Aug 96	Thailand	22 Mar 90	24 Nov 97
Mongolia		15 Apr 97			

Amendment to the Montreal Protocol, 1990

(Continued from Vol. 6 p. 242)

<i>State</i>	<i>Cons.</i>
Iran	4 Aug 97

Amendment to the Montreal Protocol, 1992

(Corrected and Updated from Vol. 6 p. 242)

<i>State</i>	<i>Cons.</i>	<i>State</i>	<i>Cons.</i>
Iran	4 Aug 97	Thailand	1 Dec 95
Sri Lanka	7 Jul 97		

Framework Convention on Climate Change, 1992

(Continued from Vol. 6 p. 243)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Singapore	13 Jun 92	29 May 97

Convention on Biological Diversity, 1992

(Continued from Vol. 6 p. 243)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Tajikistan		29 Oct 97

Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1992

(Continued from Vol. 6 p. 239)

(Status as included in IMO doc. J/6783, as at 31 December 1997)

<i>State</i>	<i>Cons. (deposit)</i>	<i>E.i.f.</i>	<i>State</i>	<i>Cons. (deposit)</i>	<i>E.i.f.</i>
Japan	24 Aug 94	30 May 96	Philippines	7 Jul 97	7 Jul 98
Korea (Rep.)	7 Mar 97	16 May 98	Singapore	18 Sep 97	18 Sep 98

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 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 the Conflicts of Law Relating to the Form of
Testamentary Dispositions, 1961**
(Corrected from Vol. 6 p. 244)

<i>State</i>	<i>Cons.</i>
Hong Kong	23 Aug 68

**Convention on Consent to Marriage, Minimum Age for Marriage and
Registration of Marriages, 1962**
(Continued from Vol. 6 p. 244)

<i>State</i>	<i>Cons.</i>
Kyrgyzstan	10 Feb 97

FINANCE

Convention Establishing the Multilateral Investment Guarantee Agency, 1988
(Reproduced from Vol. 6 p. 245, as corrected and updated)
(Status as at 31 December 1997, provided by the World Bank)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh	13 Mar 87	13 Mar 87	Pakistan	7 Jul 86	1 Dec 86
Cambodia	1 Oct 93		Papua New Guinea	9 May 90	29 Oct 90
China	23 Apr 88	30 Apr 88	Philippines	15 Sep 86	22 Nov 93
India	13 Apr 92	20 Sep 93	Singapore	3 Jun 97	20 Jun 97
Indonesia	26 Jun 86	26 Sep 86	Sri Lanka	3 Oct 86	27 May 88
Japan	12 Sep 86	5 Jun 87	Tadjikistan	4 Jun 93	26 Jul 93
Kazakhstan	23 Jul 92	18 Sep 92	Thailand	3 Oct 96	
Korea (Rep.)	11 Oct 85	24 Nov 87	Turkmenistan	26 Sep 92	26 Sep 92
Kyrgyzstan	28 Sep 92	21 Sep 93	Uzbekistan	24 Sep 92	24 Sep 92
Malaysia	2 Jul 91	2 Aug 91	Vietnam	27 Sep 93	4 Apr 94
Mongolia	14 Jun 91	6 Jan 92			
Nepal	23 Sep 92	23 Sep 93			

Agreement Establishing the Asian Development Bank, 1965
(Corrected and updated from Vol. 6 p. 245)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China		10 Mar 86	Indonesia		24 Nov 66
Hong Kong		27 Mar 69	Uzbekistan		31 Aug 95

HEALTH

Protocol Concerning the Office International d'Hygiène Publique, 1946: *see* Vol. 6 p. 245.

HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

International Convention against Apartheid in Sports, 1985: *see* Vol. 6 p. 248.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, *see* Vol. 6 p. 249.

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

(Reproduced from Vol. 6 p. 246, as corrected and updated)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		16 Nov 66	Myanmar	14 Sep 54	
India	29 Apr 53	1 Nov 61	Nepal		26 Apr 66
Indonesia	31 Mar 53	16 Dec 58	Pakistan	18 May 54	7 Dec 54
Japan	1 Apr 55	13 Jul 55	Papua		
Korea (Rep.)		23 Jun 59	New Guinea		27 Jan 82
Kyrgyzstan		10 Feb 97	Philippines	23 Sep 53	12 Sep 57
Laos		28 Jan 69	Thailand	5 Mar 54	30 Nov 54
Mongolia		18 Aug 65	Uzbekistan		29 Sep 97

Convention on the Nationality of Married Women, 1957

(Continued from Vol. 6 p. 246)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		10 Feb 97

Convention against Discrimination in Education, 1960

(Continued from Vol. 6 p. 246)

(Status as at 1 June 1998, provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Uzbekistan		8 Dec 97

International Covenant on Economic, Social and Cultural Rights, 1966

(Continued from Vol. 6 p. 246)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China	27 Oct 97		Turkmenistan		1 May 97

International Covenant on Civil and Political Rights, 1966

(Corrected and updated from Vol. 6 p. 246)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Iran	4 Apr 68	24 Jun 75	Turkmenistan		1 May 97
Mongolia	5 Jun 68	18 Nov 74			

Optional Protocol to the International Covenant on Civil and Political Rights, 1966

(Continued from Vol. 6 p. 247)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Sri Lanka		3 Oct 97	Turkmenistan		1 May 97

International Convention on the Elimination of All Forms of Racial Discrimination, 1966

(Continued from Vol. 6 p. 247)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		5 Sep 97

Convention on the Elimination of All Forms of Discrimination against Women, 1979

(Corrected and updated from Vol. 6 p. 247)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		10 Feb 97	Pakistan		12 Mar 96
Malaysia		5 Jul 95	Papua New Guinea		12 Jan 95
Maldives		1 Jul 93	Turkmenistan		1 May 97
Myanmar		22 Jul 97			

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

(Continued from Vol. 6 p. 248)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
India	14 Oct 97		Kyrgyzstan		5 Sep 97

Convention on the Rights of the Child, 1989

(Corrected from Vol. 6 p. 248)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Tajikistan		26 Oct 93	Turkmenistan		20 Sep 93
Thailand		27 Mar 92			

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV, 1949: *see* Vol. 6 p. 249.

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977: *see* Vol. 6 p. 250.

**Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the
Protection of Victims of International Armed Conflicts, 1977**
(Corrected from Vol. 6 p. 249)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Laos		18 Nov 80

INTELLECTUAL PROPERTY

- Convention for the Protection of Industrial Property, 1883 (most recently revised Stockholm, 1967 and amended 1979): *see* Vol. 6 p. 250.
- Convention for the Protection of Literary and Artistic Works, 1886 (most recently revised Paris, 1971 and amended 1979): *see* Vol. 6 p. 250.
- 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.
- Convention Establishing the World Intellectual Property Organization, 1967: *see* Vol. 6 p. 252.
- Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: *see* Vol. 6 p. 252.
- Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: *see* Vol. 6 p. 252.

INTERNATIONAL CRIMES

- Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963: *see* Vol. 6 p. 254.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: *see* Vol. 6 p. 254.
- Convention for the Suppression of Unlawful Seizure of Aircraft, 1970: *see* Vol. 6 p. 254.
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971: *see* Vol. 6 p. 255.
- International Convention Against the Taking of Hostages, 1979: *see* Vol. 6 p. 255.
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, *see* Vol. 6 p. 256.
- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, *see* Vol. 6 p. 256.
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988, *see* Vol. 6 p. 256.
- International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989: *see* Vol. 6 p. 256.

Slavery Convention, 1926 as amended in 1953

(Continued from Vol. 6 p. 253)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		5 Sep 97		Turkmenistan	1 May 1997

Convention on the Prevention and Punishment of the Crime of Genocide, 1948

(Continued from Vol. 6 p. 253)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		5 Sep 97

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956

(Continued from Vol. 6 p. 253)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		5 Sep 97		Turkmenistan	1 May 97

International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973

(Continued from Vol. 6 p. 255)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		5 Sep 97

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973

(Continued from Vol. 6 p. 255)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Brunei		13 Nov 97

Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991

(Continued from Vol. 6 p. 256)

(Status as included in IMO doc. J/6783, as at 31 December 1997)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan		26 Sep 97

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)*

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Mongolia		31 Dec 97

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*(Corrected from Vol. 6 p. 258)**(Status as provided by the Permanent Bureau of the Hague Conference on Private International law)*

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Hong Kong		25 Apr 65

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965*(Corrected from Vol. 6 p. 258)**(Status as provided by the Permanent Bureau of the Hague Conference on Private International law)*

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Hong Kong		19 Jul 70

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970*(Corrected from Vol. 6 p. 258).**(Status as provided by the Permanent Bureau of the Hague Conference on Private International law)*

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>		<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China	8 Dec 97	6 Feb 98		Hong Kong		22 Aug 78

LABOUR

Forced Labour Convention, 1930 (ILO Conv. 29)

(Corrected and updated from Vol. 6 p. 259)

<i>State</i>	<i>Ratif. registered</i>		<i>State</i>	<i>Ratif. registered</i>
Turkmenistan	15 May 97		Uzbekistan	13 Jul 92

Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87)

(Continued from Vol. 6 p. 259)

<i>State</i>	<i>Ratif. registered</i>
Turkmenistan	15 May 97

Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98)

(Corrected and updated from Vol. 6 p. 259)

<i>State</i>	<i>Ratif. registered</i>		<i>State</i>	<i>Ratif. registered</i>
Turkmenistan	15 May 97		Uzbekistan	13 Jul 92

Equal Remuneration Convention, 1951 (ILO Conv. 100)

(Continued from Vol. 6 p. 259)

<i>State</i>	<i>Ratif. registered</i>		<i>State</i>	<i>Ratif. registered</i>
Korea (Rep.)	8 Dec 97		Uzbekistan	13 Jul 92
Malaysia	9 Sep 97		Vietnam	7 Oct 97
Turkmenistan	15 May 97			

Abolition of Forced Labour Convention, 1957 (ILO Conv. 105)

(Continued from Vol. 6 p. 260)

<i>State</i>	<i>Ratif. registered</i>		<i>State</i>	<i>Ratif. registered</i>
Turkmenistan	15 May 97		Uzbekistan	15 Dec 97

Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111)

(Corrected and updated from Vol. 6 p. 260)

<i>State</i>	<i>Ratif. registered</i>		<i>State</i>	<i>Ratif. registered</i>
Turkmenistan	15 May 97		Vietnam	7 Oct 97
Uzbekistan	13 Jul 92			

Employment Policy Convention, 1964 (ILO Conv. 122)
(Corrected and updated from Vol. 6 p. 260)

<i>State</i>	<i>Ratif. registered</i>
China	17 Dec 97

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
(Corrected from Vol. 6 p. 260)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		29 Jan 57	Indonesia		3 Apr 58
Cambodia		3 Oct 51			

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946
(Corrected from Vol. 6 p. 261)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia		3 Oct 51	Papua		
Indonesia		3 Apr 58	New Guinea	28 Oct 80	

Single Convention on Narcotic Drugs, 1961
(Continued from Vol. 6 p. 262)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		29 Apr 97

Protocol amending the Single Convention on Narcotic Drugs, 1961

(Continued from Vol. 6 p. 263)

<i>State</i>	<i>Sig.**</i>	<i>Cons.***</i>
Kazakhstan		9 Apr 97

Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972

(Continued from Vol. 6 p. 263)

<i>State</i>	<i>Sig.**</i>	<i>Cons.***</i>	<i>State</i>	<i>Sig.**</i>	<i>Cons.***</i>
Kazakhstan		29 Apr 97	Vietnam		4 Nov 97
Tajikistan		26 Mar 97			

Convention on Psychotropic Substances, 1971

(Continued from Vol. 6 p. 264)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		29 Apr 97	Tajikistan		26 Mar 97
Laos		22 Sep 97	Vietnam		4 Nov 97

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

(Continued from Vol. 6 p. 264)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		29 Apr 97	Vietnam		4 Nov 97
Singapore		23 Oct 97			

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: *see* Vol. 6 p. 265.

** 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.

NUCLEAR MATERIAL

Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 6 p. 265.

Convention on the Physical Protection of Nuclear Material, 1980: *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

(Continued from Vol. 6 p. 266)

(Status as at 31 December 1997, provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Myanmar		18 Dec 97	Singapore		15 Dec 97

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986

(Continued from Vol. 6 p. 266)

(Status as at 31 December 1997, provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Singapore		15 Dec 97

Convention on Nuclear Safety

Vienna, September 1994

Entry into force: 24 October 1996

(Status as at 31 December 1997, provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh	21 Sep 95	21 Sep 95	Kazakhstan	20 Sep 96	
China	20 Sep 94	9 Apr 96	Korea (Rep.)	20 Sep 94	19 Sep 95
India	20 Sep 94		Pakistan	20 Sep 94	14 Jun 95
Indonesia	20 Sep 94		Philippines	14 Oct 94	
Japan	20 Sep 94	12 May 95	Singapore		15 Dec 97

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 1997, provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia	6 Oct 97		Korea (Rep.)	29 Sep 97	
Kazakhstan	29 Sep 97				

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 1997, provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia	6 Oct 97	

Convention on Supplementary Compensation for Nuclear Damage

Vienna, 12 September 1997

Entry into force: not yet

(Status as at 31 December 1997, provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia	6 Oct 97	

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

(Continued from Vol. 6 p. 267)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia		16 Jul 97

PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the United Nations, 1946: *see* Vol. 6 p. 267.

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 Specialized Agencies, 1947

(Continued from Vol. 6 p. 268)

<i>State</i>	<i>Cons.</i>	<i>Applicable to</i>
Nepal	11 Sep 1996	ILO
Uzbekistan	18 Feb 97	ILO, ICAO, UNESCO, IMF, IBRD, WHO (Annex rev.), UPU, ITU, WMO, IFC, IDA, WIPO, UNIDO

Vienna Convention on Consular Relations, 1963

(Continued from Vol. 6 p. 269)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Myanmar		2 Jan 97

REFUGEES

Convention relating to the Status of Refugees, 1951: *see* Vol. 6 p. 270.Protocol relating to the Status of Refugees, 1967: *see* Vol. 6 p. 270.

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968

(Continued from Vol. 6 p. 270)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Mongolia		19 Dec 97

Convention on Road Signs and Signals, 1968

(Continued from Vol. 6 p. 270)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Mongolia		19 Dec 97

SEA

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.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.

Convention on the High Seas, 1958

(Corrected from Vol. 6 p. 271)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Malaysia		21 Dec 60

United Nations Convention on the Law of the Sea, 1982

(Continued from Vol. 6 p. 272)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Pakistan	10 Dec 82	26 Feb 97	Papua New Guinea	10 Dec 82	14 Jan 97

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. 6 p. 272)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Pakistan	10 Aug 94	26 Feb 97	Papua New Guinea	10 Dec 82	14 Jan 97
Philippines	15 Nov 94	23 Jul 97			

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.

Convention on Facilitation of International Maritime Traffic, 1965 (as amended): *see* Vol. 6 p. 273.

International Convention on Load Lines, 1966: *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.

International Convention on Tonnage Measurement of Ships, 1969

(Continued from Vol. 6 p. 274)

(Status as included in IMO doc. J/6783, as at 31 December 1997)

<i>State</i>	<i>Cons. (deposit)</i>	<i>E.i.f.</i>
Thailand	11 Jun 96	11 Sep 96

Protocol Relating to the International Convention on Load Lines, 1981

(Continued from Vol. 6 p. 274)

(Status as included in IMO doc. J/6783, as at 31 December 1997)

<i>State</i>	<i>Cons. (deposit)</i>	<i>E.i.f.</i>
Japan	24 Jun 97	

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.

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.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950

(Continued from Vol. 6 p. 278)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		5 Sep 97

TELECOMMUNICATIONS

Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended): *see* Vol. 6 p. 280.

Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 6 p. 280.

Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981: *see* Vol. 6 p. 279.

Constitution of the Asia-Pacific Telecommunity, 1976

(Corrected from Vol. 6 p. 279)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia		29 Apr 85		Korea (DPR)	22 Feb 94

Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991

(Continued from Vol. 6 p. 279)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Malaysia		6 May 97		Vietnam	7 Jan 97

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. 6 p. 280)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
China		3 Sep 97

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: *see* Vol. 6 p. 283.

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. 6 p. 283)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia		25 Mar 97	Uzbekistan		29 Sep 97

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)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh	14 Jan 93	25 Apr 97	Korea (Rep.)	14 Jan 93	28 Apr 97
Bhutan	24 Apr 97		Laos	13 May 93	25 Feb 97
Brunei	13 Jan 93	28 Jul 97	Nepal	19 Jan 93	18 Nov 97
China	13 Jan 93	25 Apr 97	Pakistan	13 Jan 93	28 Oct 97
Iran	13 Jan 93	3 Nov 97	Singapore	14 Jan 93	21 May 97

ASIA AND INTERNATIONAL ORGANIZATIONS

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE
ANNUAL SURVEY OF ACTIVITIES 1996-1997,
including the work of its Thirty-sixth Session, held in Tehran,
3-7 May 1997*

M.C.W. Pinto**

	Paragraphs
1. Membership and organization	1-5
2. Questions under consideration by the International Law Commission	6-11
3. Matters referred to the Committee by participating States	12-31
3.1. International rivers	12-15
3.2. Legal protection of migrant workers	16-17
3.3. Extra territorial application of national legislation: sanctions imposed against third parties	18-21
3.4. Status and treatment of refugees; Deportation of Palestinians in violating of international law	22-26
3.5. Law of the Sea	27-31
4. Matters of common concern having legal implications	32-40
4.1. United Nations Conference on Environment and Development: follow up	32-36
4.2. United Nations Decade of International Law	37
4.3. Establishment of an International Criminal Court	38-40
4.4. Mutual assistance in judicial co-operation: extradition of fugitive offenders	38-40
5. Trade law matters	23-26
5.1. Report on legislative activities of the United Nations and other organizations, and concerned with international trade law	
5.2. WTO as a framework Agreement and Code of Conduct for World Trade	
5.3. Report of the regional Centres for Arbitration	

Annex

Principles concerning treatment of refugees as adopted by the Asian-African Legal Consultative Committee at its Eighth Session, Bangkok 1966 (and addenda 1970/1987 thereto).

* Source: unless otherwise specified, Report of the Thirty-sixth Session ('Report') held in Tehran (Islamic Republic of Iran) from 3-7 May 1997 and related documents prepared by the Secretariat of AALCC. Items are presented here according to their Agenda category, and in the order in which they were reportedly dealt with by the Committee.

** General Editor

1 MEMBERSHIP AND ORGANIZATION

1. There were forty-three Members of the Committee on 3 May 1997: Bahrain, Bangladesh, China, Cyprus, Egypt, Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, Palestine, Philippines, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates and Yemen. Botswana is an Associate Member.

2. The thirty-sixth session of the Committee was held in Tehran from 3-7 May 1997 at the invitation of the Government of the Islamic Republic of Iran. H.E. Dr. HASSAN HABIBI, First Vice-President of the Islamic Republic of Iran delivered the inaugural address, and H.E. Dr. ALI-AKBAR VILAYATI, Minister for Foreign Affairs of the Islamic Republic of Iran, an address of welcome. H.E. Dr. M. JAVAD ZARIF, Deputy Foreign Minister for Legal and International Affairs of the Islamic Republic of Iran was elected President, and H.E. Mr. ABDUL RAZAK PEEROO, Attorney-General and Minister of Justice, Human Rights and Corporate Affairs of Mauritius was elected Vice-President of the Committee for its thirty-sixth session.

3. The President and Vice-President of the Session were elected Chairman and Vice-Chairman respectively of the *Special Meeting on Inter-related Aspects of the International Criminal Court and International Humanitarian Law*, held on 5 May 1997. Mr. MAHMOUD M. ALLAM, Minister and Deputy Chief of Mission, Arab Republic of Egypt, was elected Rapporteur of the Special Meeting. The Special Meeting was assisted by the following experts who made presentations on the subjects indicated:

Mr. YVES SANDOZ, Director of International Law and Policy, International Committee of the Red Cross (ICRC), Geneva: "International Humanitarian Law: Current Developments",

Professor GEORGES ABI-SAAB, Member ICRC Expert Group on Humanitarian Law, Geneva: "The International Tribunals and the International Criminal Court",

Professor DJAMCHID MOMTAZ, Tehran University: "Universal adherence to International Humanitarian Law and the Importance of its Implementation at the National Level",

Professor N.L. MITRA, National Law School of India University, Bangalore: "The Competence of National Tribunals and of the International Criminal Court facing repression of violations of International Humanitarian Law".

4. The Secretary-General of the Committee, Mr. TANG CHENGYUAN, Deputy Secretaries-General TOHRU KUMADA and WAFIK ZAHER KAMIL, and Assistant Secretaries-General ASGHAR DASTMALCHI and AHMED AL GAATRI, and other members of the AALCC Secretariat were responsible for the organization of the Session.

5. The President announced, at the seventh plenary meeting of the Session, that the

Committee should hold its thirty-seventh meeting in a Member State from the African region on dates to be determined in consultation with the Secretary-General.

2 QUESTIONS UNDER CONSIDERATION BY THE INTERNATIONAL LAW COMMISSION

6. The Committee had before it document AALCC/XXXVI/TEHRAN/97/S.1 prepared by the Secretariat, entitled *Report of the International Law Commission on the Work of its Forty-eighth Session*, containing a summary of, and comments upon, the Commission's work on the topics (i) State responsibility, (ii) Draft code of crimes against the peace and security of mankind, (iii) International liability for injurious consequences arising out of acts not prohibited by international law, (iv) Law and practice relating to reservations to treaties, and (v) State succession and its impact on the nationality of natural and legal persons; as well as on the Commission's proposed Long-term Programme of Work, projected to cover the topics (a) Diplomatic protection, (b) Ownership and protection of wrecks beyond the limits of national maritime jurisdiction, and (c) Unilateral acts of States.

7. The delegate of *Japan* noted that the Commission had, at its forty-eighth session, completed its second reading of a *Draft Code of Crimes against the Peace and Security of Mankind*, and transmitted it to the General Assembly. He sought to clarify functional linkages between the Draft Code of Crimes, which contained substantive criminal law, and the Draft Statute on the Establishment of an International Criminal Court adopted by the Commission in 1994, which provided the procedural and organizational elements for the administration of criminal justice. Observing that the Commission's draft on State responsibility, the first reading of which had just been completed, contained controversial texts on 'civil liability' and 'international crimes', he urged all AALCC Member States to respond to the UN Secretary-General's request for comments by early 1998, with a view to ensuring that their interests were given due consideration.

8. The delegate of *India* emphasized the changes effected in the Draft Code of Crimes between its first and second readings, including reduction in the number of crimes dealt with in the Code from 12, to 5, viz. the crime of aggression, the crime of genocide, crimes against humanity, crimes against UN and associated personnel, and war crimes. While recognizing that the Code ought to cover crimes against UN and associated personnel, he pointed out that there had been no in-depth analysis of the legal criteria governing application of the relevant rules, and recalled that certain crimes had been excluded from the Code due to difficulties experienced in identifying their constitutive elements. He urged all AALCC Member States to provide the General Assembly and the Commission with detailed comments so as to aid them in analyzing the issues involved, and suggested that AALCC convene an expert group on the subject to facilitate articulation of their views.

9. The delegate of *China* said that in his view any provisions in the Draft Code implying that an International Criminal Court (ICC) could exercise jurisdiction in respect of a judgement delivered by a national court would be inconsistent with the principle of complementarity incorporated in the Draft Statute of the ICC. Other issues which would require to be resolved included the exclusion from the Draft Code of such crimes as apartheid, colonialism and international terrorism, and the introduction of a new category of crimes, viz. crimes against UN and associated personnel. Concerning Part III of the Commission's draft articles on State responsibility, he expressed reservations regarding provision for compulsory arbitral procedures (articles 58 and 60), which appeared to be inconsistent with the principle that recourse to arbitration requires the consent of all the parties concerned; and with the Statute of the International Court of Justice, which provides that agreement between States constitutes the basis of jurisdiction.

10. The delegate of *Iran* said that in reducing the number of offences dealt with in the Code from 12 to 5, the Commission had sacrificed juridical idealism for political expediency. Declaring that the principle of 'non-intervention', whereby a State or a group of States was forbidden to intervene directly or indirectly in the internal affairs of another State was well established in international law, he expressed the hope that the Commission would eventually include in the Code "the crime of intervention in the internal affairs of a State". The Commission's concluding statement to the effect that inclusion of certain crimes in the Code did not affect the status of other crimes under international law, seemed to him to leave room for this possibility. He was also of the view that the Code should contain a definition of the term "crimes against the peace and security of mankind", and suggested that such a definition could already be derived from the Commission's work on State responsibility, wherein reference had been made to "the breach of an international obligation . . . essential for the protection of fundamental interests of the international community". Continuing, the delegate of Iran said that the Commission's work on 'counter-measures' and circumstances precluding wrongfulness might appear to legitimize certain unilateral economic sanctions imposed against weaker States. While expressing agreement with the terms of draft article 34 on self-defence, he emphasized, citing the *Nicaragua case* before the International Court of Justice, that the lawfulness of a reaction to aggression depended on respect for the criteria of necessity and proportionality.

11. After discussion of the item (*Report*, pages 33-7) the Committee adopted an essentially procedural resolution (*Report*, page 66).

3. MATTERS REFERRED TO THE COMMITTEE BY PARTICIPATING STATES

3.1. International rivers

12. The Committee had before it document AALCC/XXXVI/TEHRAN/97/S-9, prepared by the Secretariat, entitled "The Law of International Rivers: Report of the Secretary-General", containing an outline (1) of the independent work carried out by the Committee since the item was referred to it by the Governments of Iraq and Pakistan at the Committee's Bangkok Session in 1966; (2) of the Committee's subsequent discussion of the item following its decision (Arusha, 1986) to confine itself to monitoring work on a similar topic by the International Law Commission; and (3) of the work of the International Law Commission, and of the Sixth Committee of the UN General Assembly which, at its 52nd Session (1997) would have before it the Commission's draft of some 37 articles of a "Convention on the Law of the Non-navigational Uses of International Watercourses", as well as the Sixth Committee's Report thereon.

13. The delegate of *Japan* (Member of the International Law Commission, and Chairman of the Sixth Committee's Working Group on the draft articles) outlined what he termed a 'Framework Convention' comprising provisions on core principles, procedural rules for distribution of waters, and dispute settlement. Describing the Convention as "more a guide than a treaty", he urged all AALCC Member States to participate actively in the discussions in the Sixth Committee that were expected to conclude with adoption of the Convention (15 May 1997), to ratify the Convention, and to incorporate its provisions into their municipal laws.

14. The delegate of *India* urged all AALCC States to make maximum use of the new 'Framework Convention' which, in his view, (i) ensured equitable sharing of watercourses passing through a State's territory, without adversely affecting the interests of other user States, (ii) made protection of the environment an important issue, and (iii) provided for the peaceful settlement of water disputes. Emphasizing the 'flexible' nature of the Convention, he called on all AALCC Member States to support its adoption, and to ratify it.

15. After discussion of the item (*Report*, pages 37-9) the Committee adopted a resolution that, *inter alia*, encourages AALCC Member States to consider concluding bilateral or regional user agreements that are in accordance with the provisions of the new 'Framework Convention' (*Report*, page 71).

3.2. Legal protection of migrant workers

16. The Committee had before it document AALCC/XXXVI/TEHRAN/97/S-7 prepared by the Secretariat containing an overview of the issues involved, including motivations of migrants, the role of recruiting agents, and the impact of migration on 'sending'

and 'receiving' countries. The document makes reference to relevant Conventions and Recommendations on migrant protection adopted by the International Labour Organisation, and to the Convention on the Protection of the Rights of Migrant Workers and their Families, adopted by the UN General Assembly on 18 December 1990. The document recalls that study of the item was inspired by President RAMOS' call, during the Committee's thirty-fifth session (Manila), for a more sensitive approach by governments in 'host countries', and for a comprehensive programme of adherence to, and implementation of, international conventions and standards, including

- (a) survey of laws and mechanisms in receiving countries to protect migrant workers, with a view to harmonizing them at a later stage;
- (b) bilateral arrangements;
- (c) a system of legal assistance to migrant workers; and
- (d) constitution of an impartial international or regional tribunal with specific petitioning mechanism and procedures, by which an aggrieved migrant worker may seek redress of his/her grievances.

17. After discussion of the item (*Report*, pages 40-1) the Committee adopted a resolution (*Report*, pages 69-70) that, *inter alia*,

- “1. *Urges* Member States which have not already done so to ratify the UN Convention on the Protection of Migrant Workers (1990);
- 2. *Urges* Member States to transmit to the AALCC Secretariat their comments on the proposed examination of laws and mechanisms in their countries to protect migrant workers;
- 3. *Mandates* the Secretariat to study the utility of drafting model legislation aiming at the protection of the rights of migrant workers within the framework of labour conventions and recommendations and of the relevant United Nations General Assembly resolutions . . .”

3.3. Extra-territorial application of national legislation: sanctions imposed against third parties

18. The Committee had before it document AALCC/XXXVI/TEHRAN/97/S-8 and a note on the item by the Secretary-General to which was annexed an Explanatory Note by the Islamic Republic of Iran, at whose request the item had been placed on the agenda of the present session. Part of the document is reproduced below.

Note by the Secretary-General

“II. EXTRATERRITORIALITY: DOCTRINE AND PRACTICE

- 8. In common understanding jurisdiction in matters of public law character is territorial in nature. However, some States are known to give extraterritorial effect to

their municipal legislation which as in the past resulted in a conflict of jurisdiction and resentment on the part of other States.³

9. Civil Law countries exercise jurisdiction over their nationals for offences committed even while they were abroad. In recent years Germany is known to have asserted extraterritorial jurisdiction especially in connection with competition regulations. Among countries of the common law system, United Kingdom law allows such jurisdiction in select cases: treason, homicide, bigamy, perjury, and breaches of the Officials Secret Act. The United States of America has historically asserted far broader extraterritorial jurisdiction than have most other countries. It exercises jurisdiction in a wide variety of cases: banking; drug enforcement⁴; securities regulations; export and trade control; international aviation⁵; shipping⁶; taxation; transnational communications; treason; unauthorized attempts to influence a foreign government; violation of US laws on restrictive trade practices; and failure to answer subpoenas issued to attend a court as a witness for offences committed outside the territorial sea on the high seas.⁷

10. It has been suggested that the exercise of such extraterritorial jurisdiction is deemed desirable and, indeed, inevitable because of (i) the interdependence of the international community necessitating the extension of a State's legislative jurisdiction beyond its borders to regulate transnational activities which have profound effect on, or are of concern to the State; (ii) the desirability of avoiding the creation of safe havens for criminals; (iii) the need to regulate and control activities of entities with agencies in different parts of the world but connected or linked to a common source or headquarters criss-crossing several jurisdictions with no single jurisdiction being effective to control the enterprise; (iv) the imperatives of international cooperation to give full effect to bilateral or multilateral obligations.

11. Claims and counter-claims as to the acceptability or reasonableness of exercise of extraterritorial jurisdiction are often centered around (i) the nature of jurisdiction, civil or criminal; and (ii) the type of jurisdiction: legislative, adjudicatory or enforcement. As regards the nature of jurisdiction some publicists do not believe that there exists any real distinction between civil and criminal jurisdiction. Others, however, distinguish the elementary cases of direct physical injury, from other cases where only an element of alleged remote consequential damage is involved and have argued from that premise that while in the former case, extraterritorial exercise of criminal jurisdiction is permissible, in the latter case to apply the formula of 'effects' would be "to enter upon a slippery slope, virtually endorsing unlimited extraterritorial jurisdiction of a State". There is also a divergence in view as to the type of jurisdiction. While some writers discard *in toto* any kind of distinction, others have discussed the problems of extra-territoriality by treating the three different types of jurisdiction separately.

12. Conflicts have often arisen in the context of economic issues when States have sought to apply their laws outside their territory. In the claims and counter-claims, that have arisen with respect to the exercise of extraterritorial jurisdiction the following seven principles have been invoked viz. principles concerning (i) jurisdic-

tion; (ii) sovereignty – in particular economic sovereignty – and non-interference; (iii) genuine or substantial link between the State and the activity sought to be regulated; (iv) public policy, national interest; (v) lack of agreed prohibitions restricting a State's right to extend its jurisdiction; (vi) reciprocity and retaliation; and (vii) promotion of respect for law. Notwithstanding the national interests of the enacting State, grave concern has been expressed on the promulgation and application of municipal legislation whose extraterritorial aspects affect the sovereignty of other States. It has been stated in this regard that “any promulgation of provisions intended to pressure other States, particularly developing States, or attempts to apply rules of domestic law extraterritorially is not only incompatible with international law, but is also part of the new generation of unilateral actions that is one of the most disturbing trends on the world states today. Such actions are guided by domestic political interests and therefore introduce elements that are incompatible with the overall purpose of achieving a more constructive framework for relations among States”.⁸ While universal jurisdiction may be invoked in order to prosecute such offenses as: piracy, slave trade; genocide; war crimes; and attacks on or hijacking of civil aircraft, are recognized by the community of States as being of universal concern, consideration needs to be given to the limits within which a State can exercise its jurisdiction over conduct outside its territory. It may be stated in this regard that in *United States v. Aluminium Co. of America*⁹ the Court had declared that:

“any State may impose liabilities, even upon persons not with its allegiances, for conduct outside its borders that has consequences within its borders which the . . . state . . . reprehends.”

13. A corollary to that question is the question of the limits for exercise of jurisdiction on the basis of the principles of ‘effects’,¹⁰ ‘passive personality’¹¹ or ‘nationality principle’.¹² Yet another question which may require consideration is whether ‘self-help’ by a State, or its officials, or its agents in enforcing national law and policies in the face of opposition, lack of cooperation, or lack of expeditious response from foreign States, can be justified.

14. The Supreme Court of the United States of America has observed that “Extraterritoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders”.¹³ More specifically, the extraterritoriality principle provides that ‘(r)ules of the United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States’.¹⁴

15. An early example of the application of the extraterritoriality principle is *American Banana Co. v. United States Fruit Co.*¹⁵ In that case, the plaintiff alleged that the defendant, a US corporation, had violated United States antitrust laws by inducing a foreign government to take actions within its own territory which were adverse to the plaintiffs business. The Supreme Court refused, in the absence of a clear statement of extraterritorial scope, to infer congressional intent to apply the federal

statute to the conduct of a foreign government because enforcement would have interfered with the exercise of foreign sovereignty.

16. Similarly, in *Foley Bros. v. Filardo*,¹⁶ the Supreme Court declined to give extraterritorial effect to a labor statute applying to “(e)very contract made to which the United States . . . is a party”. The Court recognized that extraterritorial application of the statute would have “extend(ed) its coverage beyond places over which the United States has sovereignty or has some measure of legislative control”, and therefore held that the intention “to regulate labor conditions, which are the primary concern of a foreign country, should not be attributed to Congress in the absence of a clearly expressed purpose”.

17. The United States’ Supreme Court has observed that there are at least three general categories of cases for which the presumption against the extraterritorial application of statutes clearly does not apply. First, the presumption will not apply where there is an “affirmative intention of the Congress clearly expressed” to extend the scope of the statute to conduct occurring within other sovereign nations.¹⁷ It may, however, be mentioned in this regard that Judge King of the United States Court of Appeal in her dissenting opinion in *Bourselan v. ARAMCO* observed that Congressional intent to exercise extraterritorial jurisdiction must be explicit only when such an exercise of jurisdiction would violate international law. Where there is no conflict with international law, no explicit congressional authorization is needed. Evidence of expressed ‘contrary intent’ of Congress must be gleaned from statutory construction and may be sufficient to overcome the presumption.¹⁸

18. Second, the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States. Two prime examples of this exception are the Sherman Anti-Trust Act, and the Lanham Trade-Mark Act, which have both been applied extraterritorially where the failure to extend the statute’s reach would have negative economic consequences within the United States. As Bowett observes, “in the celebrated *Alcoa* case the US Supreme Court was quite clear that it was dealing with conduct outside its borders that has consequences within its borders’ . . . ”.¹⁹

19. Finally the presumption against extra-territoriality is inapplicable when the conduct regulated by the government occurs within the United States. By definition an extraterritorial application of a statute involves the regulation of conduct beyond US borders. Even where the significant effects of the regulated conduct are felt outside US borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.

III. EXTRATERRITORIALITY AND LIMITS IMPOSED BY INTERNATIONAL LAW

20. Notwithstanding the above mentioned presumptions against extraterritoriality, in the words of Justice Blackmun of the United States Supreme Court, “generally-worded laws covering varying subject matters are routinely applied extraterritorially”²⁰. Thus in *Hellenic Lines Ltd. vs. Rhoditis* the Jones Act was applied extraterritorially as recently as in 1970. Earlier in 1927 the US Supreme Court had applied the National Prohibition Act to the high seas despite its silence on the issue of extraterritoriality. Other instances include the extraterritorial application of the treason statute and the Lanham Act.

21. In recent times the Helms-Burton Act to impose new restrictions on foreign persons who traffic in property confiscated by Cuba,²¹ the D’Amato Act to cut off trade with Iran and Libya and punish companies incorporated in the United States that continue to trade with Iran, and other measures related to Iraq and Libya have raised several questions related to the extraterritorial application of national laws as well as the question of economic countermeasures.²²

22. It may be stated that the provisions of the Helms-Burton Act authorizing lawsuits by US nationals against foreign firms that ‘traffic’ in property expropriated by Cuba has caused much controversy. While American international lawyers are divided in their opinion as to whether the provisions of that Act violate international law, there is general agreement among foreign governments that they do so. Such actions and counteractions will strain the common commitment to the rule of law. The Helms-Burton Act, it has been observed, “establishes sanctions of various types against countries that trade with and/or invest in Cuba. In all fairness, this attempt by a State to compel citizens of a third State to obey the legislation of another State is in complete violation of the principles and norms of international law and what it stands for”.²³

23. Unilateral countermeasures are, of course, distinct from collective countermeasures – otherwise referred to as sanctions. A major distinction rests in the fact that whilst the latter viz. sanctions, are decided upon by an international organ, the Security Council, and their implementation is mandatory for all members of the United Nations, unilateral measures are within the discretion of each State and are accordingly not mandatory. Yet another distinction lies in the fact that the feasibility of applying economic sanctions is circumscribed by the scope of the provisions of Article 39 of the Charter of the United Nations which requires the existence of a threat to the peace, a breach of the peace or an act of aggression. In contrast a broad interpretation of this requirement may make room for individual countermeasures to come into play. Besides, countermeasures can be adopted for a variety of purposes: political, economic, or environmental.

24. In the opinion of the Inter-American Juridical Committee (the juridical body of the Organization of American States), all States are subject to international law in their relations and no State may “take measures that are not in conformity with international law without incurring responsibility”. The Juridical Committee observed that, while all States have the freedom to exercise jurisdiction, such exercise must “respect the limits imposed by international law. To the extent that such exercise

does not comply with these limits, the exercising State will incur responsibility". It was reiterated that the basic premise under international law for establishing legislative and judicial jurisdiction is rooted in the principle of territoriality and that a State may not exercise its power in any form in the territory of another State except where "a norm of international law permits". It observed that a State may justify the application of the laws of its territory only insofar as an act occurring outside its territory has "a direct, substantial and foreseeable effect within its territory and the exercise of such jurisdiction is reasonable".

25. Finally, it found that a State may exceptionally exercise jurisdiction on a basis other than territoriality only where there exists a substantial and significant connection between the matter in question and the State's sovereign authority, such as in the event of the exercise of jurisdiction over acts performed abroad by its nationals and in certain specific cases of the protections objectively necessary to safeguard its essential sovereign interests. The Inter-American Juridical Committee on examination of "the legislation . . . whose effect is similar to that of the Helms-Burton Act" and the provisions of which establish the exercise of jurisdiction on bases other than those of territoriality concluded that the exercise of jurisdiction over acts of "trafficking in confiscated property" did not conform with the norms established by international law for the exercise of jurisdiction.²⁴

26. It may be stated that the Opinion of the Inter-American Juridical Committee merits careful reading in as much as, in the words of Professor Seymour Rubin, it "contains much that supports the doctrinal basis for fair treatment and protection of private foreign investment – which is essential for today's interdependent economies . . . (and) condemns the application of provisions which, in Helms-Burton, are questionable under international law".²⁵

27. It may be recalled in this regard that the European Economic Community also asserts an extraterritorial application of its own competition laws. The application of these rules to international trade and economic relations too has been controversial. Moreover, a growing number of other States have applied their national laws and regulations on an extraterritorial basis. As regards the European Community it has been stated that:

"(i) *legislative* jurisdiction may be extended to acts outside Community territory except 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."²⁶

28. It has been commented in this regard that the difficulty "facing the Commission is not so much with the identification of such permissive rules, which are generally to be found in the form of specific treaty obligations permitting action within foreign States' territory, but with ascertaining both the nature and the extent of the

prohibitive rules of international law delimiting legislative jurisdiction. It is quite likely that, when the PCIJ stated (in the *Lotus Case*) that the 'wide measure of discretion' enjoyed by States in determining their legislative jurisdiction was limited in certain cases by prohibitive rules, it was thinking of such treaty rules as later came to govern the application of States' laws . . .".²⁷ The author then goes on to suggest that in contemporary international law such prohibitive rules must primarily be derived from broad principles of international law, such as the principles of peaceful cooperation and non-intervention in the domestic affairs of another State, the freedom to choose one's own socio-economic system, and the doctrine of abuse of rights. Were Professor Kuyper writing this in more recent times he may, perhaps, have added the right to development to that list.

Sovereign Equality

29. According to Bowett, the doctrine of sovereign equality has implications for jurisdiction, and he goes on to point out that the formulation of the principle of equal rights and self-determination in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States suggests "something of the kind of limitation on jurisdiction" which might result from that doctrine. The Friendly Relations Declaration, *inter alia*, refers to the right of peoples "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development and every State has the duty to respect this right in accordance with the provisions of the Charter". Professor Bowett, now an eminent member of the International Law Commission, then goes on to suggest that this "implies, however vaguely, that for State A to assert a jurisdiction which interferes with the political, social or economic development of State B is to exceed the limits of propriety and permissibility. It may also imply a condition of reciprocity in the sense that it would offend against the principle of equality if State A were to assume a jurisdiction it was not prepared to concede to State B".²⁸

Non-Intervention

30. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty clearly condemns not only armed intervention but also "all other forms of interference or attempted threats against its political economic and cultural elements."²⁹

31. The application of unilateral measures is at variance with numerous international instruments, including the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States which in elaborating the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter, *inter alia*, states that:

"No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind . . .".³⁰

32. At this juncture it may be recalled that the 1970 Friendly Relations Declaration had, *inter alia*, provided that:

“No State . . . has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Every State has an inalienable right to choose its political, economic, social and cultural systems without interference in any form by another State.”

33. In the context of a New International Economic Order, Chapter I entitled “Fundamentals of International Economic Relations”, of the Charter of Economic Rights and Duties of States³¹ adopted by the General Assembly at its Twenty-ninth Session provides that:

“Economic as well as political and other relations among States shall be governed, *inter alia*, by the following principles:

- (a) Sovereignty, territorial integrity and political interdependence of States;
- (b) Sovereign equality of all States;
- (c) Non-Aggression;
- (d) Non-intervention;
- (e) Mutual and equitable benefit;
- (f) Peaceful coexistence;
- (g) Equal rights and self-determination of peoples;
- (h) Peaceful settlement of disputes;
- (i) Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development;
- (j) Fulfilment in good faith of international obligations;
- (k) Respect for human rights and fundamental freedoms;
- (l) No attempt to seek hegemony and spheres of influence;
- (m) Promotion of international social justice;
- (n) International co-operation for development; and
- (o) Free access to and from the sea by land-locked countries within the framework of the above principles.”

34. Article 32 of the Charter of Economic Rights and Duties of States also stipulates that “No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.”

35. The Explanatory Note points out that Article 15 of The Bogota Charter of 1948 establishing the Organization of American States, among other things, expressly prohibits “the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.” A similar prohibition may be found in Article VI of the Helsinki Final Act of 1975 which, *inter alia*, requires all States in all circumstances to

“refrain from any other act of military, or political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantage of any kind.”³²

36. Apart from these international and regional instruments which proscribe resort to economic or political coercion, recourse may be had to the jurisprudence of the International Court of Justice which recognized the illegality of economic measures in the context of the principle of non-intervention in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*.³³

37. Besides, as with the principle of equality, the above mentioned stipulations suggest limits to jurisdiction, as the principle of non-intervention is breached by an assertion of jurisdiction which interferes with another State’s political, social, economic or cultural system.

Dispute Settlement

38. The legality of the use or resort to countermeasures is linked closely to the recourse to dispute settlement procedures and is considered as a core issue in the current work of the International Law Commission on State Responsibility. It may be recalled that the Special Rapporteur, Mr. ARANGIO-RUIZ, had taken the view that countermeasure cannot be taken prior to the exhaustion of all available dispute settlement procedures, except in certain specific circumstances.³⁴

39. The “Understanding on Rules and Procedures Governing the 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 countermeasures. A similar provision can also be found in the “North American Free-Trade Agreement” (NAFTA).

40. On 20 November 1996 the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) established a panel to examine the complaint of the European Communities against the US Cuban Liberty and Democratic Solidarity (Libertad) Act.³⁵ In its request the European Communities stated that the problem was not with the objective of that Act but rather with the extraterritorial means chosen to meet those objectives. It was stated that though some of the measures had been suspended the provisions relating to the denial of visas was in force and contended that the US measures violated GATT 1994 and the General Agreement on Trade in Services (GATS) and nullified and impaired EC benefits under the WTO.

IV. RESPONSE OF THE INTERNATIONAL COMMUNITY

41. Earlier, the European Union Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act of March 15, 1995 had, *inter alia*, pointed out that the European Union had consistently expressed its opposition as a matter of law

and policy to extraterritorial application of US jurisdiction which would restrict EU trade in goods and services with Cuba. It emphasized that "it cannot accept that the US unilaterally determine and restrict EU economic and commercial relations with third countries."³⁶

42. The Council of Ministers of the European Union adopted a regulation declaring that 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 fifteen States. Mexico is known to have recently adopted an Act for the Protection of Commerce and Investment against Foreign Rules Contravening International Law. This legislative measure is meant to counteract the extraterritorial effects of laws of third States. It may be recalled in this regard that, in the context of the United States Anti-Trust Legislation, submitting the Protection of Trading Interests Act to the British Parliament the then Secretary of State for Trade had stated that the objective of the Bill was:

"to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us. From our point of view, the most objectionable method by which this is done is by the extra-territorial application of domestic law.

(T)he practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America. We have not suddenly become belligerent or confrontational in regard to this most powerful and valued friend. The Bill is a response to a situation of a very particular nature which has been developing over several decades and which in the past few years has become much more acute."³⁷

These self-help measures by States in response to perceived abuses of extraterritorial application of national legislation, it has been observed, have extraterritorial application.³⁸

43. Addressing the Fifty-first Session of the General Assembly the Chairman of the delegation of Dominica, His Excellency Mr. Simon Paul Richards stated, *inter alia*, that

"The Commonwealth of Dominica abhors the concept of national laws having extraterritorial jurisdiction and serving as underpinnings for legal secondary boycotts. We are particularly troubled by the potential use of these instruments by large and powerful States to compromise the territorial integrity and national sovereignty of small States like ours."³⁹

44. It is pertinent to recall in this regard that addressing the General Assembly the Foreign Minister of Myanmar had, *inter alia*, stated that:

"We find unacceptable the threat or use of economic sanctions and the extraterritorial application of domestic law to influence policies in developing coun-

tries. The use of economic sanctions as a tool of policy is indefensible. It is a flagrant breach of the United Nations Charter.”⁴⁰

45. The Ministerial Declaration of the Group of 77 adopted at Midrand, South Africa on 28 April 1996 during the Ninth Session of the United Nations Conference on Trade and Development, *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 extraterritorial 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

“(c)ontinuing use of coercive economic measures against developing countries, through, *inter alia*, unilateral economic and trade sanctions which are in clear contradiction with international law. . .”⁴¹

46. The Group of 77 had at Midrand objected to the new attempts aimed at extra-territorial application of domestic law, which “constitutes a flagrant violation of the United Nations Charter and of WTO rules”.

47. The Eleventh Conference of the Heads of State or Government of the Non-Aligned Countries held in Cartagena de Indias, in October 1995 Colombia, *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”.⁴²

48. The 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.”

49. It had also called upon the Government of the United States of 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 neighborliness, cause huge material losses and economic damage. They called upon the United States of America to settle its differences with Cuba through negotiations on the basis of equality and mutual respect, and requested strict compliance with resolutions 47/19, 48/16 and 49/9 of the General Assembly of the United Nations.”⁴³

50. In this regard it may be recalled that by its resolutions 47/19, 48/16 and 49/9 the General Assembly had, *inter alia*, reaffirmed the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of international trade and navigation. Concerned about the “continued promulgation and application . . . of laws and regulations whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction, as well as the freedom of trade and navigation” the General Assembly called upon all States to refrain from promulgating and applying such laws in conformity with their obligations under the Charter of the United Nations and international law, which reaffirm the freedom of trade and navigation. It may be recalled that similar resolutions, 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, were also adopted at the Fiftieth and Fifty-first session of the General Assembly.⁴⁴

51. 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”.⁴⁵

52. The Foreign Ministers reiterated their concern for the insistence of certain States to resort to one-sided qualifications of the policies of other States, thus serving interests of their own. They rejected the continued use of unilateral mechanisms of evaluation, qualification and certification, as they are inconsistent with the principles of sovereign equality of States and of non-intervention and undermine multilateral instruments and mechanisms established for this purpose.

53. They reiterated the commitment expressed by the Heads of State or Government at the Eleventh Summit held in Cartagena to jointly oppose all kinds of conditionalities and coercive unilateral measures, rules and policies that are attempted to be imposed or those that are imposed on Member States, and called upon all States to refrain from adopting or implementing any unilateral measures not in accordance with international law and the Charter of the United Nations.⁴⁶

54. A report on the “Extraterritorial Application of National Laws”, issued under the auspices of the International Chamber of Commerce, had pointed out that the overall effect of extraterritorial application of national laws is to discourage productive economic activity, including international investment, and ultimately to reduce employment and economic growth. The Report had argued that an emerging international legal rule forbids nations to apply their laws to conduct principally occurring abroad when to do so would unreasonably interfere with the interests of other States and of private parties. The Report had recommended that States endeavour to

minimize the extraterritorial application of national laws and where that is impractical to coordinate their extraterritorial activities by means of consultations, coordination and international adjudication.⁴⁷

V. GENERAL OBSERVATIONS

55. The topic clearly covers a broad spectrum of inter-state relations i.e. politico-legal, economic and trade. It may be recalled in this regard that an AALCC Secretariat study on the "Elements of a Legal Instrument on Friendly and Good Neighbourly Relations Between 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 on space ship earth. The 34 principles and norms so enumerated, *inter alia*, included: (1) independence and state sovereignty; (2) territorial integrity and inviolability of frontiers; (3) legal equality of States; (4) non-intervention, overt or covert; (5) non-use of force; (6) peaceful settlement of disputes; (7) peaceful coexistence and (8) mutual cooperation.⁴⁸

56. It may be recalled that the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty clearly condemns not only armed intervention but also "all other forms of interference or attempted threats against its political, economic and cultural elements".⁴⁹

57. It is equally pertinent to recall that the application of unilateral measures is at variance with numerous international instruments, including the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States which, *inter alia*, states that:

"No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."⁵⁰

58. The use of unilateral actions, particularly those with extraterritorial effects can impede the efforts of the developing countries in carrying out trade and macro economic reforms aimed at sustained economic growth. It need hardly be emphasized that the use of such unilateral trade measures imposes a threat to the multilateral trading system. Even where there is a basis for exercising jurisdiction, the principles of comity suggest that forbearance is appropriate. Under these principles (of comity) States are obliged to consider and weigh the legitimate interests of other States when taking action that could affect those interests.

59. The Declaration and Programme of Action adopted by the Sixth Special Session of the General Assembly,⁵¹ the Charter of Economic Rights and Duties of States, 1974, the United Nations Convention on the Law of the Sea, 1982 and several other international instruments retain many of the traditional aspects of sover-

eignty. The economic sovereignty provisions of these instruments are reaffirmations of the rights and interests in natural resources within an expanded definition of a State's territory. Further, the provisions relating to development touch upon the concept of economic sovereignty. Article 7 of the Charter of Economic Rights and Duties of States stipulates:

“Every State has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each State has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development. All States have the duty, individually and collectively, to co-operate in order to eliminate obstacles that hinder such mobilization and use.”

60. General Assembly Declaration on the Right to Development envisages that States have the primary responsibility for the creation of national and international conditions favourable to the right to development. The Declaration clearly stipulates:

“The realization of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations.”⁵²

61. The Report issued under the auspices of the International Chamber of Commerce referred to above had argued that an emerging international legal rule forbids nations to apply their laws to conduct principally occurring abroad, when to do so would unreasonably interfere with the interests of other States and of private parties.

62. It may, perhaps, be necessary to delimit the scope of the inquiry into the issue of extraterritorial application of national legislation. In determining the parameters of the future work of the Committee on this item consideration needs to be given to the question whether it should be a broad survey of the question of extra-territorial application of municipal legislation and in the process examining the relationship and limits between public and private international law on the one hand and the interplay between international law and municipal law on the other.

63. It may be stated in this regard that at the Forty-fourth session of the International Law Commission, the Planning Group of the Enlarged Bureau of the Commission established a Working Group⁵³ on the long-term programme to consider topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission. One of the topics included in the pre-selected list was the “Extraterritorial Application of National Legislation”. An outline prepared on the topic by one Member of the Commission had, *inter alia*, suggested that:

“It appears quite clear that a study of the subject of the extraterritorial application of national laws by the International Law Commission would be important and

timely. There is an ample body of State practice, case law, national statutes and international treaties and a variety of critical scholarly studies and suggestions. Such a study could be free of any ideological overtones and may be welcomed by States of all persuasions . . . Such a study further could complement the efforts of the Commission in the codification and progressive development of law in other areas like responsibility of States, liability for transnational injury, draft code of crimes and establishment of an international criminal jurisdiction.”⁵⁴

64. In determining the scope of the future work on the subject the Committee may, recall that the request of the Government of Islamic Republic of Iran is to carry out a comprehensive study concerning the legality of such unilateral measures (i.e. sanction imposed against third parties) “taking into consideration the positions and reactions of various governments including the position of its Member States”

NOTES:

³ National legislation is given extraterritorial effects in such contexts as (a) to exercise jurisdiction over nationals wherever they may be; (b) to protect a State against treason, terrorism, drug trafficking and other offenses affecting its power and security; (c) to protect and regulate activities affecting its wealth, resources and other economic activities; and (d) to secure the rights of persons.

⁴ *United States vs. Bank of Nova Scotia*, 691 F 2d.

⁵ *Laker Airways Ltd. v. Sabena Belgian World Airlines* 731 F.2d. 909; *Laker Airways Ltd. v. Pan American World Airways Inc.* 604F. Supp. 280. Also see *British Airways Board v. Laker Airways Ltd.* 1985 Appeal Cases 58.

⁶ *United States v. Atlantic Container Line*.

⁷ M.L. Nash: *Contemporary Practice of the United States Relating to International Law 1974* (1980) p. 134.

⁸ See the statement of the delegate of Colombia, Mrs. Ramirez, made at the fifty-first session of the General Assembly. *Official Records of the General Assembly, Fifty-first session A/51/PV.57* p. 8.

⁹ 148 F. 2d.416 (1945).

¹⁰ The principle of ‘effects’ is invoked by some States to extend the reach of their laws over activities affecting interests, including those of their nationals.

¹¹ The passive personality principle allows States to “assume jurisdiction for offences committed against its nationals”. For details see the decision of the Permanent Court of International Justice in *The SS Lotus Case*, PCIJ Series A.

¹² Under the ‘nationality principle’ a state may prescribe laws governing the conduct of its citizens irrespective of where they reside.

¹³ See *Environment Defense Fund. Inc. v. Walter E. Massey*. Reported in 32 *International Legal Materials* (1993) p. 505.

¹⁴ See the *Restatement (Third) of the Foreign Relations Law of the United States*, 403 Com. (g) 1987.

¹⁵ 213 US 347 (1909).

¹⁶ 336 US 281, at 282.

¹⁷ See *Environmental Defense Fund v. Massey*, supra note 13.

¹⁸ See *Bourselan v. Aramco*, 857 F 2d. 1014. Reported by M.S. Gallozzi in 89 AJIL (1989) p. 375.

¹⁹ D.W. Bowett "Jurisdiction: Changing Patterns of Authority over Activities And Resources". *British Yearbook of International Law* vol. LIII (1982) p. 1 at 7. It will be recalled that in *US v. Aluminium Co of America* the Court had declared that "any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."

²⁰ See the dissenting opinion of Justice Blackmun in *Sale, Acting Commissioner, Immigration and Naturalization Service, et al vs. Haitian Centers Council, Inc. et al.* Reported in 32 *International Legal Materials* (1993) p. 1039.

²¹ Public Law 104-114. For the text of the Act see 35 *International Legal Materials* (1996) p. 357.

²² The Preamble to Iran and Libya Sanctions Act of 1996 Act reads: "An Act to impose sanctions on persons making certain investments 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". Public Law 104-172. For the text of the Act see 35 *International Legal Materials* (1996) p. 1273.

²³ See the statement of the delegate of the United Republic of Tanzania, Mr. Mwakawago, made at the UN General Assembly fifty-first session, 57th Plenary Meeting A/51/PV.57 p. 10.

²⁴ For details see 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" Doc. CJI/SO/II/doc.67/96 rev. 5 of 23 August 1996.

²⁵ Seymour J. Rubin: Introductory Note on "Organization of American States: Inter American Juridical Committee Opinion Examining the US Helms-Burton Act" 35 *International Legal Materials* (1996) p. 1322 at 1324.

²⁶ P.J. Kuyper: "European Community Law And Extraterritoriality: Some Trends And New Developments" 33 *International and Comparative Law Quarterly* (1984) p. 1013 at 1014 (footnotes omitted).

²⁷ *Ibid.* p. 1015. Emphasis in original.

²⁸ D.W. Bowett: "Jurisdiction: Changing Patterns of Authority over Activities and Resources." LIII *British Yearbook of International Law* (1982) p. 1 at 16.

²⁹ General Assembly Resolution 2131 (XX) of 21 December 1965 was adopted by a vote of 109 for, none against and one abstention. It may be recalled that the relevant provisions of this Declaration on Inadmissibility of Intervention were later incorporated in the Friendly Relations Declaration.

³⁰ General Assembly Resolution 2625 (XXV) Annex, para 1.

³¹ General Assembly Resolution 3281 (XXIX) December 12, 1974.

³² See the Final Act of the Conference on Security and Cooperation in Europe, Helsinki, August 1, 1975. For text of the Declaration See *International Legal Materials*, Vol. XIV (1975) p. 1293.

³³ I.C.J. Reports 1986, p. 108.

³⁴ For details see the *Report of the International Law Commission on the Work of the Forty-fifth Session*, UNGA Official Records, 48th session (1993) UN Doc. A/48/10.

³⁵ Public Law 104-114. For the text of the Act see 35 *International Legal Materials* (1996) p. 357. It may be stated that the Preamble to the 'Helms-Burton' Act reads "An Act to seek international sanctions against the Castro government in Cuba for support of a transition government leading to a democratically elected government in Cuba, and for other purposes".

³⁶ For the text of the European Union demarches protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act see 35 *International Legal Materials* (1996) p. 397.

³⁷ See *British Yearbook of International Law*, vol. LIII (1982) p. 457.

³⁸ See Comment: "The Protection of Trading Interests Act of 1980: Britain's Response to US Extraterritorial Antitrust Enforcement", 2 *North Western Journal of International Law and Business* (1980), p. 476.

³⁹ See *Official Records of the United Nations General Assembly, Fifty-first Session* 29th Plenary Meeting, Thursday 10 October 1996. A/51/PV.29 p. 17 at 19.

⁴⁰ See *Official Records of the General Assembly, Fifty-first session*, Plenary Meetings. A/51/PV.13 p. 17.

⁴¹ 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, held in Midrand, South Africa, from 27 April to 11 May 1996. Doc. TD/378 p. 89 at 90.

⁴² See the documents of the Eleventh Conference of the Heads of State or Government of the Movement of Non-Aligned Countries, held in Cartagena, Colombia, from 18 to 20 October 1995. Reproduced in United Nations Doc A/50/752 & S/1995/1035.

⁴³ The Eleventh Meeting of the Heads of State or Government of the Non-Aligned Countries had also expressed deep concern about new legislation presented to the Congress of the United Nations that would intensify the embargo against Cuba. *Ibid.* para 183 at p. 52.

⁴⁴ See General Assembly Resolution 50/10 of 2 November 1995 adopted by a vote of 117 in favor, 3 against and 38 abstentions and Resolution 51/15 of 12 November 1996 adopted by a vote of 137 in favor, 3 against and 25 abstentions.

⁴⁵ See the draft final document of XII Ministerial Conference of the Movement of Non-Aligned Countries, New Delhi April 4-8, 1997. Document No. NAC/FA 12/Doc.1/Rev. 3 Para 89 at page 33.

⁴⁶ *Ibid.* Paras 91, 92 at page 33.

⁴⁷ Dieter Lange and Gary Born (Eds.): *The Extraterritorial Application of National Laws* (I.C.C. Publishing S.A. 1987) p. 1.

⁴⁸ AALCC Secretariat study on "Elements of a Legal Instrument on Friendly and Good-Nighborly Relations Between the States of Asia, Africa and the Pacific". Reprinted in *AALCC Combined Report of the Twenty Sixth to Thirtieth Session* (New Delhi 1992) p. 193.

⁴⁹ General Assembly Resolution 2131 (XX) of 21 December 1965 adopted by a vote of 109 for, none against and one abstention. It may be recalled that the relevant provisions of this Declaration on Inadmissibility of Intervention were later incorporated in the Friendly Relations Declaration.

⁵⁰ General Assembly Resolution 2625 (XXV) Annex, para 1.

⁵¹ General Assembly Resolutions 3201 and 3202 of 1 May 1974 adopted at the Sixth Special session.

⁵² See Article 3 paragraph 2 of the General Assembly Resolution 41/218 of 4th December 1986.

⁵³ Outlines Prepared by Members of the Commission on Selected Topics of International Law, International Law Commission, Forty-fifth session. Document No. A/CN.4/454, p. 71.

⁵⁴ Dr. P. Sreenivasa Rao: "Extraterritorial Application of National Legislation". *Ibid.* p. 85.

19. The delegate of the *Islamic Republic of Iran* referred to two pieces of recent legislation by the Government of the United States of America pursuant to which it intended to exercise jurisdiction beyond its territory by imposing sanctions on third States that invest in, or do business with Iran, Libya and Cuba, viz. the "Cuban Liberty and Democratic Solidarity Act (LIBERTAD)" of 1996 (also called the 'Helms-Burton Act'), and the 'Iran-Libya Sanctions Act' of 1996 (also called the 'Kennedy-D'Amato Act'). He de-

clared that the scope of the sanctions imposed under both Acts was broader than that provided for in previous US legislation, and violated customary and conventional international law. In that connection be recalled that the UN Charter made no provision for unilateral imposition by one State of economic sanctions against another State. In his view, the Charter permitted the taking of measures not involving the use of force by way of sanctions, only pursuant to article 41, following determination by the Security Council of the “existence of any threat to the peace, breach of peace, or act of aggression”, and then only in accordance with the relevant Security Council decisions or recommendations, and as necessary to maintain or restore international peace and security.

20. Continuing, the delegate of Iran declared (1) that UN General Assembly resolutions 47/19 and 50/10 had called upon States to refrain from promulgating and applying laws which contravene the United Nations Charter; (2) that unilateral imposition by a State of economic sanctions had been declared to be violative of the Vienna Declaration and Programme of Action of 25 June 1993 which guaranteed the Right to Development; (3) that UNCTAD had condemned the use of economic measures, especially against the developing countries; and (4) that economic sanctions were violative of the customary law rule forbidding intervention in the internal affairs of States. Declaring that such unilaterally imposed sanctions had no basis in law, be recalled that such measures had been condemned not only by the Group of 77 and the Non-aligned countries, but also by the European Union, through its opposition to the 1982 amendments to the US Export Administration Regulations expanding US control of the export and re-export of goods and technical data to the USSR, and more recently, to the 1996 Kennedy D’Amato Act. He called on all AALCC Member States to oppose the extra-territorial application of national legislation. Noting that the subject of extra-territorial application of national legislation was on the list of topics to be dealt with by the International Law Commission, he urged that the AALCC Secretariat proceed with its study of the item, and suggested that it might be useful to organize one or two seminars on the topic during the inter-sessional period.

21. The statement of the delegate of Iran drew support from the delegates of *Syria, Ghana, Egypt, Myanmar, Indonesia, Senegal* and *India*. After discussion of the item (*Report*, pages 46-51), the Committee adopted a resolution, *inter alia*, requesting Member States to share information and materials on the topic with the Secretariat; and requesting the Secretary-General to “convene a seminar or meeting of experts [on the item] and, to ensure a scholarly and in-depth discussion, to invite a cross-section of professionals thereto”, and to report thereon to the next session of the Committee (*Report*, page 70).

3.4. Status and treatment of refugees; Deportation of Palestinians in violation of international law

(a) Status and treatment of refugees

22. The Committee had before it document AALCC/XXXVI/TEHRAN/97/S-5 prepared by the Secretariat entitled "Report of the Seminar to Commemorate the 30th Anniversary of the Bangkok Principles¹ held in Manila, Philippines, 11-13 December 1996". The Seminar, held with the collaboration of the Office of the UN High Commissioner for Refugees, had identified four subjects for study: (A) Definition of refugees, (B) Asylum and standards of treatment, (C) Durable solutions and (D) Burden-sharing, each of which was assigned to a working group. The Report and Recommendations adopted at the Plenary Session of the Seminar are reproduced below:

"REPORT AND RECOMMENDATIONS OF THE SEMINAR (Source: AALCC Bulletin, Vol. 21 (1997) pages 2-7):

Following deliberations, the Working Group adopted a report on the respective subjects, which was then presented to the Plenary Session. The reports of the Working Groups as adopted at the Plenary Session of the Seminar, are as follows:

A. DEFINITION OF REFUGEES

The Seminar has reached a consensus on the following principles:

- it is important that any definition proposed by the AALCC reflect the complex reality of contemporary refugee situations;
- many States have in the past responded, and will probably continue to respond to mass refugee influxes without reference to any particular legal instrument. It was acknowledged, however, that even in such cases a group determination of the need for international protection was made on the basis of an implicit definition:
- an implicit expansion of the original Bangkok definition, covering situations of foreign domination, external aggression or occupation, is included in Addendum I to the Bangkok Principles of 1970, para 1. It may be useful to consolidate this implicit expansion into the AALCC definition;
- any definition must clearly establish the causal links between, on the one hand, objective circumstances or grounds for persecution and a threat to life or freedom, or a fear of persecution; and, on the other hand, between that threat or fear and the compulsion to leave in search of asylum;
- the persecutor or potential persecutor may be State of nationality or origin of the refugee, the occupying State or a non-State entity which the State is unable or unwilling to control;
- 'nationality' could usefully be introduced as an additional ground for persecution alongside race, colour, religion, political belief or membership of a particular social group, so as to ensure maximum consistency with the language of the 1951 Convention.

¹ *Principles concerning treatment of refugees as adopted by AALCC at its Eighth Session* ('Bangkok Principles') and *Addenda I (1970) and II (1987)* thereto, are reproduced at the end of this Annual Survey.

As to the most appropriate way of ensuring that the AALCC definition covers the refugee situations which the world is facing nowadays, differing views have emerged. This is therefore an area in need of further research and examination by the AALCC.

OPTION 1:

The majority of participants were of the opinion that the language of the original Bangkok definition could usefully be updated, and several proposals were made in this respect. Other participants felt, on the other hand, that a formal expansion of the definition, particularly towards the additional grounds introduced by the Cartagena Declaration of 1984, would be premature.

OPTION 2:

According to this line of thought, a liberal interpretation of the concept of [well founded fear of] persecution would go a long way towards addressing the need for protection of, e.g. civilian victims of violations of laws of war, including in internal armed conflicts. It was also observed that the language of the Bangkok definition was less ambiguous than that of more recent texts (see, e.g. “massive violations of human rights” or “events seriously disturbing public order”), and that the concept of well-founded fear of persecution itself had been clarified over the years by case law referring to the 1951 Convention.

The Seminar acknowledged that the implications of broadening the definition needed to be carefully considered, particularly with regard to mass outflows of refugees straining the resources of host countries.

B. ASYLUM AND STANDARDS OF TREATMENT

Points on which Consensus was achieved:

(1) Regarding para 1 of Article III of the Bangkok Principles, it was agreed that the new text should read as follows:

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 domestic legislation.

(2) Paragraph 2 remains unchanged.

(3) Paragraph 3 should be moved to a separate, new non-refoulement clause (see paragraph 5 below).

(4) Paragraph 4 should remain unchanged in substance and replace paragraph 3.

(5) *Non-refoulement*

This clause, now desegregated from that of asylum, should read as follows:

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 result in his life or freedom being threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

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 for the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

[(6)] *Standard of treatment of refugees*

Paragraph 1 of Art. VI of the Bangkok Principles should now read as follows:

A State shall accord to refugees treatment in no way less favourable than that generally accorded to aliens in similar circumstances, with due regard to basic human rights as recognised in generally accepted international instruments.

. . . .

Points for Further Review

The Seminar identified as areas in need of further review the following:

- a) activities of refugees with regard to the country of origin;
- b) aspects of decisions on voluntary repatriation of refugees;
- c) regional approaches to refugee problems; and
- d) the incorporation into the Bangkok Principles of the relevant provisions of the 1993 Vienna Declaration on Human Rights, para 2.3 of which, *inter alia*, reads:

[. . .] every one, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one's own country.

[. . .] stresses the importance of the Universal Declaration of Human Rights, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and regional instruments.

C. DURABLE SOLUTIONS

The Seminar has agreed that *voluntary repatriation* is not just one durable solution, it is indeed the ideal permanent solution to refugee problems. Any updating of the AALCC Principles on Status and Treatment of Refugees must incorporate the appropriate references to this ideal solution.

Voluntary repatriation must be guided by a set of humanitarian principles, including:

- co-operation between all the principles of burden-sharing and international solidarity;

- the responsibility of States, among these the State of origin, and of the international community;
- the free will of refugees to repatriate, based on objective, reliable information to be provided preferably by UNHCR; return in safety and with dignity; and
- the prohibition of discrimination against returning refugees.

Some positive experiences can also be drawn upon in the area of local integration. The sense of the meeting, however, was that the international climate was not ripe for a formal inclusion of this solution in the AALCC principles.

Third-Country Resettlement is certainly not a solution for the vast majority of refugees in the Afro-Asian region. The resettlement option needs, however to be left open.

In final analysis, the Seminar recognised the importance of Comprehensive Approaches including a mix of solutions, and involving all concerned States and relevant international organisations in the search for, and implementation of, durable solutions to refugee problems.

D. BURDEN SHARING

Articles I, II, III and IV as contained in para 5 of the Addendum to the Status and Treatment of Refugees, 1987 may be incorporated into the Bangkok Principles, 1966 to constitute new Article IX and then subsequently the old Article IX shall be Article X.

The Seminar also recommended that:

- (i) the working documents, presentations and reports and recommendations of the Seminar be published, under the auspices of AALCC and UNHCR, and that these institutions, as well as Member States, adopt the necessary measures for the widest possible dissemination of such publication;
- (ii) in recognition of the universal dimension of the refugee problem, the AALCC ensure that the discussion of the refugee item at the thirty-sixth and subsequent sessions feed into, and influence, broader initiatives for the development of international law and principles at the universal level, particularly under the auspices of the United Nations; and
- (iii) that the Chairman and Secretary General of the AALCC submit the final report and conclusions of this Seminar to the thirty-sixth session of the AALCC to be held in Tehran in 1997, and that the re-examination of the Bangkok Principles concerning Treatment of Refugees be introduced at that session as a key sub-item under the item 'Status and Treatment of Refugees'.

The recommendations were adopted following the proposals made by the Representatives of the Philippines, Egypt and the Islamic Republic of Iran respectively.

...

23. The delegates of *Nepal, Egypt, Indonesia, Thailand, Ghana, Uganda and India*, welcoming the results of the Manila Seminar, described the experience gained by their respective administrations in dealing with contemporary refugee problems. They endorsed the Secretariat's suggestion that a Working Group of representatives of Member States continue study of the subjects identified at the Seminar. At the close of the discussion (*Report*, pages 52-7), the Committee adopted a resolution (*Report*, pages 67-8) that, *inter alia*,

“

4. *Appeals* to Member States to take all possible measures to eradicate the causes and conditions which force people to leave their countries and cause them to suffer unbounded misery;

5. *Urges* Member States who have not already done so to ratify and/or accede to the Convention relating to the Status of Refugees, 1951, and the 1967 Protocol thereto;

6. *Directs* the Secretariat to examine ways and means of promoting the recommendations of the Manila Seminar, and in this connection

7. *Requests* the Secretary-General to convene as appropriate, a meeting of experts in 1997 in order to conduct an in-depth study of the issue, in light of the recommendations of the Manila Seminar, as well as the comments thereon at the current session and report to the Thirty-seventh Session;

. . . .”

(b) *Deportation of Palestinians in violation of international law*

24. The Committee had before it document AALCC/XXXVI/TEHRAN/97/S-11 on the item prepared by the Secretariat which, *inter alia*, described recent difficulties encountered in the Middle East peace process due to a series of measures taken by the Israeli Government, including repeated attacks against Palestinian officials and private citizens in Arab Jerusalem and Palestinian cities, which had killed many and left hundreds wounded; the building of new Jewish settlements and the construction of by-pass roads for settlers; the demolition of Palestinian homes; the continued seizure of Palestinian lands and the refusal of Israel to withdraw its forces in accordance with its solemn undertakings.

25. The delegate of *Palestine* condemned the Israeli Government for renegeing on its pledges to support the peace process. Referring to the massive immigration of Jews and a corresponding practice of expelling Palestinians, to the construction of tunnels adjoining the holy site of the Al-Aqsa Mosque, he declared that these actions constituted flagrant violations of the Geneva Conventions of 1949, the general principles of international law, Security Council resolution 252/468, and the provisions of the Hebron Agreement. Re-affirming Palestine's commitment to the peace process, he called for continued support from Asian and African governments, and urged the United States to rescue the peace process from being de-stabilized by Israeli activity.

26. The delegates of *Iran, Egypt, Indonesia, Ghana and India* expressed grave concern over the deteriorating situation in the Middle East, and their support for restoration of the rights of the Palestinians. At the close of the discussion (*Report*, pages 52-7) the Committee adopted a resolution which, *inter alia*, expressed the hope that a just and durable solution would allow the Palestinian people to recover their legitimate rights, and directed the Secretariat to “continue to monitor developments in the occupied territories from the viewpoint of relevant legal aspects ; . . .” (*Report*, pages 71-2).

3.5. Law of the Sea

27. The Committee had before it document AALCC/XXXVI/TEHRAN/97/S-6 on the item prepared by the Secretariat and which reported on developments associated with the UN Convention on the Law of the Sea, and generally concerning the marine environment. The report covers consideration of the item by the UN General Assembly at its 51st regular session; the adoption in 1994 of the *Agreement relating to the Implementation of part XI of the Convention on the Law of the Sea*, and the adoption in 1995 of the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*. The document records that at the first part of the second session of the Assembly of the International Sea-bed Authority, held at Kingston, Jamaica, from 11-22 March 1996, the Assembly elected its 36-member Council, and elected Mr. SATYA N. NANDAN (Fiji) as the Authority’s first Secretary-General. Elections to the Council of the Authority, and to the International Tribunal for the Law of the Sea, are recorded as follows, with emphasis on Asian States:

Council of the International Sea-bed Authority

Group A (4 Members from among those States Parties which, during the last 5 years have either consumed more than 2 per cent, in value terms, of total world consumption, or have had net imports of more than 2 per cent, in value terms, of total world imports of commodities produced from categories of minerals to be derived from the international sea-bed area, including the State with the largest economy in Eastern Europe in terms of gross domestic product): *Japan, Russian Federation, United Kingdom, United States of America.*

Group B (4 Members from among the eight States Parties which have made the largest investments in preparation for, and in the conduct of, activities in the international sea-bed area): *China, France, Germany, India.*

Group C (4 Members which, on the basis of production in areas under their jurisdiction are major net exporters of categories of minerals to be derived from the international seabed area, including at least 2 developing States whose exports of such minerals have a substantial bearing upon their economies): *Australia, Chile, Indonesia, Zambia.*

Group D (6 Members from among developing States, representing special interests, including States with large populations, land-locked or geographically disadvantaged States, island States and States which are major importers of categories of minerals to be

derived from the international sea-bed area, States which are potential producers of such minerals and the least developed States, it having been agreed that the 6 seats would be distributed among the 3 regional groups of developing countries): *Bangladesh, Oman, Cameroon, Nigeria, Brazil, Trinidad & Tobago.*

Group E (18 Members elected on the basis of equitable geographical distribution, provided each geographical region – Africa, Asia, East Europe, Latin America and the Caribbean, and West Europe and Other States – shall have at least 1 seat):

Asia: Republic of Korea, Malaysia, Philippines

Africa: Egypt, Kenya, Namibia, Senegal, South Africa, Sudan, Tunisia

East Europe: Poland, Ukraine

Latin America and Caribbean: Argentina, Cuba, Paraguay

West Europe and Others: Austria, Italy, Netherlands.

International Tribunal for the Law of the Sea

The States Parties to the UN Convention on the Law of the Sea, at their fifth meeting held in New York from 24 July – 2 August 1996 elected the Tribunal's 21 judges: D.H. ANDERSON (United Kingdom), H. CAMINOS (Argentina), G. EIRIKSSON (Iceland), P.B. ENGO (Cameroon), A. JOSEPH (Lebanon), A.L. KOLODKIN (Russian Federation), E.A. LAING (Belize), R.V. MAROTTA (Brazil), M.M. MARSIT (Tunisia), T.A. MENSAH (Ghana), T.M. NDIAYE (Senegal), L.D. NELSON (Grenada), C.-H. PARK (*Rep. of Korea*), P.C. RAO (*India*), T. TREVES (Italy), B. VUKAS (Croatia), J.S. WARIOBA (Tanzania), R. WOLFRUM (Germany), S. YAMAMOTO (*Japan*), A. YANKOV (Bulgaria), L. ZHAO (*China*).

28. Having reported on the inter-governmental conference on a *Global Programme of Action for the Protection of the Marine Environment from Land-based Activities*, convened in Washington D.C., by the Executive Director of UNEP, from 23 October – 3 November 1995 pursuant to a request contained in Chapter 17 of Agenda 21, the document outlines the provisions of the Washington Declaration (UN doc. A/51/116, dated 16 April 1996) and the Global Programme of Action adopted by the Conference.

29. The document also makes reference to the Report of the UN Secretary-General under Article 319 of the UN Convention on the Law of the Sea (doc. SPLOS/6), which, *inter alia*, lists three 'emerging issues', to which States Parties, the International Sea-bed Authority and competent international organizations are invited to give consideration: (i) protection of underwater cultural heritage, (ii) protection of marine and coastal biodiversity, and (iii) formulation of 'rules of origin' of products (living and non-living) derived from various maritime zones, and of relevance to the functions of the World Customs Organization, and the WTO Committee on Rules of Origin.

30. Finally, the document makes a plea for harmonization of national maritime legislation, drawing attention to instances where the laws defining maritime jurisdiction are inconsistent with States Parties' commitments under the provisions of the UN Convention on the Law of the Sea.

31. After discussion of the item (*Report*, pages 61-3) the Committee adopted a resolution (*Report*, pages 68-9) which, *inter alia*,

“

7. *Reminds* Member States to give timely consideration to the need for adopting a common policy and strategy for the interim period before the commercial exploitation of the deep sea-bed's minerals becomes feasible, and for this purpose urges Member States to take an evolutionary approach especially to the 'initial function' of the Authority so as to make the ISBA useful to the international community and developing countries during this initial period;

8. *Urges* Members States to co-operate in regional initiatives for the securing of practical benefits of the new ocean regime;

. . . .”

4. MATTERS OF COMMON CONCERN HAVING LEGAL IMPLICATIONS

4.1. United Nations Conference on Environment and Development: follow-up

32. The Committee had before it document AALCC/XXXVI/TEHRAN/97/S-14 on the item prepared by the Secretariat, which described the background and main features of (a) the *UN Convention to Combat Desertification* which had been negotiated within the Inter-governmental Negotiating Committee on Desertification convened by the General Assembly, and entered into force on 26 December 1996 (62 ratifications as at 15 January 1997); (b) the *UN Framework Convention on Climate Change (FCCC)* which entered into force on 21 March 1994 (161 ratifications at date of reporting); and (c) the *Convention on Biological Diversity (CBD)*, which entered into force on 29 December 1993 (161 ratifications at date of reporting). The document summarizes the main issues discussed at the second Conference of the Parties (COP-2) to the UN Convention on Climate Change, and the third Conference of the Parties (COP-3) to the Convention on Biological Diversity.

33. *FCCC/COP-2, Geneva 8-19 July 1996*. The document's summary of the Ministerial Declaration adopted at the close of COP-2 indicates the outstanding policy issues. As reported, the Ministerial Declaration:

“(i) re-affirmed the over-arching importance of the principles of equity, common but differentiated responsibilities and precautionary approach in mitigating the effects of climate change;

(ii) endorsed the Second Assessment Report of the Inter-governmental Panel on Climate Change as currently the most comprehensive and authoritative assessment of the science of climate change, although some uncertainties do exist;

- (iii) called upon Annex I Parties to strengthen their commitments by implementing their national policies and measures and making additional efforts to stabilize their emissions of greenhouse gases;
- (iv) instructed representatives to accelerate negotiations on the text of a legally binding protocol or other legally binding instrument (the 'Berlin Mandate') to be completed for adoption at COP-3;
- (v) affirmed the need for Quantified Emission Limitation and Reduction Objectives (QELROS) and significant overall reductions, within specified time frames such as by the years 2005, 2010 and 2020, of anthropogenic emissions, by reference to sources and sinks of greenhouse gasses;
- (vi) while welcoming the efforts of the developing country Parties to implement the Convention, called upon Annex II Parties to fulfil their commitments to provide environmentally sound technologies and contribute to meeting 'incremental costs'; and
- (vii) called upon the Global Environmental Facility to provide timely support to developing country Parties and initiate work toward full replenishment in 1997."

34. *CBD/COP-3, Buenos Aires, 4-15 November 1996*

As reported, the Ministerial Declaration adopted at the close of COP-3, *inter alia*, called upon the Parties to take into account:

- (i) the need for the transfer of additional resources and technology by developed country Parties;
- (ii) the need to simplify procedures for obtaining funding from the Global Environmental Facility;
- (iii) the need to review the work of multilateral agencies in order to improve investments;
- (iv) the need for capacity-building, especially in Africa and the least developed countries;
- (v) the need to share information, engage in bio-prospecting, and to recognize the local knowledge, innovation and practices of indigenous peoples;
- (vi) the developed countries' demand for free access to genetic resources as a necessary corollary to the transfer of bio-technology and additional funds;
- (vii) the need for a bio-safety protocol guaranteeing adequate information-sharing and advance informed consent;
- (viii) the concerns of small island developing States (SIDS) who stressed the importance of marine and coastal issues; and
- (ix) the need for integrated management and sustainable use of the marine environment and resources, including coastal zones, coral reefs and reef ecosystems.

35. In the course of the discussion of the item (*Report*, pages 41-3), the delegate of the *Republic of Korea* invited attention to an attempt by a party in northeast Asia to transfer radio-active wastes to a location in the northern part of the Korean Peninsula, which was a densely populated area with a single eco-system. He referred to customary and conventional law concerning the safe management and disposal of radio-active and other hazardous wastes, and recalled that the Rio Charter, and in particular, Principle 19 thereof, required prior consultation procedures and a precautionary approach to be followed in relation to such activities. Emphasizing the need to build an international con-

sensus on the prohibition of transboundary environmental harm, he urged AALCC Member States to take note of the memorandum on the subject prepared by the Korean Foreign Ministry.

36. At the close of the discussion (*Report*, pages 41-3) the Committee adopted an essentially procedural resolution (*Report*, pages 73-4).

4.2. United Nations Decade of International Law

37. The Committee had before it document AALCC/XXXVI/TEHRAN/97/S-2, a note on the item by the Secretary-General which recalled its origin in decisions adopted by the Non-aligned countries, and contained an outline of the activities undertaken by the United Nations and by AALCC during the Decade thus far. Following discussion of the item (*Report*, pages 44-6) the Committee adopted an essentially procedural resolution (*Report*, pages 66-7).

4.3. Establishment of an International Criminal Court

4.4. Mutual assistance in judicial co-operation: extradition of fugitive offenders

38. The Committee had before it document AALCC/XXXVI/TEHRAN/97/SP-1 prepared by the Secretariat which described (1) the development of international humanitarian law both customary and conventional, (2) national measures to implement international humanitarian law, (3) the nexus between international humanitarian law and the establishment of the *ad hoc* International Criminal Tribunals for Yugoslavia and Rwanda, as well as the prospective establishment of the permanent International Criminal Court, (4) the International Law Commission's draft Statute of an International Criminal Court, (5) the work of the UN General Assembly's Ad Hoc Committee on the Establishment of an International Criminal Court, and (6) successive sessions of the General Assembly's Preparatory Committee on the Establishment of an International Criminal Court. The Committee also had before it document AALCC/XXXVI/TEHRAN/97/S.10 entitled 'Extradition of Fugitive Offenders', prepared by the Secretariat, containing a Note on the history of the Committee's consideration of the subject, to which was annexed a series of draft articles² which could be treated as a 'model framework' for the formulation of relevant rules.

39. The inter-related aspects of an International Criminal Court and International Humanitarian Law, and the issues relating to the Extradition of Fugitive Offenders were discussed at a special meeting held during the Session under the chairmanship of the President of the Session, Dr. M. JAVAD ZARIF. The Report of the Rapporteur of the special meeting, Minister A.R.M.A. PEEROO (*Report*, pages 24-26) contains the following paragraphs:

² The draft articles and commentaries thereon were reproduced in 6 AsYIL 301-321.

“12. The Secretariat had prepared summary records of the deliberations during the two sessions, which among other things, reflected that

(i) There was absolutely no divergence of views on the need to establish an independent and permanent International Criminal Court nor did there appear to be any difference of opinion as to the mode of establishment.

(ii) There was a fair amount of divergence of views on the material jurisdiction of the proposed ICC. Doubt, for instance was raised for the inclusion of an exercise of jurisdiction by the Court on crimes committed against UN and associated personnel while excluding other more serious offences. It was in this regard also that questions were raised as to the pragmatism of inherent jurisdiction of the proposed Court and more specifically identified crimes included within the provisions of the Statute of the Court.

(iii) A related question, which perplexed some participants, was the implementation in practice of the principle of complementarity. Corollaries to the principle of complementarity were the principles of the trigger mechanism and exclusivity. There was a strong feeling that a line of demarcation between the jurisdiction of the municipal Courts and ICC be clearly drawn.

(iv) The role of the Security Council or as some of the representatives phrased it, the relationship between the Security Council and the ICC was yet another issue on which representatives expressed reservations. An undercurrent of the frequent references to the relationship between ICC and Security Council was the implicit question “would a strong relationship between the Security Council and ICC be tantamount to politicizing the proposed international criminal jurisdiction?” Reference was in this regard made by some to the right of veto of the five permanent members of the Security Council, and the fear that the Court might become an instrument manipulated by some countries. In this regard, the composition or rather the need to enlarge the membership of the Security Council was also touched upon.

(v) On the procedural aspects, doubts were raised as to the exemption of certain officials from having to depose or give evidence before the Court. The question of the role of the Procuracy, though mentioned, was not debated.

(vi) Mention was made of the final clauses of the Statute and the question of the number of ratifications which may be required for the Statute to enter into force were raised. The general opinion appeared to be that the number of ratifications required should not be very high. The point thus made was based on the experience of the Law of the Sea Convention which took 12 years to enter into force because it was imperative that 60 States should ratify it.

(vii) Regarding International Humanitarian Law the first issue identified was the need for the wider dissemination and appreciation of International Humanitarian Law. The interventions and observations related to the implementation of International Humanitarian Law reflected a twofold concern (i) the incorporation of the principles and norms of International Humanitarian Law in the municipal legislation of states and the enforcement of principles of International Humanitarian Law before national tribunals. Another major aspect of implementation of International Humanitarian Law was the jurisdiction of the ICC over the violations of the Geneva Conventions and their two Protocols.

13. Views were expressed on the necessity to see the institutions of International Humanitarian Law independent, neutral and apolitical and to urge them to watch NGOs trying to use their umbrella for other purposes than humanitarian assistance.”

40. After discussion of the two items (*Report*, page 64, see also the observations of delegates in the course of their (a) general statements at the commencement of the Session (*Philippines*, p. 28, *Indonesia*, pp. 29-30, *Tanzania*, p. 30; and (b) discussion of the work of the International Law Commission, above, paragraphs 7-10)), the Committee adopted an essentially procedural resolution (*Report*, pages 74-5).

5 TRADE LAW MATTERS

5.1. Report on legislative activities of the United Nations and other international organizations concerned with international trade law

5.2. WTO as a Framework Agreement and Code of Conduct for World Trade

5.3. Report of the Regional Centres for Arbitration

41. The Committee had before it document AALCC/XXXVI/TEHRAN/97/S-12 on the legislative activities of the United Nations and other international organizations concerned with international trade law, prepared by the Secretariat, containing a review of the work of (i) UNCITRAL (Electronic data exchange: Model Law on Electronic Commerce; Notes on organizing arbitral proceedings; BOT (build-operate-transfer) projects); (ii) UNCTAD (legislative activities covering several areas, including commodity agreements, transfer of technology, restrictive business practices and aspects of maritime transport); (iii) UNIDO (preparation of guidelines, manuals and model forms of industrial contracts); and (iv) UNIDROIT (International Institute for the Unification of Private Law) (Principles for international commercial contracts; international protection of cultural property; international aspects of security interests in mobile equipment; franchising; inspection agency contracts; civil liability connected with the carrying out of dangerous activities; legal issues connected with software). The President of UNIDROIT addressed the Committee on the functions and current work programme of the organization (*Report*, pages 19-23).

42. The Committee also had before it document AALCC/XXXVI/97/S-13 on the World Trade Organization, containing outlines of the Agreement establishing WTO, and of some 15 Agreements contained in Annex 1.A thereto, as well as the General Agreement on Trade in Services (GATS) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) contained in Annexes 1.B and 1.C respectively; of the Understanding on Rules and Procedures governing the Settlement of Disputes (Annex 2); of the Trade Policy Review Mechanism (TPRM) (Annex 3); of Plurilateral Trade Agreements (PTAs) (Annex 4). The document also contains a report on the Singapore Ministerial Conference of WTO, held from 9-13 December 1996, and the ‘Singapore Declaration’, adopted by it, which, *inter alia*, affirms, “in pursuit of the goal of sustainable growth and development for the common good”, a renewed commitment to a fair, equitable and

more open rule-based system; rejection of all forms of protectionism; elimination of discriminatory treatment in international trade relations and integration of developing and least developed countries and the economies in transition, into the multilateral system. The report explains that, although the term 'rule-based system' is not defined in WTO literature, it is commonly understood to include four components, viz. non-discrimination, reciprocity, market access and fair competition.

43. As reported, the Declaration refers to the "primacy of the multilateral trading system", while recognizing the increasing influence of regional trade arrangements, and the 'complementarity' between them; the need to pay special attention to the interests of the least developed countries; the recommendations of the WTO Council's *Committee on Trade and Environment* on the "trade-environment-sustainable development interface"; the establishment of working groups to examine the relationship between trade and investment, and the interaction between trade and competition policy; the progress of negotiations on issues connected with market access in the area of services, and in particular, of financial services, movement of natural persons, maritime transport services and telecommunications; and, as to dispute settlement, the Members' satisfaction with the functioning of WTO's Dispute Settlement Body, and the newly established (December 1995) Independent Entity administered by WTO, and constituted jointly by WTO, the International Chamber of Commerce and the International Federation of Inspection Agencies, for settling disputes between exporters and pre-shipment inspection companies.

44. The Committee also had before it document AALCC/XXXVI/TEHRAN/97/ORG.4 which presented an overview of the promotional activities of the regional arbitration centres, and heard statements from the Deputy Secretary-General and the Assistant Secretary-General concerning, in particular, the activities of the Cairo and Kuala Lumpur Centres. It was reported that, with the liberalization of economic policies, some 700 investment agreements had been signed in the ASEAN region. An ASEAN Investment Area had been established, and a Protocol on the settlement of investment disputes, adopted. Among AALCC's Members, Bahrain, Cyprus, Egypt, India, Kenya, Nigeria and Singapore had adopted legislation along the lines of the UNCITRAL Model Law on Arbitration. It was noted that, of AALCC's 44 Members, only 28 were currently parties to the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

45. Following discussion of the items (*Report*, pages 58-61) the Committee adopted essentially procedural resolutions on each of them (*Report*, pages 72, 73, 75).

ANNEX

PRINCIPLES CONCERNING TREATMENT OF REFUGEES AS ADOPTED BY THE
 ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE
 AT ITS EIGHTH SESSION

BANGKOK 1966

Article 1 : Definition of the term 'Refugee'

A refugee is a person who, owing to persecution or well-founded fear of persecution for reasons of race, colour, religion, political belief or membership of a particular social group:

- (a) leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident, or
- (b) being outside such State or Country, is unable or unwilling to return to it or to avail himself of its protection.

Exceptions

- (1) 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.
- (2) A person who prior to his admission into the Country of refuge, has committed a crime against peace, a war crime, or a crime against humanity or a serious non-political crime or has committed acts contrary to the purposes and principles of the United Nations shall not be a refugee.

Explanation

The dependants of a refugee shall be deemed to be refugees.

The expression 'leaves' includes voluntary as well as involuntary leaving.

Notes

- (i) The Delegation of Ghana reserved its position on this Article;
- (ii) The Delegations of Iraq, Pakistan and the United Arab Republic expressed the view that, in their opinion, the definition of the term 'Refugee' includes a person who is obliged to leave the State of which he is a national under the pressure of an illegal act or as a result of invasion of such State, wholly or partially, by an alien with a view to occupying the State.
- (iii) The Delegations of Ceylon and Japan expressed the view that in their opinion the expression 'persecution' means something more than discrimination or unfair treatment but includes such conduct as shocks the conscience of civilized nations.
- (iv) The Delegations of Japan and Thailand expressed the view that the word 'and' should be substituted for the word 'or' in the last line of paragraph (a).
- (v) In Exception (2) the words "prior to his admission into the Country of refuge" were inserted by way of amendment to the original text of the Draft Article on the proposal of the Delegation of Ceylon and accepted by the Delegations of India, Indonesia, Japan and Pakistan. The Delegations of Iraq and Thailand did not accept the amendment.
- (vi) The Delegation of Japan proposed insertion of the following additional paragraph in the Article in relation to proposal under note (iv):

“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 or the Country of which he is a habitual resident, at the time of the events which caused him to have a well-founded fear of above-mentioned persecution and is unable or unwilling to return to it or to avail himself of its protection shall be considered a refugee.”

The Delegations of Ceylon, India, Indonesia, Iraq and Pakistan were of the view that this additional paragraph was unnecessary. The Delegation of Thailand reserved its position on this paragraph.

Article 2 : Loss of Status as Refugee

1. A refugee shall lose his status as refugee if:
 - (i) he voluntarily returns permanently to the State of which he was a national or the Country of his nationality, to the State 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; or
 - (iii) he voluntarily acquires the nationality of another State or Country and is entitled to the protection of that State or Country.

2. A refugee shall lose his status as a refugee if 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.

Explanation

It would be for the State of asylum of the refugee to decide whether the circumstances in which he became a refugee have ceased to exist.

Notes

- (i) The Delegations of Iraq and the United Arab Republic reserved their position on paragraph 1(iii).
- (ii) The Delegation of Thailand wished it to be recorded that the loss of status as a refugee under paragraph 1(ii) will take place only when the refugee has successfully re-availed himself of the protection of the State of his nationality because the right of protection was that of his country and not that of the individual.

Article 3 : Asylum to a Refugee

1. A State has the sovereign right to grant or refuse asylum in its territory to a refugee.

2. The exercise of the right to grant such asylum to a refugee shall be respected by all other States and shall not be regarded as an unfriendly act.

3. No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as a rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

4. 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 as it may deem appropriate to enable the person thus endangered to seek asylum in another country.

Article 4 : Right to Return

A refugee shall have the right to return if he so chooses to the State of which he is a national or to the Country of his nationality and in this event it shall be the duty of such State or Country to receive him.

Article 5 : 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.

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 dependants of the refugee or of the person whose dependant the refugee was, and destruction of or damage to property and assets, caused by the authorities of the State or Country, public officials or mob violence.

Notes

(i) The Delegations of Pakistan and the United Arab Republic were of the view that the word 'also' should be inserted before the words 'such loss' in paragraph 2.

(ii) The Delegations of India and Japan expressed the view that the words "deprivation of personal liberty in denial of human rights" should be omitted.

(iii) The Delegations of Ceylon, Japan and Thailand suggested that the words "in the circumstances in which the State would incur state responsibility for such treatment to aliens under international law" should be added at the end of paragraph 2.

(iv) The Delegations of Ceylon, Japan, Pakistan and Thailand expressed the view that compensation should be payable also in respect of the denial of the refugee's right to return to the State of which he is a national.

(v) The Delegation of Ceylon was opposed to the inclusion of the words 'or country' in this Article.

(vi) The Delegations of Ceylon, Ghana, India and Indonesia were of the view that in order to clarify the position, the words "arising out of events which gave rise to the refugee leaving such State or Country" should be added to paragraph 2 of this Article after the words 'mob violence'.

Article 6 : Minimum Standard of Treatment

1. A State shall accord to refugees treatment in no way less favourable than that generally accorded to aliens in similar circumstances.

2. The standard of treatment referred to in the preceding clause shall include the rights relating to aliens contained in the Final Report of the Committee on the status of aliens, annexed to these principles, to the extent that 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 and the State or Country of na-

tionality of the refugee or, if he is stateless, the State or Country of his former habitual residence.

Notes

- (i) The Delegations of Iraq and Pakistan were of the view that a refugee should generally be granted the standard of treatment applicable to the nationals of the country of asylum.
- (ii) The Delegation of Indonesia reserved its position on paragraph 3 of the Article.
- (iii) The Delegations of Indonesia and Thailand reserved their position on paragraph 4 of the Article.

Article 7 : Obligations

A refugee shall not engage in subversive activities endangering the national security of the country of refuge, or in activities inconsistent with or against the principles and purposes of the United Nations.

Notes

- (i) The Delegations of India, Japan and Thailand were of the view that the words 'or any other country' should be added after the words 'the country of refuge' in this Article. The other Delegations were of the view that such addition was not necessary.
- (ii) The Delegation of Iraq was of the view that the inclusion of the words "or in activities inconsistent with or against the principles and purposes of the United Nations" was inappropriate as in this Article. What was being dealt with was the right and obligation of the refugee, and not that of the State.

Article 8 : Expulsion and Deportation

1. Save in the national or public interest or on the ground of violation of the conditions of asylum, 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.
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, religion, political belief or membership of a particular social group.

Notes

- (i) The Delegations of Ceylon, Ghana and Japan did not accept the text of paragraph 1. In the views of these Delegations the text of this paragraph should read as follows: "A State shall not expel or deport a refugee save on ground of national security or public order, or a violation of any of the vital or fundamental conditions of asylum."
- (ii) The Delegations of Ceylon and Ghana were of the view that in paragraph 2 the words "as generally applicable to aliens under such circumstances" should be added at the end of the paragraph after the word 'necessary'.

Article 9

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.

Addendum to the Principles concerning Treatment of Refugees

(as adopted by the Committee at its Eleventh Session at the Seventh Meeting held on 27 January 1970).

WHEREAS it appears to the Committee on further consideration that the Principles adopted at its Session held in Bangkok in 1966 mainly contemplated the status of what may be called political refugees who have been deprived of the protection of their own Government and do not provide adequately for the case of other refugees or displaced persons;

AND WHEREAS the Committee considers that such other refugees or displaced persons should enjoy the benefit of protection of the nature afforded by Articles IV and V of those Principles;

NOW THEREFORE the Committee at its Eleventh Session held in Accra between 19 and 29 January 1970 resolves as follows:

1. Any person who because of foreign domination, external aggression or occupation has left his habitual place of residence, or being outside such place, desires to return thereto but is prevented from doing so by the Government or authorities in control of such place of his habitual residence from which he was displaced.

2. It shall accordingly 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.

3. 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 1 above.

4. 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 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.

5. If the status of such a person is disputed by the Governments or authorities in control of such 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 4 above.

Note:

The Addendum was adopted by the Committee subject to reservations made by the Delegates of India and Ghana regarding the universal application of the principles contained in the Addendum as recorded in the minutes of the Sixth and Seventh Meetings of the Committee.

Addendum to the Status and Treatment of Refugees – Report of Committee

(As adopted at the Twenty-sixth Session of the AALCC in Bangkok on 13 January 1987)

The topic “Status and Treatment of Refugees” was originally referred to the Committee for consideration by the Government of the Arab Republic of Egypt in 1962. The subject was studied with the assistance and cooperation of the Office of the United Nations High Commissioner for Refugees and was deliberated upon at the Committee’s Cairo (1964), Bagdad (1965) and Bangkok (1966) Sessions. At the Bangkok Session, the Committee made its final

recommendations in the form of a set of eight principles (subsequently known as the Bangkok Principles) which, *inter alia*, contained the definition of the term 'refugee' and certain norms on the question of asylum, right of return, right to compensation, minimum standard treatment, obligations of refugees, expulsion and deportation.

The topic was taken up for further consideration at the request of the Government of Pakistan at the Karachi Session in 1969 and then at the Accra Session in 1970 where the Committee adopted an 'addendum' to the Bangkok Principles. The addendum contained an elaboration on the 'right to return' of any person who, because of foreign domination, external aggression or occupation had left his habitual place of residence. At its seventeenth session in Kuala Lumpur in 1976, the Committee considered a related topic, namely, Territorial Asylum in the context of preparations for a United Nations Convention. Thereafter some proposals were received from the Office of the United Nations High Commissioner for Refugees in 1980 that the Committee should revive consideration of the subject in the context of new developments that were taking place in the practice of States to deal with refugee situations.

At the Tokyo Session (1983) after a general exchange of views, it was decided that the AALCC's Secretariat should prepare, in collaboration with the Office of the UNHCR, a study on the principle of burden sharing as also another study on the doctrine of State responsibility in relation to the problem of refugees. A paper setting forth the evolution of principles and norms on the question of burden sharing as developed through the practice of States was accordingly placed before the Kathmandu Session and was discussed in the Plenary.

In the light of the exchange of views and the material placed before the Committee during the deliberations of the Kathmandu and Arusha Sessions the conclusion could be drawn that the principle of international solidarity in dealing with the refugee situations and the concept of burden sharing in that context appear by now to be firmly established in the practice of States. This development in the field of humanitarian refugee law is attributable largely to international concern, in the context of the United Nations Charter, to preserve human life, to diminish human suffering, to provide for the well being of all men and to assist States in providing protection and assistance to refugees and in seeking solutions to the problem of refugees. Furthermore, there has been a growing trend towards finding durable solutions to the problem of refugees and for international assistance to relieve the burden of the States faced with a large scale influx of refugees.

The Committee, having regard to the aforesaid considerations decides to make the following recommendations as additional principles to supplement those contained in the Bangkok Principles of 1966:

- I. 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.
- II. 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.
- III. 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 pro-

vision of durable solutions and the support of international bodies with responsibilities for the protection and assistance of refugees.

IV. 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.

CHRONICLE

CHRONICLE OF EVENTS AND INCIDENTS RELATING TO
ASIA WITH RELEVANCE TO INTERNATIONAL LAW
July 1996 – June 1997*

Ko Swan Sik*

with contributions from KRIANGSAK KITTICHAISAREE (Bangkok)

TABLE OF HEADINGS

Air traffic and transport	Fisheries
Aliens	Foreign investment
Arms sales and supplies	Hongkong
Asia-Pacific Economic Co-operation forum (APEC)	Human rights
Association of South East Asian Nations (ASEAN)	Immigration
Asylum	Immunities
Borders, border disputes and border incidents	Insurgents
Broadcasting	Intellectual property
Civil war	Inter-state relations: general aspects (Non-)Interference
Codification of international law	International economic relations and trade
Continental shelf	Japan's military role
Cultural matters and property	Joint development and joint ventures
Customs	Judicial assistance
Diplomatic and consular immunity and inviolability	Jurisdiction
Diplomatic and consular relations	Korean War
Disarmament and arms control	Labour
Dissidents	Litigation
Divided states: China	Loans
Divided states: Korea	Macao
Economic co-operation and assistance	Mercenaries
Embargo	Migrant workers
Emergency aid	Military alliances
Environmental pollution and protection	Military co-operation
Espionage	Minorities
Extradition	Missile technology
Fauna and flora	Monetary matters
Financial claims	Nationality
	Non-Aligned Movement (NAM)
	Nuclear energy matters

* General Editor

Oil and gas	Specific territories within a state:
Organization for Economic Co-operation and Development (OECD)	Kashmir
Rail traffic and transport	Specific territories within a state: Tibet
Recognition	State succession
Refugees	Taxation
Regional security	Technology
Rivers	Telecommunications
Sanctions	Territorial claims and disputes
Sea and sea traffic	Terrorism
Social matters	Transit
South Asian Association for Regional Co-operation (SAARC)	United Nations (UN)
Specific territories within a state: East Timor	Unrecognized entities
	Weapons
	World Trade Organization (WTO)
	World War II

AIR TRAFFIC AND TRANSPORT

US-Asian 'open skies' talks

Five Asian countries were involved in discussions with the US on the issue of 'open skies' in air traffic. Talks had resulted in agreements with Singapore (*see infra*), Taiwan and Brunei, and continued with South Korea and Malaysia. (IHT 26/27-10-96, 16-06-97) Other Asian countries, however, such as Japan, China, Thailand and Vietnam, had strong reservations, fearing that large US airlines would end up dominating the major routes across the Pacific. Japanese-US negotiations had been stalled since August 1996, but were to resume in early January 1997.

A US draft open-skies pact called for removal of restrictions on passenger and cargo flights and routes – including those flying beyond the countries concerned – as well as on charter arrangements, fares and code-sharing agreements. (JT 05 and 11-12-96; IHT 21-01-97)

It appeared that the US stood to gain most from the agreements because US airlines can draw far more passengers from their huge domestic market than any of the Asian carriers can draw from theirs. Moreover, under the agreements restrictions on international services were abolished but foreign carriers were not allowed to operate within the domestic market of each party, while the US market accounted for about 30 percent by value of the global passenger market. It was said that countries which were willing to conclude open skies agreements with the US either had competitive airlines or gave priority to promoting tourism, business travel and air freight efficiency. (IHT 16-06-97)

Japan-Russia aviation negotiations

In contradistinction to other major countries Japan had not yet concluded a new civil aviation agreement with Russia after the collapse of the USSR, despite Russian willingness to lift the current restriction on the number of Japanese airlines' flights

over Siberia. The reason was that Japan claimed that Russia had inherited all the treaties of the USSR.(JT 02-11-96)

Opening of North Korean air space

It was reported that North Korea would open its air space in December 1996 for overflights by foreign carriers.(JT 13-11-96)

Singapore-US landmark air agreement

As the first Asian country, Singapore reached agreement with the US on the opening of aviation markets on 23 January 1997.(IHT 24-01-97) The open skies agreement which was signed on 8 April 1997 lifted all restrictions on the operations of both countries' airlines in terms of routing, frequency and capacity. The agreement also provided for so-called 7th freedom traffic rights, allowing scheduled cargo flights from either country to use each other's airports as hubs for regional operations. Singapore Airlines operated a total of 39 passenger and cargo flights weekly to the US while seven US carriers operated a total of 49 passenger and cargo services on Singapore.(ST 09-04-97)

ALIENS

See also: Minorities

Participation in local government

For the first time a Japanese municipality, Kawasaki, in October 1996 offered the possibility to resident aliens to serve on a representative municipal panel designed to incorporate their views into the municipal administration.

Earlier in the year Kawasaki was the first Japanese city to scrap a Japanese nationality requirement for people applying for certain municipal jobs.(JT 10-10-96)

On 28 October 1996 the Tokyo Metropolitan Government, as the first Japanese local government to do so, unveiled a report demanding the state revise laws to give foreign residents suffrage (but not to be elected) in local elections. The report referred to a ruling of the Supreme Court according to which the Japanese constitution does not prohibit foreign residents from having suffrage in local elections.(JT 29-10-96)

Easing of visa requirements

Aiming at doubling the number of foreign visitors in the next ten years, the Japanese transport ministry had proposed to the foreign ministry that visa restrictions, particularly for Chinese, be eased. So far, Chinese were not granted tourist visas unless they had a Japanese sponsor. Visa applications from Chinese were subject to more strict regulations than any other nationality. It was believed that about 40,000 Chinese were residing in Japan illegally.(JT 17-10-96)

Racist attacks on Singaporean military in Australia

Since a debate had erupted in Australia in 1996 over Asian immigration in the country, members of the Singaporean armed forces on training in Queensland, Aus-

tralia, had been the victims of numerous racist attacks. The incidents prompted complaints from Singapore and expressions of regret by the Australian government. (JT 31-10-96)

Aliens as crew members of Japanese tuna boats

It was reported that Japanese fishing boats for deep-sea tuna fishing were nearly 40 percent manned by foreign fishermen. Fourty percent is the legal limit in Japan for foreign crew members. The reason of the high percentage was said to be partly because of the much lower wages paid to the foreigners than those paid to Japanese fishermen. (JT 30-11-96)

ARMS SALES AND SUPPLIES

North Korean supplies

According to South Korean sources North Korea had exported some 400 Scud-B and Scud-C missiles to Middle East countries since the late 1980s. It was said that North Korea had also helped Iran and Syria build missile plants and sold them missile technologies. (JT 26-09-96)

Development of South Korean submarine with Russian help

Daewoo Heavy Industries was reported to develop South Korea's first middle-sized submarine in co-operation with Russian technicians and with Russian technology. (JT 17-10-96)

Russian-US competition in the supply of weapons to South Korea

A second shipment of Russian military hardware started arriving in South Korea on 21 October 1996. It was part of a deal of August 1996 for the supply of \$150 million worth of equipment as partial payment for overdue loans and interest. (JT 23-10-96)

Among the equipment supplied would be the very advanced SA-12 anti-aircraft missiles. During a visit to South Korea in early April 1997 the US defense secretary urged South Korea not to buy the SA-12, voicing concern about its 'inter-operability' with US-made aircraft in use in South Korea, warning that it would be a political and military mistake to accept Russia's offer instead of buying the US Patriot air defence missiles. (IHT 07-04-97)

Russian submarine for Iran

It was reported that Iran would soon receive a third submarine from Russia. (JT 28-11-96)

Russian jet fighters for India

India signed an agreement with Russia on 30 November 1996 for the purchase of dozens of Su-30MK jet fighters worth more than \$1 billion. The contract would call

for long-term joint work in the field of aircraft building and development.(JT 02-12-96;AsahiEN 06-12-96;FEER 12-12-96:15)

Military spending in Asia

At more than \$9 billion, Southeast Asian arms spending in 1995 was 22 percent of world sales,making the region the third largest weapons market after the US and Europe. Among the reasons offered are US withdrawal from the Philippines in 1992, the need for defence spending to be in line with overall economic growth and military modernization.(JT 03-12-96)

China's purchase of two destroyers from Russia

It was reported that China had purchased two 'Sovremenny'-class destroyers from Russia, which were to carry supersonic ship-to-ship missiles.(FEER 13-03-97:20)

Thai plans to buy arms in China

According to a Bangkok Post report, as a result of the visit by the Thai prime minister to China in early April 1997, China had offered the sale of arms at friendship prices which was favourably considered by Thailand. A Thai military delegation would head for China in July 1997 by way of follow-up.(ST 09-04-97)

War materials for Taiwan

It was reported in August 1996 that US and French aircraft manufacturers had coordinated the delivery times of fighter planes for Taiwan (*see* 3 AsYIL 347) in order to minimize further protests from China.

Under a 1982 Sino-US communique calling for a reduction in quality and quantity of arms sold by the US to Taiwan, the US had agreed to stop selling advanced weapons to Taiwan. Nevertheless the US granted a Taiwanese request in 1992 to sell 150 F-16s, the first two of which were delivered in April 1997.(FEER 15-08-96 p.12;IHT 16-04,17-04-97)

Taiwan started deploying an initial batch of newly arrived US Patriot missile systems in early 1997. It had ordered 200 sets of missiles and launchers.(IHT 24-02-97)

China warned France in December 1996 that it would be 'resolutely opposed' to new French weapons sales to Taiwan and would treat such sales as an assault on its sovereignty. The Chinese spokesman recalled that "France has made a clear commitment in the January 12, 1994 joint communique that it would not sell weapons to Taiwan".(IHT 11-12-96) Five French-made Mirage fighter planes arrived in Taiwan on 5 May 1997.(FEER 15-05-97:15)

Chinese arms sales to Iran

When asked about Chinese sales of anti-ship missiles to Iran, the spokesman of the Chinese foreign ministry said: "Regarding the transfer of conventional weapons, including missiles, China has adopted a long-standing attitude of prudence and responsibility". He said that any sale should not harm the peace, security and stability of a region. It should strengthen the defence of the country involved but not exceed its needs. China generally notified the UN of exports of conventional weapons.(IHT 04-06-97)

ASIA-PACIFIC ECONOMIC CO-OPERATION FORUM (APEC)

Membership

One of the topics to be discussed at the 1997 APEC summit meeting was the question of the existing three-year moratorium on membership that would end in 1996. The industrialized members fear that expanded membership could cripple APEC's trade and investment liberalization drive (for which the moratorium was introduced), as APEC operates on consensus. Less developed members, however, wanted the forum to be open to the rest of the world. The following eleven countries had applied for participation in APEC: India, Macao, Mongolia, Pakistan, Peru, Russia, Colombia, Sri Lanka, Vietnam, Panama and Ecuador. (JT 19-10-96; AsahiEN 20-11-96)

Investment rules

It was reported that Japan would try to get a stronger regional commitment to freer investment at the APEC meeting in November 1996 at Manila, as a support for the industrialized countries' effort to achieve global investment rules at the first ministerial meeting of the WTO which was due a month later. Specifically, Japan wanted to have the current non-binding principles of APEC on investment liberalization reinforced with additions such as a stand-still clause which would prevent additional restrictions from being introduced, or a roll-back clause stipulating the gradual removal of barriers. However, there would be strong opposition from Asian developing countries, Malaysia in particular. (JT 19-11-96)

The 1996 Manila meeting

It was reported since before the meeting took place that renewed emphasis would be laid on the original issues of economic and technical co-operation rather than on trade and investment liberalization. One of the reasons was that amid global economic slowdowns the developing member countries countered growing criticism that liberalization benefits mostly the multinational companies at the expense of local enterprises and workers. It was said that economic and technical co-operation had been overlooked since 1993, when the group embarked on a trade and investment liberalization program initiated by the US.

Industrialized members, on the other hand, could fear that the forum might turn into another organization to funnel aid to developing countries, and a fresh focus on economic and technical development may then widen the rift between industrialized and developing members. (AsahiEN 21-11-96)

The resulting "Declaration on an APEC Framework for Strengthening Economic Cooperation and Development", adopted on 23 November 1996, underlined sustainable and equitable growth as well as the narrowing of economic disparities among the members as main goals of the region's economic and technical co-operation. (IHT 03-12-96; JT 24-11-96)

Proposed elimination of tariffs for computers and other information technology products

The US had proposed that the Manila meeting of APEC decide on elimination of the tariffs by 2000 (Information Technology Agreement, ITA), in order to press for further steps at the subsequent WTO conference in December 1996. The proposal was endorsed by Japan but rejected by the developing member countries (particularly China, Malaysia, Chile, and Thailand) because the range of products favoured the developed countries. The US accounted for about 60% of the \$1.8 trillion generated annually by the computer industry.

The Joint Declaration finally called for “the conclusion of an information technology agreement by the WTO ministerial conference that would substantially eliminate tariffs by the year 2000, recognizing the need for flexibility as negotiations in Geneva proceed”.(IHT 23/24 and 26-11-96;JT 24-11-96;FEER 05-12-96:18)

APEC Business Advisory Council

The Council, consisting of members of the business community, was set up by APEC in 1996 to advise APEC on business matters.(JT 26-11-96)

ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN)

See also: Dissidents, Inter-state relations (Myanmar, Japan-Southeast Asia), Regional security

China as dialogue partner

The ASEAN ministerial conference in July 1996 decided to grant the position of ‘dialogue partner’ to China, putting it on a par with the US, Japan, Australia, New Zealand, Canada and South Korea. As such it would take part in meetings of senior officials (SOM).(IHT 25-11-96;FEER 11-07-96)

At the dialogue meeting of April 1997 held at Huang Shan, China for the first time agreed to talk about the contrasting territorial claims in the South China Sea in a multilateral context.(FEER 08-05-97:15)

Myanmar membership

ASEAN decided, at its annual foreign ministers conference, to admit Myanmar as an observer on 20 July 1996 despite pressure from the US, the EU, Australia, Canada and Western human rights advocates to take a tougher stand.(IHT 20/21 and 23-07-96) The Indonesian foreign minister who chaired the meeting said that ASEAN’s approach had “always been non-interference in the internal affairs of countries, and this will continue to be our line”.(IHT 20/21-07-96) Myanmar had attended the previous foreign ministers conference as guest of the host country (6 AsYIL 344).

The ASEAN foreign ministers agreed at their meeting in July 1996 that Myanmar should not yet be admitted as a member in 1997 as it would need more time to prepare to take part in ASEAN’s activities. In late August 1996 Myanmar officially applied for full membership in 1997.(JT 30-09-96;FEER 11-07-96:36) Vietnam said on 10 October 1996 that rejecting Myanmar’s bid for full entry would be tantamount to meddling in its domestic affairs.(AsahiEN 11-10-96) The same month the Philippine

president said that ASEAN could review its constructive engagement policy with Myanmar, while the Thai foreign minister said that Myanmar should bring in democracy before joining ASEAN. In November the Singapore prime minister said he did not think Myanmar was ready for full membership on economic grounds. On the other hand it was believed that Indonesia and Malaysia were in favour of quickly admitting Myanmar, perhaps in 1997, along with Laos and Cambodia. Finally the new Thai prime minister pledged on 26 November 1996 to visit Myanmar and try to persuade it to heed demands to respect human rights and democracy. (JT 28-11-96)

The ASEAN (first) informal summit on 30 November 1996, which Myanmar attended as a guest of the host country (Indonesia), decided to admit Myanmar as a full member simultaneously with Cambodia and Laos, but deferred the decision on the timing. ASEAN had already decided earlier to accept Myanmar by the end of the century. (IHT 02-12-96; JT 01-12-96; FEER 05-12-96:15) In January 1997 all member states were agreed that Myanmar would be admitted as a member in 1997. A decision to this effect was taken unanimously and without reservations by a ASEAN foreign ministers meeting on 31 May 1997. The admission would officially take place at the annual meeting foreign ministers meeting in July 1997. As to the US and EU objections ASEAN maintained that a country's domestic policies are not a criterion for UN membership and nor should they be for ASEAN membership. The Malaysian foreign minister tried to limit the scope of the dispute by raising the idea of not assigning 'dialogue partners' to the new members.

Membership for Myanmar could disrupt the projected second summit of Asian and European heads of government (*see* 6 AsYIL 401) in London in 1998. Leaders of the Myanmar military government were banned from visiting Europe under visa restrictions imposed as part of a package of sanctions imposed by the EU in 1996 as a protest against a crackdown on the opposition in Myanmar. However, membership in ASEAN did not confer an automatic right to join the Europe-Asia summit. (IHT 25/26-01, 02-06-97; FEER 12-06-97:14)

Informal summit meetings

It was decided at the summit meeting at Bangkok in 1995 that, while the heads of state and government meet every three years at a formal summit meeting, informal meetings would be held in each of the intervening years. The first such informal summit meeting was held in Jakarta, on 30 November 1996. (JT 01-12-96; FEER 12-12-96:18)

ASEAN-India consultations

In accordance with the ASEAN system of layered regular consultation with non-member states, ASEAN and India started consultations on the level of Joint Cooperation Committee (JCC), the first meeting of which was held in November 1996. There had already been consultations in the context of Senior Officers Meetings (SOM). JCC meetings involve higher level officials than SOM meetings. (ASEAN Update Nov./ Dec. 1996)

Protocol on Dispute Settlement Mechanism

The ASEAN economic ministers signed a DSM Protocol on 20 November 1996 in Manila. It is patterned after the WTO Dispute Settlement Understanding and is to apply to all past and future ASEAN economic agreements. (ASEAN Update Nov./ Dec. 1996)

ASEAN-EU and the issue of East Timor

In 1992 the first EU attempt to conclude an ambitious trade and economic co-operation agreement with ASEAN ran into fierce opposition from Portugal which insisted that ties with ASEAN could only be upgraded when Indonesia made concessions over East Timor (*see* 3 AsYIL 349). A similar initiative by the EU Commission in July 1996 was threatened by the same danger, leading to the idea of an alternative, less formal, 'ministerial declaration' on future co-operation and the continuation of EU-ASEAN relations on the basis of a 1980 treaty. This in spite of a new Euro-Asean 'active partnership' drawn up at the time. (FEER 18-07-96:22, 19-12-96:26)

At the ASEAN-EU ministerial meeting of 13-14 February 1997 at Singapore, ASEAN decided, at the request of Indonesia, to reject a discussion of the issue of East Timor. The Indonesian position was that the issue should be discussed under UN auspices and should be brought up in bilateral talks with Portugal. (IHT 04-02-97) The compromise reached was to issue a joint declaration highlighting plans for closer co-operation with separate protocols to be negotiated and signed on specific areas identified for fast-track treatment. In contrast to treaties, under EU rules protocols do not require unanimous consent but merely a qualified majority. (IHT 04-02-97; FEER 13-02-97:21, 27-02-97:22)

The ASEAN Free Trade Area and obligations of new members

It was agreed in connection with the admission of Myanmar, Cambodia and Laos as members of ASEAN, that they would be given 10 years from January 1998 to comply with the tariff-reduction schedule mandated by AFTA, while the other members, except Vietnam, are obliged to lower tariffs on 98% of their traded goods to below 5% before 2003. Vietnam, which joined ASEAN in mid-1995, was given time until 2006. (FEER 12-06-97:15)

ASYLUM

Denial of diplomatic asylum

On 16 October three East Timorese men broke into the French embassy in Jakarta and asked for political asylum in Portugal, but they were evicted from the premises. (JT 17-10-96; AsahiEN 17-10-96)

Indonesian asylum-seekers in Malaysia

Sixteen Indonesians, allegedly from Aceh (North Sumatra) were detained in Kuala Lumpur when they tried to break into a number of Western embassies, apparently to seek political asylum. (IHT 26-12-96)

BORDERS, BORDER DISPUTES AND BORDER INCIDENTS

See also: Inter-state relations (China-India, China-Russia)

Reduction of Sino-Russian border troops

Following the agreement of April 1996 on reducing military tensions along China's borders with Russia, Kazakhstan, Kyrgyzstan and Tajikistan (6 AsYIL 347), agreement was reached in December 1996 between China and Russia on cutting troop levels along their long (4,000 km.) border.

In 1991 a basic agreement on border demarcation was concluded.(JT 20-11-96;AsahiEN 20-11-96;IHT 13-01-97) Under this agreement some 1,500 hectares of disputed territory, mainly in the triangle between Russia, China and (North) Korea along the Tuman (Tumangan) River would be handed over to China in due time. This would give China access to the Sea of Japan. The Chinese plan to build the port of Tumangan on that site. Shortly before the visit by the Chinese president to Moscow in spring 1997 it was reported that part of the Russian establishment was opposed to the idea of transfer of the territory.(AsT 09-04-97) Fears that a piece of land containing the graves of Russian soldiers would be included were allayed by drawing the border in such a way that the graves would remain Russian territory.

On the occasion of the Sino-Russian summit meeting in April 1997 the presidents of China, Russia, Kazakhstan, Kirgystan and Tajikistan signed another agreement on the reduction of border forces by way of follow-up of the 1996 agreement referred to above.(FEER 08-05-97:16) The new agreement fixed ceilings on the number of regular troops (in contradistinction to border guards or strategic forces) and weapons within a 100-kilometre zone along the former Sino-Soviet border, and on mutual information about troop movements in their border regions.(IHT 24-04,25-04-97;FEER 08-05-97:16)

Sino-Indian agreement to prevent armed conflict on their common frontier

Among the agreements concluded by China and India on the occasion of the Chinese president's visit to India in late November 1996 was an agreement on confidence-building measures to minimize the possibility of armed conflict at their borders. The agreement followed a 1993 agreement (4 AsYIL 417) on easing tension along their mutual border, and includes a mutual pledge not to attack each other across the disputed Himalayan border. The accord stated: "Neither side shall use its military capability against the other side", and added that no armed forces along the border "shall be used to attack the other side or engage in military activities that threaten the other side or undermine peace, tranquility and stability in the India-China border areas".

Besides general agreement was reached to pull back troops from the area, being a logical consequence of the above pledge. However, there was no specification on the numbers, nor how far the withdrawal would be and when it would take place. Disagreements about the exact location of the 'line of actual control' were yet to be resolved before the details on troop movements could be negotiated.(IHT 30-11/01-12-96)

Myanmar – Thai border incidents

Since late January 1997, members of the pro-government Democratic Karen Buddhist Army guerrilla group crossed the Myanmar-Thai border and attacked camps housing Karen refugees in Thai territory. The Thai army commander said: “As a matter of principle we have to protest to the Burmese [*sic*] government when our border is infringed by troops from Burma [*sic*], or any other country”.(IHT 04/05-01,11-02-97)

Observers saw three reasons for the attacks. First, they aimed at pressuring the Karens (Karen National Union) into accepting a cease-fire with the government, as had 15 other rebel forces. Second, the Myanmar government hoped the Thai government would be tired of housing the refugees and repatriate them to Myanmar. Third, the attacks were aimed at a meeting of ethnic minority groups from an area where the Myanmar government’s efforts to draw up a new constitution were rejected.(FEER 13-02-97:25)

Later, in February 1997, Myanmar government troops, fighting Karen National Union insurgents, and Thai forces several times exchanged fire along the border. The Myanmar actions resulted in nearly 15,000 refugees entering Thailand since 11 February.(IHT 22/23-02,01/02-3-97)

While Thailand and Myanmar may be considered to be some kind of historical adversaries, a relative peace had been maintained at the 2,500 kilometre land border by the buffer of a string of ethnic insurgencies in Myanmar. It is said that Thailand has never felt the need for definitive borders, as porous borders diffuse conflicts and generate local revenue from trade. In fact only 58 kilometre land border with Myanmar has been formally determined.

However, the existing situation seemed on the point of disappearing as a consequence of the settlements reached by the Myanmar government with various insurgent movements and its efforts to crush the KNU.(FEER 06-03-97:34)

Closure of Malaysia-Indonesia border in Borneo

Malaysia closed part of its border with Indonesia on the island of Borneo after recent ethnic riots on the Indonesian side. The riots took place in the Indonesian province of West Kalimantan which borders the Malaysian state of Sarawak. The border closure stranded hundreds of Indonesians working in Sarawak.(IHT 04-02-97;FEER 13-02-97:13)

BROADCASTING

Radio Free Asia

Radio Free Asia, originally called Radio Free China, and later renamed Asia Pacific Network (APN), was re-created in the US in response to the US International Broadcasting Act 1994. This Act was the result of an initiative of US senator BIDEN in 1991 to set up a surrogate broadcasting service to China, North Korea, Vietnam, Laos, Cambodia and Myanmar, aiming at influencing and combating communism and authoritarian regimes. The original Radio Free Asia, a product and tool of the Cold

War era, began broadcasting to China in 1951 but was discontinued during the Eisenhower administration due to radical budget cutting.

US and APN officials approached and negotiated with several Southeast Asian and former Soviet republics to transmit the APN programs from their territory. In the case of Thailand and the Philippines permission was asked to use the local transmitters of the Voice of America for APN broadcasts, arguing that the existing agreements for the Voice of America transmitters in fact allowed these transmitters to be used by APN even without informing the host governments. Both countries, however, refused to give in to the US requests. Thailand said it would not allow the operation of a radio service that could interfere in the affairs of a third country or affect Thailand's relationships with its neighbouring countries. It emphasized its sovereign right to prevent and ban others from using its territory to attack a third country. China as well as Vietnam expressed gratitude to Thailand for its refusal. (FEER 12-09-96:13; JT 27-09-96)

Chinese criticism of the radio broadcaster was rejected by the US State Department, which defended it by saying that the "Chinese people ought to have access to information about economics, about politics, about Western culture and ideas". (Daily Yomiuri 10-10-96)

'Democratic Voice of Burma'

In November 1996 the German government gave its permission to the Norway-based radio station 'Democratic Voice of Burma' to broadcast from Germany, using the services of the German telecommunications company *Deutsche Telekom*. It thus reversed its previous policy, enabling the station to improve the reception of its transmissions to Myanmar. The German foreign minister argued that he could find "no reason in international law" to forbid the co-operation between German Telecom and the DVB, provided the latter would not promote violence or revolution from German soil.

The DVB was established in Oslo in 1992 and is the mouthpiece of the self-styled Burmese government-in-exile, the "National Coalition Government of the Union of Burma".

Among the European states Germany used to be the biggest source of development aid for Myanmar and to be most moderate in its attitude toward Myanmar. (FEER 05-12-96:30)

CIVIL WAR

See also: Inter-state relations (Attitude toward Afghanistan), United Nations

Afghanistan

It was reported that the government of BURHANUDDIN RABBANI had reached a cease-fire agreement with the opposition Supreme Coordination Council alliance led by the National Islamic Movement under RASHID DUSTAM. The two sides had begun fighting in January 1994 (*see* 4 AsYIL 422). (IHT 13-08-96)

The Taleban rejected the government's offer to negotiate, accusing the president of illegally keeping to his position, because he was supposed to have resigned in 1995

under a UN accord (*see* 5 AsYIL 397). On 11 September 1996 the Taleban militia captured the main eastern town of Jalalabad. Kunar, the last pro-government province on the eastern border, was captured later in the month.

The neighbouring countries, Pakistan, Iran, Uzbekistan, India and Russia, each had chosen favourites in the fighting because of their interest in opening trade routes through land-locked Afghanistan and installing a friendly government in the traditional buffer state.

The Afghan government asked the UN Security Council to meet on the crisis and accused Pakistan of supporting the Taleban. The Security Council on 26 September called upon the parties to stop fighting, agree on a cease-fire and enter into negotiations to find a political solution to the conflict.

Ignoring the UN call, the Taleban militia captured the capital Kabul on 27 September 1996, two years after their formation. Government control was taken by a six-man ruling council (*Shura*). The Taleban executed the former president NAJIBULLAH and pursued the forces of the ousted president RABBANI into the north, saying they would hold war crimes trials for members of the ousted government. The movement called on the international community to recognize it as the government of the Islamic state of Afghanistan.

Pakistan announced it would dispatch officials for talks in Kabul. A foreign ministry official said Pakistan did not need to extend formal recognition to the Taleban government: "We recognize states, not governments, and we will deal with whatever government is in power." On the other hand, the Pakistan foreign minister was quoted as saying that Pakistan had always recognized the Kabul regime as the *de facto* government of Afghanistan. Later Pakistan was, after all, the first state to extend recognition to the Taleban government on 25 May 1997, followed by Saudi Arabia on 26 May 1997.

The US expressed hope that the Taleban would move toward national reconciliation, holding out the possibility of establishing diplomatic ties. (IHT 12,16,23,28/29 and 30-09-96,01-10-96,26 and 27-05-97; JT 27 and 29-09-96,01-10-96; AsahiEN 28-09-96)

At a news conference after the capture of Kabul, a senior official of the provisional government ruled out backing from the new government for international terrorism and said that the Taleban would not seek to spread its fundamentalist creed to other Muslim countries. (IHT 02-10-96)

The developments in Afghanistan led to the convening of an emergency summit meeting of Uzbekistan, Tajikistan, Kyrgyzstan, Kazakhstan and Russia on 4 October 1996. The meeting would focus on regional fears that the Taleban victory could have repercussions in the neighbouring Muslim republics. (AsahiEN 04-10-96)

After a cease-fire agreement between the BURHANUDDIN RABBANI government and the opposition 'Supreme Coordination Council' alliance led by the National Islamic Movement under ABDUL RASHID DUSTAM in August 1996 (IHT 13-08-96), an alliance emerged in October 1996 between the (ethnic Tajik) military chief of the ousted government, AHMAD SHAH MASOOD, the (ethnic Uzbek) DUSTAM, and ABDUL KARIM KHALILY, leader of the Shiite *Muslim Hezb-i-Wahdat* faction. Under it DUSTAM agreed to recognize the deposed RABBANI government. It was reported that the factions had created a 'Council for the defence of the motherland'. (JT 10-10-96; MainichiDN 12-10-96; AsahiEN 16-10-96; IHT 17-10-96)

Later in the month the Pakistan government tried to broker a cease-fire between the parties. The offer was accepted in principle, but both parties set conditions that could not be met. The UN Security Council adopted resolution 1076(1996), drafted by Russia, calling for a cease-fire and political negotiations and calling for states to refrain from interfering in the conflict and stop supplying arms. As a result of efforts by the UN special envoy the two parties met and entered discussions in Islamabad on 7 November 1996 and again in January 1997.(IHT 21,22 and 23-10-96,08-11-96,14,15-01-97)

Iran was being accused by the Taleban of interference in Afghan affairs by allegedly sheltering anti-Taleban troops and supplying them with weapons.(IHT 06-11-96) Although Iran tried to maintain good relations and in January 1997 offered to host peace talks (IHT 20-01-97) the Taleban government ordered Iran on 2 June 1997 to shut its embassy in Kabul and to evacuate its nationals within 48 hours, accusing it of "destroying peace and stability in the country".(IHT 03-06-97) Iran later restricted the flow of goods across its border into Afghanistan.(IHT 09-06-97)

In May 1997 an uprising broke out, under General ABDUL MALIK (MALIK PAHLAWAN?), against General DUSTAM, in the north of the country which was still controlled by the coalition opposing the Taleban.(IHT 21-05-97) The mutineers defected to the Taleban and General DUSTAM fled the country to Turkey. Thereupon the Taleban captured the northern town of Mazar-i-Sharif on 25 May, practically ending the civil war and uniting Afghanistan for the first time in two decades.

[The Taleban victory re-established dominance of Pashtuns, the country's largest ethnic group, and of the southern province of Kandahar. A Pashtun monarchy from Kandahar ruled the country for more than a century until 1973]

After a few days, however, the Taleban was again resisted, particularly by the Uzbek faction (under MALIK PAHLAWAN), and ethnic Hazaras who are predominantly Shiite, resulting in a change of control over Mazar-i-Sharif. Shortly afterwards it was reported that the Taleban had offered its opponents control of the northern part of the country as part of a peace plan that included a sort of federation.(IHT 26-05,27-05,02-06,03-06,06-06-97;FEER 12-06-97:24)

Tajikistan

The UN Security Council renewed the mandate of the UN Mission of Observers in Tajikistan (UNMOT) subject to the condition that the 1994 Tehran Agreement on the cessation of hostilities remained in force (*see* 5 AsYIL 396) and that the parties demonstrate their commitment to a cease fire, national reconciliation and promotion of democracy.(JT 15-12-96)

On 23 December 1996 the parties in the 4-year civil war (the government and the United Tajik Opposition – UTO) and a UN envoy signed two key accords in Moscow. It was said that this was at least partly the result of pressure by Russia, which had become concerned of the progress made by the Taleban forces in Afghanistan in their push to the north and the consequent new importance of a Tajik buffer zone.

The accords regulate, *inter alia*, the powers and functions of a new national reconciliation commission. The two sides undertook to complete negotiations for a permanent peace settlement by July 1, 1997. These negotiations started in Tehran on 6 January 1997. In early March the parties agreed to merge their military forces by July

1998. The next step would be the signing of a protocol on political questions.(IHT 24/25-12-96;FEER 16-01-97:13,27-03-97:24)

CODIFICATION OF INTERNATIONAL LAW

The state of the codification process within the UN system

In its resolution 50/45 the UN General Assembly decided that comments should be invited on the matter. In its reply of 29 August 1996 Japan said it did not share the view that further codification work is unnecessary:

“International law remains indefinite and underdeveloped in various areas, and even in those areas in which codification has taken place and legislative treaties have been adopted, practice is constantly changing and difficulties arise which make it necessary to address matters afresh.”

As to the interaction between the Sixth Committee and the International Law Commission, Japan was of the opinion that the process should be one in which the two organs together select topics in response to real and current needs of the international community.

The Japanese reply also noted that the ILC might be asked to review the state practice in connection with previously codified matters, e.g. the law of treaties and the law on diplomatic and consular relations. It might also make efforts to identify areas such as the environment in which laws are being developed sector by sector or regionally and bilaterally, involving a risk of fragmentation and inconsistency. (UN-doc. A/51/365)

CONTINENTAL SHELF

Sino-Japanese continental shelf

According to Japanese government reports Chinese drilling vessels were believed to have succeeded in February 1996 in test-drilling for oil in the continental shelf east of the midpoint in the East China Sea between Japanese and Chinese parts of the continental shelf.(JT 02-11-96)

CULTURAL MATTERS AND PROPERTY

Thai cultural agreements

It was reported in July 1996 that Myanmar had agreed in principle to a Thai initiative to conclude a cultural agreement. Thailand was to sign another cultural agreement with Vietnam on 8 August 1996.(FEER 18-07-96:12)

Return of stolen Cambodian artifacts

On 23 September 1996, the Fine Arts Department of Thailand returned to the Cambodian government, through the Cambodian ambassador to Thailand, 14 stone artifacts from the Angkor era believed to have been stolen from Cambodia and subsequently seized by the Thai police from an antique shop in Thailand in 1990. The Cambodian government had not produced any proof of ownership over the artifacts. However, the decision to return the objects was prompted by the Thai government's desire to protect the country's image from being tarnished by a possible perception of Thailand as a centre for trading in smuggled antiques and to present a goodwill gesture to Cambodia.(contr.Kr.K.)

CUSTOMS

Relocation of headquarters of the Regional Intelligence Liaison office

The (24) participants to the annual conference of the Asian Regional Office agreed on 30 October 1996 to relocate the regional headquarters for exchanging customs information to Japan from Hongkong in 1999.

The Regional Office is one of ten regional offices world-wide which are designed to co-ordinate policies and exchange information regarding the fight against smuggling such goods as drugs and firearms on a regional basis.(JT 31-10-96)

DIPLOMATIC AND CONSULAR IMMUNITY AND INVIOABILITY

Breach of inviolability of UN premises

As they captured the Afghan capital Kabul the Taleban militia caught and killed the former Afghan president who had sought sanctuary in the UN compound for the past four years.

The Muslim Mujahideen had refused to let him leave the country to join his family in India. The government's troops who guarded the gates of the UN office building to make sure he could not escape but who also promised the UN to protect him, however, had fled from the Taleban forces.

The UN Secretary General deplored the abduction of a person who had sought sanctuary in UN premises and called it a breach of the inviolability of UN premises.(AsahiEN 28-09-96;JT 29-09-96)

Forceful entry into Japanese consulate in Hongkong

Protesting against Japan's claim to the Diaoyu (Senkaku) Islands demonstrators in Hongkong broke into the Japanese consulate. They unfurled a banner and tried to debate with consular officials. The protesters stayed for about 30 minutes and then left.

The Chinese foreign ministry said: "We do not approve of the methods used by some people of forcefully entering foreign consulates". The Hongkong governor called the incident serious. While saying he understood feelings were running high over the islands, there was no justification whatsoever for a break-in to diplomatic premises.

The consulate said it would ask the Hongkong authorities to "ensure our security". (Daily Yomiuri 10-10-96; AsahiEN 11-10-96)

Demonstrations against German embassy in Tehran

As a result of the German allegations of Iranian involvement in the *Mykonos* case (*see: Jurisdiction*) demonstrations took place outside the German embassy in mid-November 1996. The protests were reported to be initially sanctioned by the authorities, but later Iranian security forces encircled the embassy to hold off the demonstrators while hundreds of riot police waited nearby. (IHT 20-11-96)

Occupation of Japanese embassy in Peru

On 18 December 1996 the residence of the Japanese ambassador was occupied by members of the Peruvian *Tupac Amaru Revolutionary Movement*. The attackers held hundreds of persons, who were attending a reception at the embassy, hostage, demanding the release of several hundred jailed comrades. (IHT 19-12-96) Two months later the Peruvian president acknowledged that the intelligence service and the national police had been negligent in protecting the ambassador's residence, as they knew about transportations of weapons by the rebels into the capital, but failed to act on the information. (IHT 26-02-97)

The crisis ended on 23 April when Peruvian soldiers stormed the residence, rescued the hostages but one, and killed the rebels. (IHT 23-04-97)

DIPLOMATIC AND CONSULAR RELATIONS

See also: Civil war (Afghanistan), Inter-state relations (China-India)

India – Pakistan

It was reported in October 1996 that India detained a Pakistani diplomat and ordered his expulsion for alleged spying, which Pakistan condemned as 'illegal'. Pakistan retaliated by detaining an Indian diplomat which in turn prompted a protest from India. (FEER 10-10-96:15)

Malaysia – Holy See

Malaysia and the Vatican agreed to establish formal diplomatic relations, probably in 1997. Malaysia has some 600,000 Catholics. (FEER 17-10-96:14)

Consular presence in Hongkong after the handover

It was reported that China would not permit the continuous functioning in Hongkong of the consulates of 13 countries which recognize the government at Taipei. (FEER 29-08-96 p.13)

China and the US were reported negotiating an agreement on the US consular presence in Hongkong after 1 July 1997. One of the sensitive matters was the existence of a Defense Liaison Office in the consulate, and the US wish to continue naval visits to Hongkong. (FEER 21-11-96:23) Another difficult issue was the status of US citizens in Hongkong, in particular those of Chinese descent, who may be regarded by China as Chinese nationals. (FEER 05-12-96:31)

Sino-Philippine exchange of military attaches

China and the Philippines had started to exchange military attachés. This was one of several agreements reached during the visit by the Philippine defence minister to China in July 1996, the first such visit by a top Philippine defence official. (IHT 03-12-96)

Expulsion of US and Indian diplomats

India expelled two US diplomats in January 1997, one of whom reportedly had unauthorized links with a director in charge of the anti-espionage division of India's Intelligence Bureau. By way of retaliation the US expelled two Indian diplomats in February 1997 because of "activities that were incompatible with their consular status". (IHT 17-02-97; FEER 27-02-97:13)

Iran-European diplomatic relations

After the ruling of the Berlin court of 10 April 1997 in the *Mykonos* case (*see: Jurisdiction*), the German government recalled its ambassador in Iran, followed by the other European Union member states, except Greece, which followed later. (IHT 11-04, 12/13-04, 18-04-97; NRC 11-04-97) Germany also expelled four Iranian diplomats, which was retaliated by Iran's expulsion of four German diplomats. (IHT 14-04-97) A fortnight later, however, it was reported that the European countries would soon send back their ambassadors to Tehran, indicating that many European states were reluctant to risk damage to their economic interests in Iran. (IHT 29-04-97) Germany exported DM 2.2 billion of goods to Iran in 1996 and was the latter's biggest trading partner in Europe.

When Iran blocked the return of the German and Danish ambassadors, the two countries that had led the campaign for EU diplomatic sanctions, the EU urged its members not to send their envoys back, frustrating the attempts to contain the damage. (IHT 02-05-97)

DISARMAMENT AND ARMS CONTROL

Comprehensive Test Ban Treaty

The 61-nation Disarmament Conference failed to reach agreement within its self-imposed deadline in late June 1996, mainly over India's insistence on a time-bound commitment by the five declared nuclear powers to scrap their nuclear arsenal. Besides, India also wanted the treaty to ban "non-explosive techniques for refinement of nuclear weapons", as appeared from a statement by the Indian foreign minister at the ASEAN Dialogue Partner meeting. India first proposed a ban on nuclear weapons testing in 1954.

On the other side the UK, Russia and China insisted that the three 'threshold states' – India, Pakistan and Israel – must be among the adherents to the Treaty.(IHT 01-07-96) This was included in the draft as it stood when the conference reconvened on 29 July.(IHT 31-07-96)

China's specific concerns with the existing text of the draft-treaty were about verification of tests and on-site inspections.(IHT 26-07-96) Not having the 'national technical means' (satellites with detection sensors) it aimed at an international monitoring network. Yet the head of its delegation demanded further changes in the draft in order to prevent the unacceptable prospect of nuclear "inspectors coming and going like international tourists". Under the draft a simple majority of a 51-nation executive council could authorize inspectors to go to a suspected test site on suspicion that the state concerned had violated the treaty. China first demanded a two-thirds majority, but in early August 1996 a compromise was reached between China and the US on the requirement of 30 votes. The agreement cleared the way for a joint declaration by the five declared nuclear powers that they were prepared to accept a common treaty text forever banning all nuclear test explosions. China had given up its demand for an exception for 'peaceful nuclear explosions' but insisted on a right to review the treaty after 10 years.

Pakistan took the position of signing the treaty only if India also did so.

Iran made objections concerning US satellite monitoring, the status of Israel under the draft treaty and the lack of a timetable for nuclear disarmament. Israel would be member of the executive council as representing the Middle East grouping of states rather than as a Western nation.(IHT 27/28-07-96,02, 08,13 and 14-08-96;FEER 29-08-96:14)

After the failure to achieve the necessary unanimity for the draft treaty at the Geneva Conference on Disarmament, Australia submitted the text of the draft by way of draft resolution to the United Nations General Assembly on 9 September 1996 (A/50/1027), thus trying to avoid the unanimity requirement of the Geneva conference.

On the same day India proposed an amendment by, *inter alia*, adding two new paragraphs in Art.I:

"Each state party undertakes to refrain from any activity relating to the development, refinement and qualitative improvement of nuclear weapons. All states parties commit themselves to taking effective measures for global nuclear disarmament by commencing negotiations on a phased programme of nuclear disarmament and for the eventual elimination of nuclear weapons within a time-bound framework."(A/50/1036)

The General Assembly resolution was adopted by 158 to 3. India, Bhutan and Libya voted against, Cuba, Lebanon, Syria, Tanzania and Mauritius abstained. (IHT 12-09-96)

On 26 October 1996 the treaty had been signed by 129 states, including the five declared nuclear powers and all but three of the states that must sign and ratify before the treaty could enter into force. The three were India, Pakistan and North Korea. The treaty requires 44 states known to have nuclear weapons, reactors and research programs in order to enter into force. On the above date only Fiji had ratified.

India has vowed never to participate in what it called an unequal treaty until the nuclear weapon states would devise a timetable for destroying their nuclear arsenals. (JT 30-09,27-10-96)

US efforts to prevent Chinese supply of advanced nuclear and missile technology

The US had been trying for a considerable time to prevent China from supplying nuclear and missile technology to various countries, such as Iran, Pakistan and Syria. China agreed in May 1996 not to provide technology to facilities of other states that were not subject to international inspections. (JT 10-11-96)

Chinese attitude toward nuclear weapons

China conducted a nuclear test on 29 July 1996, its forty-fourth since 1964, promising it would be its last. It announced a moratorium to all tests, effective 30 July. (UN doc. A/51/262; IHT 30-07-96)

In a statement issued right after the test on 29 July 1996 China appealed for, *inter alia*, the abandonment of policies of nuclear deterrence, the undertaking not to be the first to use nuclear weapons at any time and under any circumstances, the unconditional commitment not to use or threaten to use nuclear weapons against non-nuclear-weapon states or nuclear-weapon-free zones, the withdrawal of nuclear weapons deployed outside the borders of the state, and the support of and respect for nuclear-weapon-free zones. (A/51/262)

Vis-à-vis Taiwan, however, the chief Chinese arms negotiator said that since Taiwan is not a separate state, "so the policy of no-first-use does not apply". (IHT 06-08-96)

Failure to conclude Sino-US 'de-targeting agreement'

The US secretary of state broached the drafting of a Sino-US agreement pledging not to target each other with nuclear missiles. It would be largely symbolic since neither side was currently aiming weapons at the other. The Chinese condition was that both countries would pledge never to be the first to use nuclear weapons. On the other hand, the US nuclear defence policy relied on the deterrence of a possible first strike. (IHT 26-11-96; FEER 28-11-96:14)

Rejection of 1998 target date for verification regime

Non-aligned countries at the review conference of the 1993 Chemical and Biological Weapons Convention in November-December 1996 prevented the adoption of a US-EU proposal to establish a verification regime in 1998. Instead the final declaration adopted by the conference urged an ad hoc group which had been assessing the

feasibility of verification measures since 1995, to intensify its work “with a view to completing it as soon as possible before the commencement of the fifth review conference” in 2001.

Non-aligned countries, led by India and Pakistan, also resisted the idea of on-site inspections which they deemed intrusive and a measure of last resort. They also called for lifting current export controls, a move which was blocked by Western states.(JT 08-12-96)

Chemical weapons convention

China submitted its ratification of the 1993 Convention on 25 April 1997, just four days before its entry into force. Of the other permanent members of the UN Security Council France had ratified in 1995, the UK in 1996, and the US just a day before China. Russia was the only member who had not yet ratified.

By ratifying before the entry into force a state became a co-founder of the Organization for the Prohibition of Chemical Weapons, and thus entitled to membership of the executive committee which will direct monitoring and have access to confidential data on world stocks of chemical weapons.

China was previously reluctant to sign the treaty because of the monitoring and inspection procedures, which it feared could be used to interfere in its domestic affairs. According to China the only chemical weapons in its territory were those left behind by Japan during the second world war (*see* AsYIL Vol.2:384, Vol.3:454, Vol.5: 508). The US alleged in the early 1990s (*see* . 4AsYIL 443) that China had been helping Iran to develop chemical weapons.(IHT 29-04-97)

DISSIDENTS

Call to foreign countries for sanctions

The Myanmar opposition leader AUNG SAN SUU KYI called on foreign countries to impose economic sanctions against her country to force political reform on the government. She made her call on a videotape smuggled out of Myanmar.

In a parallel move the All Burma Students Democratic Front called on ASEAN countries to end their policy of constructive engagement and instead encourage dialogue with AUNG SAN SUU KYI.(IHT 19-07-96)

DIVIDED STATES: CHINA

See also: Arms supply, Diplomatic and consular relations, Inter-state relations (China-South Africa, China-US, China-Vatican, China-EU)

Taiwanese refusal of reunification along Hongkong lines

The Taiwanese president said on 2 July 1996 that the territory rejected reunification under the ‘one country, two systems’ model.(IHT 03-07-96)

Joint oil and gas exploration

The Chinese Petroleum Corp. of Taiwan and the China National Overseas Off-shore Oil Company of mainland China signed a contract on 11 July 1996 for joint exploration for oil and natural gas in a 15,400 square kilometre area between southern Taiwan and the Guangdong coast. In deference to Taiwan's official ban on direct investment, Chinese Petroleum entered the deal through a subsidiary based in Panama.(FEER 25-07-96:16)

Taiwanese investments on the mainland

Following remarks by the Taiwanese president calling for limits to the island's investments on the mainland (15 August 1996), the government postponed approval of a \$3 billion investment by Formosa Plastics Group. It would have been the largest Taiwanese investment on the mainland and was intended for the building of six power plants. The application was later withdrawn, but in early 1997 it was reported that construction in Fujian Province had begun with funds coming from the company's US subsidiary.

Although the Taiwanese authorities had banned direct investment on the mainland since 1949, there had been, according to the economic ministry at Taiwan, since the 1980s, when Taiwan allowed indirect investment, through 1995, \$5.6 billion in approved Taiwanese investment through overseas affiliates. Independent estimates, however, put total Taiwan investment at \$30 billion by more than 30,000 Taiwanese companies.(IHT 17/18 and 19-08-96;ST 09-04-97;FEER 29-08-96:62,13-02-97:57,10-04-97:65)

In connection with the change of recognition by South Africa from the government at Taipei to the central government at Beijing, the Taiwanese government said it would not approve closer economic links with the mainland by way of retaliation.(IHT 30-11/01-12-96) Some months later the Chinese vice-premier urged the Taiwan authorities not to prevent its entrepreneurs from investing on the mainland.(ST 09-04-97)

Direct shipping links

China issued regulations on 20 August 1996, paving the way for direct shipping links since 1949. As a result the days for Hongkong as a lucrative entrepot would be numbered.(IHT 21-08-96;FEER 29-08-96:13)

The two sides met and reached agreement on 22 January 1997. Shipping companies from China and Taiwan could apply to their respective cross-strait shipping associations to conduct direct trade between the ports of Fuzhou and Xiamen in southeastern China and Kaohsiung in southern Taiwan. The two sides must begin direct links as soon as possible. Chinese approval for the first six Taiwan ships, reciprocating Taiwanese permission for five mainland carriers was given in April 1997.(IHT 11/12-01,23-01,18-04-97)

The (second) Chinese ship, following shipping practices, hoisted the port state flag upon entering the port of Kaohsiung.(FEER 13-03-97:13;IHT 21-04-97)

Foreign trips by Taiwanese foreign minister

(see also: Inter-state relations (China-EU))

The Taiwanese foreign minister made two trips to Indonesia and Malaysia to meet privately with the foreign ministers of those countries. (FEER 19-09-96:13)

In connection with a visit by the Taiwanese foreign minister to Jordan, the spokesman of the Chinese foreign ministry said:

“We deeply regret and express our strong dissatisfaction with Jordan and other states for allowing a visit ... We are resolutely opposed to the development of government links or any other form of official contacts with Taiwan by any states that have diplomatic ties with our country.” (IHT 20-12-96)

On 22 May 1997 the European Parliament’s Foreign Affairs Committee met with the minister. The EU meets with Taiwan once a year, reportedly for economic talks while avoiding any political dialogue. (FEER 05-06-97:13)

Taiwanese efforts to enter international organizations

Taiwan’s attempt to ‘re-enter’ the UN failed for the fourth time in 1996 (see 6 AsYIL 365). The relevant UN committee on 18 September 1996 decided without a vote not to put the issue before the General Assembly.

A Taiwanese foreign ministry official said that “our UN bid was not to challenge their UN seat, or to push for ‘two Chinas’ or ‘one China one Taiwan’, but for the sake of survival and development of the 21 million people in Taiwan”. (IHT 20-09-96)

As an alternative Taiwan in early April 1997 applied for observer status with the WHO, and announced its intention to make similar applications in other agencies. The WHO spokesman said, however, that the director-general did not consider it appropriate to invite Taiwan to observe the annual WHO Assembly. (FEER 08-05-97:24)

Papua New Guinea attitude

Papua New Guinea was among the states supporting a proposal to set up a special committee by the UN General Assembly to study Taiwanese UN membership in September 1996. The proposal was defeated for the fourth year in a row. (FEER 10-10-96:15)

Intra-Chinese contacts urged

The Taiwanese president urged China on 10 October 1996 to increase contacts with Taiwan, but criticized the Chinese government for pursuing a hard-line policy which is detrimental to the reunification goal shared by the two parties. (AsahiEN 11-10-96) Addressing a meeting of the National Reunification Council he pledged on 21 October to reunify Taiwan with China but blamed the ‘stubborn policy’ of the mainland’s leadership for a stalemate in the relations. He iterated Taiwan’s long-standing policy that reunification was a ‘historic mission’. (IHT 22-10-96; JT 22-10-96)

Taiwan as a 'political entity'

It was reported that Chinese analysts had raised the idea of recognizing Taiwan as a 'political entity' in order to break the deadlock in the reunification discussion. The idea could be made without compromising China's insistence on one central government. (FEER 10-10-96:14)

Representation of China Airlines

China Airlines, majority-owned by the Taipei government, opened a business office in Beijing. (JT 02-11-96; FEER 14-11-96:83)

South Africa cuts diplomatic relations with Taipei in favour of Beijing

South Africa had always recognized the Taipei government as the legal government of China. It had received direct investment and aid from Taiwan thought to run into hundreds of millions of dollars, and Taiwan had been its seventh-largest trading partner. But since the establishment of the post-apartheid government bilateral trade with mainland China had risen from \$14 million to \$1.33 billion.

The South-African president announced on 27 November 1996: "We have now granted diplomatic recognition to the People's Republic of China. We will cancel our diplomatic relations with Taiwan with effect from December 1997". He expressed the hope that "within the next 12 months it would be possible to achieve a smooth transition" allowing South Africa to remain friends with Taiwan.

As to South Africa's wish to have ties with both governments the president said: "Beijing made it clear they would not tolerate that. And it is impossible to move forward on the basis of dual recognition." (IHT 01-07-96; JT 29-11-96)

Dalai Lama in Taiwan

The Dalai Lama visited Taiwan for the first time in late March 1997 at the invitation of the Chinese Buddhist Association, despite a warning from China. The head of the Association as well as the (Taiwan) government Mainland Affairs Commission said that the visit would be exclusively in the Lama's capacity as a religious figure, but he nevertheless had meetings with the Taiwanese president and vice-president. (IHT 14-01, 24-03, 26-03-97)

While in Taiwan the Dalai Lama said that he agreed with the Chinese contention that Taiwan is part of China and should not become a separate, independent state. He appealed to Taiwan and his followers to seek a compromise with China and said that he very much believed in the spirit of 'one country two systems'. (IHT 25-03, 28-03-97)

Exchange of hijackers

China gave in to a Taiwanese demand to repatriate a man who was suspected of having hijacked a domestic Taiwanese airliner on 10 March 1997 and forcing it to Xiamen on the southeastern coast of the Chinese mainland. At the same time the Chinese authorities called on Taiwan to send back 16 persons who had hijacked Chinese airplanes to Taiwan in the past. (IHT 21-03-97)

China at first refused to hand over the hijacker, accusing Taiwan of failing to honour its commitment to repatriate Chinese hijackers under an agreement between the two sides (*see* 5 AsYIL 404).(IHT 15-05-97)

Taiwan intelligence agents in Hongkong

It was reported that Taiwan would pull out its intelligence agents based in Hongkong in view of the coming return of Hongkong to Chinese rule. However, the (policy-making) Mainland Affairs Council said it would continue to operate openly in Hongkong after June 1997 under the terms of the (Taiwanese) Hongkong-Macau Relations Act, enacted on 18 March 1997.(ST 08-04-97)

Switching diplomatic relations

Taiwan established diplomatic relations with Sao Tome and Principe at the West Africa west coast in early May 1997.

The government at Taiwan announced on 18 May 1997 that it was to sever relations with the Bahamas after it learned that the latter planned to switch recognition to the Chinese government at Beijing. The Taiwanese foreign minister said that "one of the reasons we did this was to prevent a domino effect from happening". It was reported that the Bahamian shift might be caused by its concern for a newly opened container port run by a Hongkong company in view of the impending hand-over of Hongkong to China.(IHT 07-05-97,20-05-97;FEER 29-05-97:13)

DIVIDED STATES: KOREA

Joint venture enterprise

A \$10 million venture between Daewoo of South Korea and the Korea Samchonri Group of North Korea would start operations on 19 August 1996. It would produce garments and other consumer goods for export markets. The project was a 50-50 partnership.(FEER 15-08-96 p.71)

Submarine incident

On 18 September 1996 a North Korean 325-ton Shark-class submarine was discovered stranded on a reef off the east coast of South Korea near Kangnung. An estimated 26 North Koreans went ashore, most of whom were later killed or found dead, and one captured.

North Korea claimed that the submarine was on a training mission and had drifted across the border because of engine trouble, and demanded the return of the vessel and its crew, including the dead bodies. It threatened on 26 September to retaliate for the killing of its military personnel as a result of the incident.(IHT 19-09-96;JT 27 and 29-09-96,06-11-96;AsahiEN 28-09-96)

The UN Security Council unanimously agreed on a (non-binding) presidential statement of 15 October, expressing 'serious concern' over the discovery of the North Korean submarine stranded in South Korea. The statement also said, *inter alia*, "The Security Council stresses that the armistice agreement shall remain in force until it is replaced by a new peace mechanism". The North Korean representative expressed

satisfaction that the submarine incident was not expressly declared to be a violation of the armistice.(JT 13-10,17-10-96;AsahiEN 16-10-96)

South Korea demanded an apology from North Korea and steps to prevent the repetition of similar incidents, which demand was supported by the US. The demand was made a condition for further peace discussions and provision of aid. South Korea also announced an indefinite suspension of its participation in the nuclear deal with North Korea, consisting of helping North Korea build light-water nuclear reactors. On its part North Korea said it would temporarily abandon a border liaison office set up as a goodwill gesture in 1992, in response to the South Korean demand for an apology as a condition for the resumption of the dialogue.

The US later renewed a call for North Korea to make a gesture acknowledging that the submarine incursion was a serious mistake. Meanwhile the IAEA reported that North Korea was not making efforts to restart its nuclear program.(IHT 09/10 and 20-11-96; JT 09-11,12-11,25-11-96;Daily Yomiuri 10-10-96)

While in Manila for the APEC summit meeting in November 1996, the South Korean and US presidents urged North Korea to avoid further provocations and join in four-way talks with China, without referring to South Korea's demand for an apology.(IHT 25-11-96) It was widely acknowledged that there was some discrepancy between the US attitude which aimed at some general statement of North Korean regret, and the South Korean demand for a direct, unambiguous apology directed toward South Korea. It was also reported that North Korea was willing to express regret to the US, which signed the 1953 armistice agreement, but not to South Korea which was not formally a party to that agreement.(FEER 12-12-96:23)

Meanwhile negotiations took place in New York between North Korean and US officials, resulting in a North Korean statement of regret. The statement of 29 December 1996 read:

“The spokesman of the Ministry of Foreign Affairs of the DPRK is authorized to express deep regret for the submarine incident in the coastal waters of Kangrung, South Korea, in September, 1996, that caused the tragic loss of human life. The DPRK will make efforts to ensure that such an incident will not recur, and will work with others for durable peace and stability on the Korean Peninsula”.(IHT 30-12-96)

It was the first formal show of remorse by North Korea over military incidents since the 1953 armistice. In response South Korea handed over to North Korea the remains of 24 infiltrators who were killed in the course of the incident.

North Korea also said that it agreed to attend a meeting in New York to listen to an explanation on the proposed peace talks, and to resume the storage of spent nuclear rods, while the US agreed to ‘take additional measures’ to ease the embargo on North Korea and supply food.(IHT 31-12-96/01-01-97;FEER 09-01-97:15)

North Korean acceptance of US presence in South Korea

According to press reports North Korea had told China that it had made a number of proposals to the US for improvement of relations, among which concessions on the presence of US troops in South Korea.(JT 29-10-96)

No separate US-North Korean peace talks

On the occasion of his visit to South Korea the South Korean and US defence ministers said that “separate negotiations between the US and North Korea on peace-related issues cannot be considered.”(JT 03-11-96)

Chinese attitude toward four-way talks and Korean reunification

According to South Korean sources China had said in November 1996 through its ambassador in Seoul that it was prepared to join four-way talks involving the two Koreas and the US. This would be the first unambiguous Chinese support for the talks proposed by the US and South Korea in April 1996 (*see* 6 AsYIL 423). The talks would be aimed at replacing the 1953 truce agreement with a permanent peace arrangement. The ambassador also said that the truce agreement should be maintained until a peace agreement was reached.(JT 19-11-96)

[Russia had suggested an international conference to end Cold War hostilities on the Korean peninsula. An eight-party conference would include the five permanent members of the UN Security Council, the two Koreas and Japan.](FEER 27-02-97:23)

On 29 January 1997 the Chinese president called on both Koreas to start peace negotiations that might eventually lead to reunification.(IHT 30-01-97)

North Korean acceptance of peace talks in principle

North Korea on 31 December 1996 agreed in principle to meetings in which it would obtain particulars about the US-South Korean peace proposals, but twice avoided briefing sessions in the following weeks.(IHT 05-02-97) Finally, the briefing meeting with South Korea and the US took place on 5 March 1997 in New York. It was the first time in 25 years that the two Koreas sat together talking about peace.(IHT 22/23-02,06-03-97) In a good-will gesture South Korea and the US canceled the joint ‘Team Spirit’ military exercises for the current year.(IHT 07-03-97)

At the New York talks North Korea responded to the peace talks proposals by demanding a guarantee of substantial food aid in advance. South Korea and the US took the position that the issue of food aid could be discussed in the four-party talks.(IHT 28-03-97) Apparently in an attempt to coax North Korea into joining the peace talks, South Korea on 31 March 1997 lifted its ban on private rice donations. It had not sent rice to North Korea since the summer of 1995 (*see* 5 AsYIL 411) except through the UN World Food Program.(IHT 01-04-97) When North Korea gave its response in April 1997 on its participation in peace-talks it essentially repeated its condition of additional food aid. The US expressed its willingness to consider further requests for food aid but insisted that such aid could not be given as a precondition for starting the talks.(IHT 23-04-97) A positive response was finally given by North Korea in late June. The four-way talks were planned to start in August 1997.(IHT 26-06-97)

Defection of high-level North Korean official

On 12 February 1997 the top theoretician of the North Korean leadership who was one of the 11 members of the Secretariat of the Workers’ Party of Korea sought asylum at the South Korean embassy in Beijing.(IHT 13-02-97) South Korea wanted safe passage for the person from Beijing to Seoul. On 18 March 1997 China sent the man

by special plane to the Philippines from where he could, after some interval, travel to South Korea. A foreign ministry spokesman said that the 'problem' was solved through consultations among all interested sides. (IHT 19-03-97)

Meeting of North and South Korean Red Cross officials

Red Cross officials from North Korean and South Korea held their first meeting in five years in early May 1997 in Beijing to try resolve their disputes on the delivery of emergency food aid from South Korea. The three issues were: where the food aid would enter North Korea, how the packages would be labeled, and how the delivery would be monitored to make sure that the food got to the poor and hungry. The talks did not succeed in reaching an agreement, among other things because the South Korean side could not specify the amount of aid it planned to deliver.

On 23 May 1997 it offered 40,000 metric tons of food, twice the amount it had sent during the past two years. The amount was later increased to 50,000 tons. On 26 May the two sides reached agreement that South Korean donors would be allowed to target food aid to relatives or certain regions, and that delivery would be allowed in original packaging. However, the North Korean Red Cross rejected a proposal that the aid be delivered through Panmunjon; it was to go through China instead. The accord was the first between the two Red Cross societies since a 1985 agreement on hometown visits by displaced persons. (IHT 03/04-05,06-05,24/25-05,27-05-97;FEER 05-06-97:13)

ECONOMIC CO-OPERATION AND ASSISTANCE

See also: Inter-state relations (China-Japan, Iran-Turkey)

Water supply from Johor (Malaysia) to Singapore

Johor agreed in principle to supply more untreated water to Singapore if the latter would require it, but would consider the interests of its people first before committing itself to a final decision on the issue.

Three of the treatment plants in Johor (Skudai, Gunung Pulai and Kota Tinggi) are operated by Singapore's Public Utilities Board (PUB). A Johor feasibility study was being conducted on, *inter alia*, buying back the treatment plants owned by the PUB. At present Johor exports untreated water to Singapore, where it is treated and resold to Johor for 50 Malaysian cents per 4,540 litres. If treated in Johor, it would cost 70 Malaysian cents.

In May 1996 the government of the state of Johor announced a decision to stop selling unprocessed water with immediate effect, but the decision would not affect current agreements with Singapore and Malacca. Singapore is getting its water from Johor under two agreements. The first expires in 2011 and the second in 2061. (ST 13-09-96)

Official development aid and non-governmental organizations

It was said in senior circles of the Japanese foreign ministry that Japan would strengthen co-operation with non-governmental organizations as part of its future

official development assistance policy. It was acknowledged that such co-operation only began as recently as 1989.(JT 10-10-96)

World Bank aid for Vietnam

The Consultative Group for Vietnam pledged \$2.4 billion in aid for Vietnam on 6 December 1996. The amount for 1997 was higher than expected because Japan came in with more aid than expected. Its contribution accounted for more than a third of the total assistance. During a visit by the Japanese prime minister in early January 1997 an agreement was signed for \$764 million in soft loans and grants.

The Vietnamese reform process had brought average economic growth of more than 8 percent for the past five years.(JT 07 and 08-12-96;FEER 23-01-97:13)

Japanese aid to Myanmar

(see 6 AsYIL 368)

It was reported that Japan offered to resume development aid if the military government showed more respect for human rights.

After its suspension of aid in 1988, Japan had resumed aid for projects which were already under way in 1989.(IHT 14/15-06-97)

EMBARGO

US export of super-computers to China

Since deregulation of US export of computers in 1995, China had bought tens of supercomputers. According to US government officials, these computers would allow China to conduct underground nuclear weapons tests with explosions so small as to be undetectable by outsiders but of which the data could nevertheless be processed by the supercomputers. US government officials rejected suggestions to hold up further deregulation as it would be impossible to prevent China from obtaining the computers from other sources.(IHT 11-06-97) China on 12 June 1997 dismissed allegations that it had diverted the supercomputers to its military.(IHT 13-06-97)

EMERGENCY AID

Chinese food aid to North Korea

(see: Inter-state relations:China-North Korea)

Co-operation in responding to disasters

Twenty-eight countries among which eight Asian countries held a conference in late October 1996 to discuss how to co-operate in responding to natural disasters.(JT 24-10-96)

Japanese attitude toward North Korean famine

The Japanese government was criticized for its refusal to use its huge stockpiles of surplus rice to provide North Korea with emergency aid. The prime minister said it

would be difficult for Japan to give aid in light of recently disclosed evidence suggesting that North Korean agents had kidnapped several Japanese citizens in the 1970s and allegedly brought them to North Korea to teach Japanese behaviour and language to North Korean spies.(IHT 25-03-97) Later the Japanese prime minister hinted that Japan might reverse its policy and agree to provide aid if South Korea formally asked to do so.(IHT 30-05-97)

Japan had shipped 500,000 tons of rice to North Korea in 1995, 150,000 tons free and the rest on a 30-year loan. Through the UN it gave \$500,000 in 1995 and \$6 million in 1996.(IHT 28-03-97)

US and EU aid for North Korea

In a move with humanitarian and political reverberations, the US committed itself to provide \$15 million in new food aid. The announcement came one day before North Korea would inform the US whether it would join the proposed peace negotiations.

The UN World Food Program had called on states to provide \$95.5 million in aid. Before the US commitment \$22 million had been raised.(IHT 16-04-97) The EU subsequently committed itself to send 155,000 tons of food, worth \$69 million, in response to the WFP appeal. A EU Commission spokesman said that the aid should also help avert a possible deterioration in the security situation of the Korean peninsula. The EU insisted to be allowed to make its own assessment of conditions in the country and to monitor the distribution, to which North Korea reluctantly agreed.(IHT 27-05-97;FEER 05-06-97:21)

ENVIRONMENTAL POLLUTION AND PROTECTION

'Greenhouse gases' after 2000

The 1992 UN Framework Convention on Climate Change includes a non-binding call for industrialized countries to stabilize their emissions of carbon dioxide and other greenhouse gases at their 1990 levels by 2000. At their conference in July 1996, however, the signatory states agreed in principle to set a legally binding target for industrialized countries for the period after 2000.

It was reported that Japan would submit proposals on targets of reducing the emission of 'greenhouse gases' after the year 2000. The proposals were said to include alternative numerical targets. One target figure would be the rate of a cut in the national output of carbon-dioxide. Another would be the per-capita-output volume of the gas. The proposals would require each industrialized country to choose between the two targets. The Japanese proposals were expected to draw criticism from some countries, especially in Europe, that have made more progress in cutting back their emission volumes.(JT 31-10-96)

Dumping of waste by Japan

According to government reports Japan dumped 43.32 million tons of waste into the sea in 1995, either as waste or as reclaimed land, 390,000 tons more than in 1994. Dredging accounted for 74.1 percent, industrial waste for 15.1 percent and non-

industrial waste for 10.8 percent. More than 20 percent of the dumped industrial waste possibly contained toxic substances.

Japan is the only major industrial country to dump raw sewage into the sea because of a shortage of raw sewage treatment facilities.(JT 02-11-96)

Oil spill on Japanese north-central coast

The Russian-registered oil tanker 'Nakhodka' sank and broke in two off Fukui on western Honshu island in the Sea of Japan, 150 kilometres off the coast, on 2 January 1997, causing Japan's second-worst oil spill since 1971. The oil slick fouled the coast and threatened fish and wildlife.(IHT 08,10,11/12-01-97;FEER 23-01-97:13)

ESPIONAGE

North Korean charges against US citizen

North Korea notified the US it was charging an American with illegal entry and espionage. The American was arrested in August 1996 after crossing into North Korea from the Amnok (Yalu) River border with China. The person was allegedly sent for espionage by the South Korean Agency for National Security Planning. US officials said the man was the son of an American father and a Korean mother, and did not work for the US government in any capacity.(IHT 07 and 08-10-96; JT 10-10-96)

The man was released on 27 November 1996. The US congressman who successfully negotiated the release, told that there was no quid pro quo for the release, that the US paid a 'small amount' of money (later the amount of \$5,000 was reported) to cover a 'hotel fee' as the man was allowed to stay in a hotel for two months, and that although North Korea imposed a fine on the man's unauthorized entry into the country (later the amount of \$100,000 was reported) it was not paid.(IHT 23/24, 26 and 28-11-96;JT 28 and 29-11-96)

EXTRADITION

See: Hongkong, Inter-state relations (Cambodia-Thailand)

FAUNA AND FLORA

Japan's position on ivory trade

High on the agenda of the conference of states parties of the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITS) in June 1997 was likely a call by a number of African states to relax the 1989 ban on ivory trade. The African states had urged Japan to co-sponsor the proposal which was put forth in summer 1996.(JT 12-12-96)

FINANCIAL CLAIMS

See: Oil and gas (Turkmenistan)

FISHERIES

Taiwan-Japan talks

The two parties would hold talks on 4 October 1996 to discuss fishery issues arising from their rival claims to the Senkaku or Diaoyu islands. These talks would be the second round since the dispute over the islands flared in July. (AsahiEN 03-10-96)

Arrest of Japanese fishermen by Russia

(*see also*: 1 AsYIL 346)

A Japanese fishing boat was seized on 12 October 1996 about 3.9 kilometres inside Russian waters from a Russian-set borderline dividing Japan and Russia off the Russian-held but disputed island of Kunashiri (one of the four islands belonging to the Japanese 'Northern Territory', *see* 1 AsYIL 346). The fishermen were suspected of violating Russian waters and poaching. Japan asked Russia to release them as soon as possible. (JT 17-10-96) The charge of poaching was later dropped while Russia said it would release four of the five crew members. (JT 20-10-96) The fifth was later released in November without trial for want of material evidence, although the man was prevented from leaving the Russian Far East till the end of the month. (JT 12-11,30-11-96)

Annual Japanese-Russian negotiations

The two countries agreed on an unchanged annual quota for 1997 of 100,000 tons each for fish caught within each other's 200 nautical mile exclusive economic zone. Besides Russia agreed to allow Japan to catch an additional 9,000 tons against payment of 400 million yen. The agreement was based on their 1984 fisheries agreement.

Japan was also to introduce an international quota system called the Total Allowance Catch, designed to protect marine resources through close monitoring and fishing quotas. (JT 26-11,08-12-96)

Illegal fishing

Thai fishing industry is known to be most dominating in southeast Asian waters, with Thai fishing boats catching illegally in waters under jurisdiction of other states, such as the waters off Myanmar, Malaysia, Cambodia, Vietnam and Indonesia. As a result skirmishes had started to occur with naval vessels of these states, and hundreds of Thai fishermen were in jails from India and Bangladesh to Vietnam and Indonesia. It is reported that the fishing boats are often better armed than their naval opponents. (FEER 13-03-97:54)

FOREIGN INVESTMENT

See also: Joint development, Oil and gas

Indonesian natural gas exploitation

A change occurred in the number of shares held by the participants in the projects relating to the exploration and exploitation of the D-Alpha Block gas field near Natuna

Island.(see 5 AsYIL 416) The Indonesian partner, Pertamina, sold 26% of its 50% stake to Mobil Oil, and planned to sell another 13% to a consortium of Japanese companies.(FEER 12-09-96:54-55,24-10-96:70;JT 19-11-96)

Enron investment project in India

(see also: 5 AsYIL 418, 6 AsYIL 376)

Formal government approval was won in July 1996 but was still entangled in a court case initiated by a trade union challenging the government approval of the project. The court was expected to rule in September 1996.(FEER 26-09-96:55)

Foreign investment in Myanmar

Under pressure of groups critical of the government of Myanmar the Dutch brewery Heineken announced its withdrawal from a \$30 million investment in early July 1996. Its share was taken over by Fraser & Neave Ltd of Singapore. Originally the two companies, through their joint Asia-Pacific Breweries, had planned a 60% stake in a joint venture with a company in Myanmar which was controlled by the military. Similarly the Danish brewery Carlsberg abandoned another brewery project, whereupon the Myanmar partner had started negotiations with Asia-Euro Brewery Sdn of Malaysia for continuation of the project. Other companies that had withdrawn from Myanmar included, *inter alia*, Eastman Kodak, Walt Disney, Hewlett-Packard, Liz Clayborne, PepsiCo. Pressure was also exerted on multinational companies like Unocal Corp., Texaco Inc. and Atlantic Richfield of the US and Total of France.

Unocal and Total had a joint venture with Myanmar Oil and Gas Enterprise to develop a natural gas project in the Gulf of Martaban (Andaman Sea), south of Yangon, and in late January 1997 it was announced that the Unocal and Total subsidiaries had entered a production-sharing contract with Myanmar Oil and Gas Enterprise for the exploration of oil and natural gas in a new area in the Andaman Sea. The area abuts the zone of the Yadana gas field (*infra*).

Texaco, in partnership with Myanmar Oil and Gas, Nippon Oil of Japan and Premier Oil PLC of Britain, is developing the second largest offshore gas field of Myanmar. Texaco would take 50 percent of the mining rights, Premier Oil 30 percent and Nippon Oil 20 percent. The exploration site is around 27,000 square kilometres and located 60 kilometres off Myanmar in the Andaman Sea.(IHT 16-07-96,31-01-97;FEER 25-07-96:81, 14-11-96:83;AsahiEN 30-10-96;JT 31-10-96) The project includes a 415-mile gas pipe line from the Yadana field to the shore and the Thai border. From there, a 161-mile Thai extension would carry the gas to a power plant near Bangkok. Thailand would pay \$400 million a year for the gas, half of which would go to the Myanmar government. Plans for developing additional offshore blocks were aborted by the US ban on new US investments which was issued in April 1997.

On the other hand Southeast Asian investments kept flowing into Myanmar. In 1995 Singapore was the biggest investor with almost \$300 million or about half of the total foreign investments of \$668 million.(IHT 12/13-10,09-12-96,24-04-97)

Malaysian participation in Iran investment

(see 6 AsYIL 378)

It was reported that the Malaysian national oil company (Petroleum Nasional, or: Petronas) had agreed to take a 30 percent stake in an oil field project, sharing the \$600 million investment burden with Total of France. (IHT 20-08-96)

US-Hongkong investment promotion and protection accord (IPPA)

It was reported in October 1996 that the efforts since 1991 to reach agreement on the matter had not yet materialized. One of the toughest differences involved the 'denial of benefits' provision, which would entitle the US to withhold investment protection from a company deemed to be using Hongkong as a base merely to benefit from the treaty ('treaty shoppers'). The US was concerned that companies from China, which is no WTO member, would pose as Hongkong companies and would benefit from the treaty in case of their investing in the US. It wanted to have the right to deny a Hongkong-based investor IPPA benefits if the US deems that its national security is threatened. The US also wanted clauses that would bar the transfer of certain hi-tech goods to third countries. (FEER 10-10-96:63,29-05-97:32)

The idea of a global investment pact

Under the title 'Trade and Foreign Direct Investment' WTO economists had issued a report arguing for a global trade agreement to bring foreign investment under binding international trade rules. The report collated the latest research on the matter, *inter alia* by the OECD.

While developed countries are supportive of the idea, developing countries are loath to negotiate such an agreement as it would limit their ability to control and direct foreign investment into their countries under national policies.

Foreign investment amounted to an estimated \$315 billion in 1995, and had become increasingly interlinked with trade. (AsahiEN 17-10-96; JT 18-10-96)

Closure of main McDonald store in Beijing

McDonald was to close its main store in central Beijing after holding out for two years against a removal order. It had agreed to move the restaurant after having resisted on the grounds that it had signed a 20-year lease on the site. It would receive compensation for the move. (JT 03-12-96)

Obstruction of Korean acquisition of French company

The French government had planned to privatize the state-owned company Thomson S.A. and sell it (for the symbolic sum of one franc) to the Lagardere Group, which would have absorbed the Thomson-CSF defence contracting unit and sold control over Thomson Multimedia to Daewoo of Korea. However, France abruptly pulled out of the deal on 4 December 1996 after its privatization commission objected to ceding control over Thomson Multimedia to the Korean company. The French finance minister said that the commission had been reluctant because of the transfer of technology involved. (IHT 06-12-96) In addition the French government said it was not confident that Daewoo would meet a commitment to create jobs in France. The Fed-

eration of Korean Industries responded by writing a protest letter to the French ambassador in Korea, demanding that appropriate steps be taken by your government to redress the matter". When the French government sent a presidential envoy to Korea to try to repair the damage, the Korean president said: "The South Korean people believe we have been totally discriminated against. ... We have a bad impression of France and have come to think France cannot be trusted."(IHT 12-12-96,15-01-97) The French government announced on 19 February 1997 that it would sell the defence company Thomson-CSF as a single unit at auction, but made it clear that Asian or American buyers need not apply. According to the government Thomson Multimedia would be put onto the market later in 1997.(IHT 20-02-97)

Indian attitude toward foreign investment

The Indian industry minister said that the government welcomed foreign investment but would protect domestic companies if they were in danger of being 'gobbled up' by multinational corporations. "We will give protection just as America gives protection to automobiles and semi-conductors."(IHT 07-02-97)

On 24 January 1997 the Indian government decided that foreign airlines would not be allowed to invest in domestic Indian airlines, although non-airline overseas investors were allowed to own up to 40 percent stakes in such airlines. The foreign airlines concerned were given a six-month deadline to disinvest. The underlying goal was to insulate state-owned Indian Airlines from competition.

The new guidelines put an end, *inter alia*, to a \$780 million plan by Singapore Airlines and the Tata business group of India to set up a new airline in India. The project had earlier received a green light from the Foreign Investment Promotion Board.

It was not clear whether foreign airlines could invest through holding companies and whether overseas Indians count as foreign or local investors. These issues were involved in the case of Jet Airways, owned by a holding company in which Gulf Air and Kuwait Airways each owned 20%, the rest being held by overseas Indian investors.(FEER 16-01-97:55,06-02-97:55;IHT 5/6-04-97)

National priority in Philippine investments

The Philippine Supreme Court ruled that a Philippine company should be awarded a contract to buy a 51% stake in a government firm which was being auctioned, although the company was only the second-highest bidder after a Malaysian company. The Supreme Court took its decision on the grounds that the constitution gives preference to a national company.(FEER 13-02-97:57)

Enron project in Bangladesh

The Bangladesh Power Development Board on 24 May 1997 initialled a contract with Enron International & Associates to set up a \$100 million power plant, the first investment by a foreign firm in Bangladesh on a build-own-operate basis. The final agreement was set for June 1997.(FEER 05-06-97:65)

Chinese investment in foreign oil industry

China National Petroleum Corporation bought 60% of Aktyubinskneft, the top oil company of Kazakhstan which is based near the Chinese border. The CNPC also concluded a contract for the development of two oil fields in Venezuela and a contract to develop the Ahdab oil field in southern Iraq. It also formed an oil and gas joint venture with Agip SpA of Italy, Chinagip Overseas Petroleum BV, based in the Netherlands. (IHT 06-06-97)

HONGKONG

See also: Diplomatic and consular relations, Foreign investment

Agreement on container terminal facilities

The agreement in principle between the Chinese and British sides on the matter (*see* 6 AsYIL 388) was implemented in such a way that the colonial company Jardine Matheson would be awarded berths at an older terminal and relinquish its leading role in the projected new facilities. (IHT 20-09-96)

Japanese visa policy for Hongkong passports

The governor of Hongkong pleaded with the Japanese government for a more liberal visa policy for Hongkong Special Administrative Region passports compared to Chinese passports after the territory would revert to Chinese rule. (JT 27-11-96)

No protection for dual nationals

The British foreign office said that the UK would not be able to give full consular protection to British nationals in Hongkong after the colony reverts to Chinese rule if they hold Chinese nationality besides. (IHT 05-12-96)

Changes in human rights- and civil liberties laws

It was reported that the Hongkong government-in-waiting would shortly release a consultation paper on planned changes in human rights and civil liberties laws. The changes would scrap some recent amendments to existing ordinances and would curb protests and overseas links of political groups. (ST 08-04-97)

Nationality status of ethnic minorities

About 8,000 people in Hongkong belonging to ethnic minorities would likely be left stateless after the hand-over (although retaining the right to stay in Hongkong). About half were of South Asian origin.

In view of their awkward status after the hand-over (6 AsYIL 384, 385) the United Kingdom introduced the British Nationality (Hong Kong) Act 1997 in March 1997. Under this Act persons, who were solely British nationals on 4 February 1997 and were ordinarily resident in Hongkong, are entitled to apply for registration as British citizens, with right to abode, as from 1 July 1997. (IHT 6/7-07-96, 05-02-97; FEER 13-02-97:13; UNdoc. CCPR/C/125)

Right of abode in Hongkong

For the purpose of determining whether a Chinese person fulfills the requirement of residence at the time of the handover on 1 July 1997 in order to qualify for the right of abode in Hongkong, the Chinese government would not require physical presence in Hongkong on that date; it would suffice if the person returned to Hongkong within 18 months of the handover.(IHT 15-04-97)

A summary of the rules applying to the subject as agreed between China and the UK was contained in the final UK report in respect of Hongkong under the ICCPR as submitted to the UN Commission on Human Rights on 30 June 1997. (UNdoc. CCPR/C/125)

British objection to the establishment of a provisional legislature

As a Chinese Selection Committee of 400 people gathered in the neighbouring Chinese city of Shenzhen to select the temporary body (*see* 6 AsYIL 388), the British foreign secretary invited China to settle the matter in the International Court.(IHT 21/22 and 23-12-96)

International jurisdiction over Hongkong after its reversion to China

A district court in Boston, US, ruled on 7 January 1997 that a Hongkong resident should not be extradited to Hongkong because his trial would take place after the territory's handover, and in light of the fact that no extradition treaty existed between China and the US. The court gave its ruling against the backdrop of an extradition agreement concluded (but not yet ratified at the time of the court ruling) between the US and the UK on behalf of Hongkong, which prohibits offenders from being turned over to a third jurisdiction.

In 1992 the US Congress passed the 'Hong Kong Policy Act' which commits the US government to recognize the reversion of Hongkong but allows the president to strip Hongkong of its separate legal status 'whenever' he thinks it is 'not sufficiently autonomous' from China.(FEER 23-01-97:17)

Hongkong-Taiwan sea trade

Shipping executives from Hongkong and Taiwan reached agreement on 23 May 1997 to ensure two-way trade would continue after the handover. Taiwanese ships would not fly a flag when entering Hongkong; Hongkong ships would hoist the flag of the local Hongkong Special Administrative Region when docking in Taiwan.(FEER 05-06-97:13)

HUMAN RIGHTS

See also: Inter-state relations: China-US

Myanmar

The ruling State Law and Order Restoration Council (SLORC) banned a congress that the National League of Democracy had planned to hold. According to the NLD the three-day meeting was to mark the eighth anniversary of its founding, but the

government said that the NLD was colluding with the US embassy and aimed at disrupting national stability. According to these accusations the US had urged AUNG SAN SUU KYI to hold the congress to coincide with discussions of a sanctions bill against Myanmar in the US Congress. However, the US Congress was due to adjourn on 27 September and had yet to vote on the 1997 Foreign Operations Appropriations bill, which included an amendment urging Myanmar to improve its human rights record.

The US and the UK protested against the measure and demanded the release of those who had been detained in the effort to prevent the meeting. The US denied the accusation of a collusion and the UK said it would consult with its European partners on possible measures against Myanmar. (AsahiEN 28-09-96; JT 29-09-96)

Japan on 7 October 1996 renewed a call on the military government of Myanmar not to prevent the National League for Democracy leader from speaking to crowds.

Discussion in the UN on Chinese human rights record

China warned that relations with countries which join condemning China publicly in the UN Commission on Human Rights would suffer, but that it was prepared to hold dialogues with countries that refrain from such criticism. (IHT 04-04-97)

China requested other states, among which Japan, to support a resolution in the UN Commission on Human Rights aiming at avoiding the debate and voting on a draft-resolution on the Chinese human rights record. Japan rejected the request on the grounds that the Chinese-sponsored resolution sought to stem debate on the substantive resolution. (IHT 15-04-97)

On 16 April 1997 the UN Commission on Human Rights for the seventh time in a row rejected a draft resolution aiming at censuring China. Among the states refusing to support the rejection were France, Germany, Italy, Spain, Canada and Australia. (-IHT 17-04-97) After the voting China retaliated against some European states which had backed the resolution, by cancelling high-level visits to these countries. (IHT 19/20-04-97)

Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region

Since 1990 three workshops had been held under the auspices of the UN: in Manila (1990), Jakarta (1993), and Seoul (1994). A fourth Workshop was convened in Kathmandu (26-28 February 1996) pursuant to resolution 1995/48 of 3 March 1995 of the UN Commission on Human Rights, in which the Commission invited the states of the region to undertake actions for the establishment of a regional arrangement for the promotion and protection of human rights.

As it was considered premature to discuss specific arrangements relating to the setting up of a formal human rights mechanism in the region such as those existing in Europe, the Americas and Africa, the fourth Workshop put emphasis on exploring the options available and the process necessary for establishing a regional mechanism.

The Workshop was attended by representatives of 30 states of 'Asia' in the broadest sense of the word. In contradistinction to previous years, the 1996 Workshop ended with the adoption of (nine) 'agreed conclusions' instead of 'Chairman's concluding remarks'. The conclusions identified steps towards the establishment of a regional arrangement. The Workshop decided to set up an open-ended team comprised of

representatives of interested governments of the region and the UN Centre for Human Rights, *inter alia*, for that purpose.

Conclusion 4 stated, *inter alia*, that the diversities and complexities of the region would require the process of establishing a regional arrangement to involve extensive consultations among countries in the region in order to arrive at consensus. A step-by-step approach was recommended, including the sharing of information and experiences and the building up of national capacities for the promotion and protection of human rights. The importance of confidence-building measures was emphasized.

According to conclusion 5, any regional arrangement would need to be based on the needs, priorities and conditions prevailing in the region. Consequently, the rationale for any such arrangement should emerge from within. (UN publ.HR/PUB/96/3)

IMMIGRATION

See also: Inter-state relations:China-South Korea

Illegal immigration to Japan

The Japanese police arrested 71 Chinese nationals on 1 May 1997 on suspicion that they illegally entered the country through the island of Kyushu. In the first two months of 1997 692 foreigners had been arrested for illegal entry, of whom 84 percent were Chinese. There had been 679 arrests for all of the year 1996. (IHT 02-05-97)

IMMUNITIES

See: Diplomatic and consular immunity

INSURGENTS

See also: Borders, Refugees

Christians against Philippine peace deal with Muslims

It was reported that Christian politicians attacked, and the Roman Catholic Church urged to defer the plans of the Philippine president to offer a major role in the economic development of the southern Mindanao region to the Moro National Liberation Front. The Christian protests continued in the following months. (IHT 02-07,09-07,09-08-96)

Final agreement between Philippine government and MNLF

(*see* 6 AsYIL 390)

The agreement which was to bring the insurgency to a final and formal end was signed on 2 September 1996. A transitory Southern Philippines Council for Peace and Development would be established, headed by the leader of the MNLF. This would be followed in three years by voting in 14 southern provinces (coinciding with the 13 provinces referred to in the Tripoli agreement) with large Moro populations (called in the current agreement: 'Special Zone for Peace and Development') to determine the

size of the projected final autonomous region, which would replace the presently existing four-province Autonomous Region of Muslim Mindanao.(IHT 20-08-96)

It appeared that a final solution of the whole issue would still meet many problems: only five out of the 13 provinces are Muslim-dominated, as a result of Christian immigration over the past decades. Besides, the powers of a regional governor, and, for that matter, of the Council for Peace and Development would be quite limited.

The rebellion started when President MARCOS proclaimed martial law in 1972 and, as a result, the Muslim leadership went underground. It claimed more than 120,000 lives. The 3-year long peace talks took place under the supervision of a committee of the Organization of the Islamic Conference presided by Indonesia.(FEER 05-09-96 p.24-27;IHT 02 and 03-09-96)

Philippine government talks with Communist insurgents

Philippine government negotiators left for the Netherlands on 12 September 1996 to resume peace talks with communist rebel leaders in exile in the Netherlands. The initiative came a week after the signing of a peace deal between the government and the Moro National Liberation Front, and some months after a peace arrangement with the remnants of a right-wing military group. An end of the rebellion by the Communist Party of the Philippines/New People's Army would complete efforts by the Philippine president to end all insurgencies in the country.(NST 13-09-96)

In late November the Communists suspended the peace talks after the government refused to release a detained leftist leader. Their National Democratic Front of the Philippines accused the government of violating an agreement on safety and immunity guarantees and considered terminating the negotiations because of these violations.(IHT 30-11/01-12-96) Eight days of peace talks were later held in the Dutch city of Utrecht in early February 1997.(IHT 10-02-97) They were resumed in March.(IHT 10-03-97)

Philippine truce with Moro Islamic Liberation Front (MILF)

The first-ever formal meeting between the Philippine government and the MILF (see 5 ASYIL 426) took place in Davao City on 3 August 1996. While a cease-fire accord was expected to be concluded on 19 September 1996, following the peace agreement with the Moro National Liberation Front (MNLF), an interim agreement was in fact signed on 27 January 1997.

[In 1987 the then Philippine president rejected an MILF proposal that it be included in the government's talks with the MNLF.]

In late December 1996 a meeting was held on Mindanao island under the name of 'Bangsa Moro People's Consultative Assembly', dealing with the issue of an independent Islamic state in Mindanao. The organizers consistently denied any links with the MILF.(FEER 15-08-96:12,26-12-96/02-01-97:22,06-02-97:13;IHT 13-09-96)

Indian insurgents near Bangladesh border

During a visit to Bangladesh by the Indian prime minister in early January 1997 the two countries agreed to co-operate in fighting insurgents near their border.(IHT 07-01-97)

Shanti Bahini insurgency in Bangladesh

(see: 4 AsYIL 452)

The peace talks with the government had not yet achieved results, but were continued in early 1997.(FEER 06-02-97:13)

INTELLECTUAL PROPERTY

Vietnam – US copyright treaty

The two countries signed a copyright treaty in April 1997.(IHT 18-04-97)

INTER-STATE RELATIONS: GENERAL ASPECTS

China – South Africa

South Africa had always recognized the Taipei government as the legal government of China. It had received direct investment and aid from Taiwan thought to run into hundreds of millions of dollars, and Taiwan had been its seventh-largest trading partner. It had been represented in China by a ‘South Africa Centre’ in Beijing since 1992. But since the establishment of the post-apartheid government bilateral trade with mainland China had risen from \$14 million to \$1.33 billion.

The South-African president announced on 27 November 1996: “We have now granted diplomatic recognition to the People’s Republic of China. We will cancel our diplomatic relations with Taiwan with effect from December 1997”. He expressed the hope that “within the next 12 months it would be possible to achieve a smooth transition” allowing South Africa to remain friends with Taiwan.

As to South Africa’s wish to have ties with both governments the president said: “Beijing made it clear they would not tolerate that. And it is impossible to move forward on the basis of dual recognition.”(IHT 01-07,29-11-96;JT 29-11-96)

China – US

(see also: Diplomatic and consular relations, Foreign investment: Hongkong)

As the most senior US visitor to China since the 1994 visit by the Secretaries of State and of Defense, the US National Security Advisor came to China in early July 1996, in order to try to minimize differences between the two states and to find out the possibilities of a presidential summit meeting. It was said that the parties agreed to take a long-term, strategic view of how to assess and manage their relations.(IHT 6/7,08 and 09-07-96)

It was reported that a change in US policy came about under the influence of warnings from US allies in the Asian region, withholding their support from US confrontation with China over sensitive questions of Chinese unity and security, and regarding actions encouraging the independence of Taiwan or Tibet as interference in China’s internal affairs.(IHT 10-07-96)

There was a further sign of improved relations when the two sides agreed on a visit by the US secretary of state in November 1996. The visit was originally planned in

spring but was postponed because of tensions over the Chinese missile tests and military exercises in the Taiwan Strait in March.(IHT 24-07-96)

On the other hand the Chinese defence minister came to the US on 5 December 1996 for a 10-day visit. He had been in charge as chief of the general staff in 1989 during the Tienanmen incident.(JT 05-12-96) His visit was twice postponed: June 1995 as a result of the visit of the Taiwanese president to the US, March 1996 in connection with the US response to the Chinese missile test-firing.(IHT 03-12-96;FEER 12-12-96:26)

The US secretary of state arrived in China on 19 November 1996. The visit was a reflection of a change in US policy: it had downgraded human rights as it sought to mend ties and press a broad agenda. The secretary of state emphasized the need for "a steady and comprehensive approach to the relationship that is not rooted in a single issue".(IHT 20-11-96) He tried to put China and the US on a co-operative course heading to the 21st century. In his speech at Fudan University in Shanghai he said the US intends to remain a Pacific power in the 21st century, so the two states need to get along.(JT 20 and 22-11-96)

On his way to the APEC summit meeting at Manila the US president said, *inter alia*, that "the US has no interest in containing China". China had accused the US of pursuing a policy of containment (6 AsYIL 396) and had denounced as aggressive a 1996 US-Australian agreement authorizing the largest military exercises of the two countries since World War II.(IHT 21-11-96)

While in Manila for the APEC summit meeting in November 1996 the two presidents agreed to exchange state visits within the next two years. The last presidential visit on either side was the US President's trip to Beijing in February 1989.(JT 25-11-96;IHT 25-11-96)

The US vice-president visited China in late March 1997 (IHT 25,27-03-97) and the Chinese foreign minister visited the US in late April 1997.(IHT 29-04-97)

While Sino-US relations were said to have generally improved, disagreements remained.

There were said to be frictions over the treatment of dissidents and over fresh reports of Chinese nuclear sales to Pakistan, although it was maintained by the US that no pledges had been violated with the sale.(AsahiEN 17-10-96)

According to newspaper reports in early November 1996 the two countries were discussing a package of measures intended to defuse tensions over human rights.(JT 02-11-96)

It was reported that after seven months of secret diplomacy a deal was struck between the two countries under which China would sign the two UN human rights covenants, release up to eight political prisoners and restart talks with the ICRC aimed at establishing a program of prison visits (*infra*) to determine the status of political prisoners.(IHT 24-02-97) By way of reciprocity the US would refrain from sponsoring an annual draft-resolution in the UN condemning China for its human rights record.(IHT 24,28-02-97)

[In six out of the past seven years the US had co-sponsored a resolution calling for an investigation into China's human rights record. However, the draft was every time defeated in the 53-member UN Commission on Human Rights.](IHT 03-03-97)

In the economic field the US blamed Chinese trade barriers for a worsening trade gap which had surpassed US deficit with Japan.(JT 20-11-96)

Besides, there seemed to be a continuing stalemate in the US efforts to get increased access to the Chinese market due to uncertainties on both sides. While US businesses were eager to enter the Chinese market, the enthusiasm seemed to be tempered by a fear that China might become another Japan, using US technology and guaranteed access to US markets to run up even larger trade deficits, while continuing to limit import of US goods and services through government rulings and unofficial collusion. This would translate for the lower-skilled US workers into yet another round of job losses and declining wages. For China, any significant market opening would hold the almost certain prospect of throwing millions of Chinese out of work at the inefficient government-owned enterprises that still employed two-thirds of China's urban workers. It could undermine China's efforts to develop advanced industries.(JT 26-11-96)

The US decided in early August 1996 to issue a transit visa to the Taiwanese vice-president who would be on his way to a presidential inauguration ceremony in the Dominican Republic. US officials said that the granting of a transit visa was in accordance with the one-China policy under which the US continued to maintain 'informal' relations with Taiwan. The Chinese foreign ministry made known its opposition to the stop-over and urged the US "to honour the solemn commitment it has made on the question of Taiwan so as to prevent new damages from occurring in Sino-US relations". China accused Taiwan of using 'transit diplomacy' to increase its international profile.(08 and 13-08-96)

China demanded on 15 August 1996 that the US cancel its plans to sell the Avenger anti-aircraft missile system to Taiwan. A foreign ministry statement said the sale would violate the joint communiques on the US position *vis-à-vis* Taiwan. On the other hand the US department of state spokesman said that the system was purely defensive and that the sale was consistent with US policy on arms sales to Taiwan.(IHT 16-08-96)

China - ICRC

In the past China had rejected any outside agency, such as the ICRC, to be given unsupervised access to its prisons. In early March 1997 agreement was reached with the ICRC to resume talks on the issue after a two-year hiatus. The aim was to come to an understanding on the possibility of getting access to political detainees and on the 'standards and conditions' for such visits.(IHT 03-03-97)

China - North Korea

Marking the 35th anniversary of the Sino-North Korean Treaty of Friendship and Mutual Assistance of 11 July 1961 a Chinese naval flotilla called on a North Korean port for the first time on 10 July 1996.(IHT 11-07-96)

In a sign of improved relations after their co-oling as a result of the establishment of diplomatic links between China and South Korea, China offered 100,000 tons of food to alleviate the famine after the crops failure in North Korea because of the floods of 1996.(IHT 13/14-07-96;FEER 25-07-96 p.13)

Sanctions against Myanmar

A citizen of Myanmar who served as honorary consul for Denmark, Norway, Finland, Sweden and Switzerland, was jailed in April 1996 and sentenced to three years, reportedly on charges of possessing two facsimile machines and a telephone switchboard. He died in prison in June 1996, according to Myanmar officials from a stroke and a heart attack. As a result Denmark put the matter of sanctions against Myanmar on the agenda of the EU foreign ministers in July 1996. The Myanmar authorities rejected calls from abroad for an independent autopsy. (IHT 12 and 17-07-96)

Myanmar – US

The US introduced new visa restrictions barring entry into the US for all members of the Myanmar State Law and Order Restoration Council. According to the White House announcement the measure was aimed at ‘ongoing repression’ by the military regime. (JT 05-10-96) The measure was reciprocated by Myanmar by restricting visas to certain categories of US citizens. (JT 13-10-96)

Different policies vis-à-vis Myanmar

The US and the EU were considering economic sanctions intended to make the Myanmar government ease political repression, but ASEAN as well as China and Japan were preferring a policy of ‘constructive engagement’ rather than isolation in bringing about economic and political change. (IHT 16-07-96)

The ASEAN decision of 20 July 1996 on observer status for Myanmar was critical. It was criticized by the vice-president of the European Commission who warned that acceptance of Myanmar as a full member could jeopardize the EU plan to deepen its relationship with ASEAN. Ministers of ASEAN countries responded by accusing the EU of hypocrisy by comparing the latter’s stance toward Myanmar with that on Bosnia and Northern Ireland, while the Indonesia foreign minister said, *inter alia*: “I do not believe it is appropriate to comment on the internal affairs of an organization where those who are commenting are not even members of the organization”. (IHT 18-07-96)

At the ‘dialogue’ meeting on 24 July 1996 Canada and the EU called for a UN ‘contact group’ made up of Asian and Western states be formed in order to hasten political reform in Myanmar, but the ASEAN members as well as China immediately condemned the proposal (“an absurd proposal put forward to grab headlines back home”, “we don’t believe in that kind of hypocrisy”). Because of its nature the 24 July meeting was not attended by Myanmar which had only observer status in ASEAN. (IHT 25-07-96)

China – South Korea

It was reported that relations between the two countries had become less smooth than at the beginning. Mention was made of South Korean annoyance over its exclusion from a projected joint aircraft project, Chinese concern over South Korea’s treatment of its ethnic Chinese population who were denied full citizenship and faced discrimination in education, disputes over fishing rights and nautical exclusion zones,

and South Korean concern over growing numbers of illegal Chinese immigrants.(IHT 14-07-96)

Cambodia – Korea

Cambodia had been prevented from re-establishing formal relations with South Korea (which were severed in 1975) because of the close relations that existed between the King and North Korea. These relations had developed during the King's years of exile but had soured after the death of KIM IL SUNG: the new leadership had rejected the King's request to visit Pyongyang and lay flowers at the deceased's tomb.

In May 1996 Cambodia and South Korea announced plans to exchange quasi-diplomatic missions, and on 14 July the 'Second Prime Minister' visited Seoul where agreements were signed on the protection of foreign investments and the exchange of scientific and technological know-how.(FEER 25-07-96:21)

Japan – Latin America

The Japanese prime minister went on a tour to Mexico, Chile, Brazil, Peru and Costa Rica, the first such visit since seven years. Japan had invested almost \$60 billion in the region in the past 14 years, and its economic aid had doubled from 1990 to 1995 to \$1.14 billion.(IHT 19-08-96)

Japan – Russia

The foreign ministers of the two countries held a working-level session on a bilateral peace treaty on 2 and 3 October 1996.(JT 26-09-96)

During a regular meeting on 15 November 1996 the foreign ministers of both countries discussed the bilateral territorial dispute over a chain of islands off Hokkaido. The Russian minister suggested that the two countries should jointly develop the disputed islands, and referred to a British-Argentinian arrangement regarding the Falkland Islands. Joint development would not be a substitute for resolving the territorial dispute, but would help improving bilateral relations. Among the concrete problems are the right of Japanese fishing boats to operate in the area, and the possibility for residents of the disputed islands and those of other, Japanese, territory to visit each other's territory without a visa.

The Japanese side stated it would resume economic assistance which was frozen for reasons of political instability in Russia.(IHT 16/17-11-96;FEER 05-12-96:36)

Japan – US

The US president and the Japanese prime minister met in New York and re-affirmed the need to continue reducing the US military presence in Okinawa (although the US president stressed the need to maintain this presence for stability in Asia), and to resolve trade disputes, with the US raising those regarding civil aviation and (the implementation of a 1994 agreement on) insurance, and Japan raising the issue of the sale of super-computers (*see*:International economic relations).(JT 26-09-96)

Japan – China – Korea

In the context of the Chinese protests against the building of a lighthouse on one of the Senkaku (Diaoyu) islands (*see*: Territorial disputes) the Chinese foreign minister also criticized the Japanese prime minister's pilgrimage to the Yasukuni shrine in July 1996, classifying it as a return to Japan's 'historic perspective' of justifying its role in the second World War.

The Japanese prime minister said that the July visit was made on his birthday in his private capacity, but in September he nevertheless dropped his plan to visit the shrine again on 16 October, the anniversary of the day on which he was informed of his cousin's death in the war. It was said on 28 September 1996 that the decision was conveyed to the Chinese government through the Chinese embassy.

Mr. HASHIMOTO RYUTARO was the first prime minister to visit Yasukuni since 1985 (prime minister NAKASONE), but he did not visit the shrine on 15 August, the anniversary of the end of World War II, to deflect criticism from South Korea and China. (IHT 16-08-96; JT 26 and 29-09-96)

Cambodia – Thailand

Cambodia filed an extradition request with Thailand for the arrest and return of five senior Khmer Rouge officials who were suspected to have fled over the border. An extradition treaty applied between the two countries. (IHT 04-10-96)

India – Pakistan

In her speech to the UN General Assembly the prime minister of Pakistan proposed on 2 October 1996 that Pakistan, India and the major powers convene a conference to resolve the dispute over Kashmir, promote conventional arms control and ease the danger of a nuclear arms race in South Asia. (IHT 04-10-96)

The new prime minister who was elected after the February 1997 elections in his inaugural address offered reconciliation with India, while the Indian prime minister expressed his willingness to resume talks. Earlier talks broke down in January 1994 on the issue of Kashmir. (IHT 18-02-97) Agreement was reached on the resumption of talks on 28 March 1997. A second round was held in April during an NAM meeting in New Delhi (*infra* p. 464), followed in May by discussions between the prime ministers during a SAARC meeting in the Maldives (*infra* p.477).

One of the immediate results of the talks in May was the release of civilian prisoners who were being held for offences linked to the hostility between the two countries. Another result was the re-establishment of a 'hot-line' telephone after nearly a decade. [A similar line was set up by the previous summit meeting in July 1989 but was shut down after the then Pakistani prime minister was removed from office the following year.] (IHT 13-05-97; FEER 22-05-97:13)

The talks, essentially on normalizing relations, were to be resumed on 19 June 1997 and would include border clashes, the alleged deployment of missiles by India, confidence-building measures, and 'people-to-people contact'. (IHT 14/15-06-97) In a joint statement of 23 June the two sides agreed to explore possible solutions to the Kashmir dispute. This was the first agreement on the matter since 1972 when they agreed to seek a peaceful settlement of the problem. The two sides would meet again in September 1997. (IHT 24-06-97)

Besides the Kashmir issue the following matters could be subject of Indo-Pakistani discussions: demilitarization of the Siachen glacier in the northern part of Kashmir, defining the western-most border along a 100-kilometre estuary, fishing rights in nearby Arabian Sea waters (rich in prawn and lobster), and expanding trade. (IHT 28-02,07-03,27-03,12-05-97)

Attitude of neighbouring states toward developments in Afghanistan

According to reports the *US* was keen to offset Iranian influence in the region while being torn between supporting Pakistan, which was backing the Taleban, and not antagonizing India and Russia which were sympathetic to the AHMAD SHAH MASUD faction (2 AsYIL 283, 3 AsYIL 342). *Iran* was allegedly worrying since the Taleban was militantly anti-Shia and might threaten the (Shia) Hazaras in Central Afghanistan. *Russia* was concerned about a (Pashtun) Taleban movement which might be expansionist, threatening the Central Asian states. *India* would support the opposition against the Taleban which was a Pakistani creation in Indian eyes, and because the Taleban was strongly anti-Hindu. *Pakistan* would be the only regional ally of the Taleban. *Uzbekistan*, which had supported its fellow Uzbek, RASHID DOSTAM (DUSTAM), in the Afghan civil war, was said to fear the Pashtun-fundamentalist Taleban, like the other four Central Asian republics. *Turkmenistan* had been closely allied to another participant in the Afghan civil war, the (Herat) strongman ISMAEL KHAN, and a significant Turkmen population in Western Afghanistan had historically been victimized by the Pashtuns. *Tajikistan* had been sympathetic to fellow Tajiks under BURHANUDDIN RABBANI and SHAH MASUD. (FEER 10-10-96:17)

China-Japan-US

A Chinese spokesman reiterated Chinese concern over the expansion of the US-Japanese defence co-operation (*see* 6 AsYIL 426): "We think that the mutual defence treaty between the US and Japan should deal only with matters concerning the two countries. So what we are concerned about is enlarging the scope of this treaty. ... We consider it inappropriate for the Japanese to expand the coverage of this treaty to territory other than that belonging to Japan." (Daily Yomiuri 10-10-96)

The Japanese prime minister assured the Chinese president during the APEC summit conference in November 1996 (*supra* p.396) that his government "inherits the war apology issued by the previous prime minister in 1995" (*see* 6 AsYIL 466), and that Japan's moves to strengthen security ties with the US were not directed at any other country and that Japan did not support the independence of Taiwan. He emphasized that "[w]e only ask for a peaceful solution of the China-Taiwan problem through dialogue".

In the framework of its perception of being the target of an upgraded defence pact between the US and Japan, China launched a diplomatic counter-offensive by arguing that, *inter alia*, "Asian security should be decided by Asians" and that "[t]he aim of modifying the guidelines is clearly to expand the scope of Japan-US defence co-operation to cover the whole of the Asia-Pacific region". It was reported that later, during the first half of 1997, China had gone further and had proposed an alternative, consisting of a 'new security concept' that calls for the current US alliances in the

region to be gradually replaced by bilateral relationships and some form of multilateral security mechanism.(FEER 26-06-97:18)

North Korea – Russia

The two countries embarked in January 1997 on discussions for a new bilateral treaty to strengthen ties. The 1961 Treaty of Peace and Friendship had become a dead letter since the collapse of the Soviet Union in 1991, and was terminated in September 1996. The new treaty would have no provisions on mutual defence.

A new visa agreement was signed in January 1997. It was reported that previously North Korean migrant workers in Russian territory remained under North Korean jurisdiction, while under the new agreement they would be issued visas to live in a specific place and would register with the local authorities like other foreign residents.(FEER 27-02-97:23)

China – Japan

After his meeting with the Chinese president at the APEC summit meeting at Manila in November 1996, the Japanese prime minister said that Japan planned to resume the extension of grant aid to China in November 1996. It had suspended the aid in August 1995 in protest over Chinese nuclear tests, the first time Japan had used aid as a political means *vis-à-vis* China. Since the Chinese declaration of a halt (moratorium) to nuclear testing in July 1996 and its signing of the Comprehensive Test Ban Treaty (*supra* p. 409), Japan intended to lift the suspension but had refrained from doing so because of China's strong reaction to the incident over the Senkaku lighthouse (*infra* p. 479). (JT 06-11-96;IHT 25 and 26-11-96) The freeze was finally lifted in late March 1997.(IHT 29/30-03-97)

The re-elected Japanese prime minister pledged that his most important foreign policy task would be to improve bilateral relations with China. In this context he would announce the dispatch of a long delayed survey mission to discuss yen loans for the current fiscal year. Between fiscal 1996 and 1998 580 billion yen would be provided to China.(JT 20-11-96) The mission visited China in late November 1996.(JT 26-11-96)

Meanwhile a policy guideline had been drafted in the Liberal Democratic Party of Japan which was expected to be adopted as an official party platform, and which calls for a review of Japan's economic assistance policy toward China. It envisaged that the extension of yen loans to China may be coming to an end now that the Chinese economy was on a path of development. Specifically, the guideline prescribed that in extending official development assistance to China, the government must stick to the principle of not extending ODA to a country that lacks progress in democratization or has an unjustified large military budget.(JT 29-11-96)

Japan – France

The two countries signed a far-reaching bilateral agreement on 18 November 1996, covering diverse subjects such as increased co-operation in space research and the holding of annual summit meetings and regular meetings of foreign ministers.(IHT 19-11-96)

South Korea – Vietnam

The South Korean president paid a visit to Vietnam in November 1996, the first South Korean leader to do so four years after the establishment of official relations. The two countries fought on opposite sides in the Vietnam War. Relations between South Korea and (then) South Vietnam were cut in 1975. (IHT 21-11-96;AsahiEN 21-11-96)

South Korea – Japan

The Japanese prime minister and the South Korean president agreed on 24 November 1996 at the APEC summit at Manila to meet in Japan early 1997 to exchange views on the future course of bilateral relations.(JT 25-11-96)

Meanwhile a policy guideline, expected to be adopted as an official party platform of the Liberal Democratic Party of Japan, stressed the need to build bilateral relations while paying due attention to the feelings of the South Korean people concerning Japan's colonial rule of the peninsula from 1910 to 1945 and Japan's wartime behaviour.

The guideline proposed expanding economic relations between Japan and North Korea and opening diplomatic relations between the two countries at an early date.

Concerning Takeshima Island (*infra* p.482) the guideline stressed that the island is Japanese territory.(JT 29-11-96)

China – India

The Chinese president made the first ever Chinese state visit to India from 28 till 30 November 1996. The visit was aimed at easing tensions with India.(JT 29-11-96) [Relations between the two countries were severed in 1962 and restored in 1976. Since then Indian prime ministers visited China in 1988 and 1993.](IHT 30-11/01-12-96)

During the visit four agreements were initialed: one on confidence-building measures minimizing the possibility of armed conflict on the common borders ('line of actual control'), a second on direct shipping links, a third on the establishment of an Indian consulate in Hongkong after mid-1997, and a fourth one on preventing illegal drug trafficking.(JT 30-11-96) The first agreement would advance an agreement signed in 1993 in Beijing by the Indian prime minister (*see* 4 AsYIL 417). Since this latter agreement tensions between the two countries had eased while bilateral trade had increased sharply.(IHT 28-11-96) Specifics on the timetable for withdrawals as well as the number of troops to be moved back from the lines of actual control would be decided later after further bilateral discussions.(FEER 12-12-96:16)

China – Pakistan

The Chinese president came to Pakistan for a four-day state visit on 1 December 1996. He emphasized that the co-operation in the use of nuclear energy for peaceful purposes would be continued despite outside concerns that China had supplied technology for nuclear weapons.(IHT 01-12-96;JT 02-12-96)

Cambodia – Vietnam

More than two dozen members of a group allegedly advocating the overthrow of the Vietnamese government were arrested in Cambodia. The group was believed to be connected with *Vietnam Tudo*, or Free Vietnam, an underground movement that was believed to have operated in Cambodia since 1994. It was said that almost all were Cambodian-Vietnamese and ethnic Vietnamese. (JT 03-12-96)

Chinese state visit to Nepal

After his visits to India and Pakistan the Chinese president paid a two-day state visit to Nepal from 4 December 1996. This was the first visit by a Chinese president in 12 years. (JT 05-12-96)

China – Vatican

China responded on 5 December 1996 to an appeal from the Roman Catholic Pope to allow the Chinese Roman Catholics to have official links with the Vatican. It said it wanted better relations with the Vatican but would brook no interference in China's internal affairs.

China maintained relations with the Vatican until 1957, when the Pope excommunicated two Chinese bishops appointed by the Chinese authorities. China then severed ties with the Vatican, which set up relations with the government at Taipei. As a condition for improved relations China required severance of relations with Taiwan and recognition of the Beijing government as the sole legal government of China including Taiwan. (IHT 06-12-96; AsahiEN 06-12-96)

Chinese high-level visit to South Korea

A Chinese military delegation visited South Korea, being the highest-level visit since the two countries which fought each other in the Korean War established relations in 1992. (JT 08-12-96)

Iran – Turkey

The president of Iran visited Turkey, beginning 19 December 1996, reciprocating the visit by the Turkish prime minister in August 1996. During the earlier visit an agreement was signed for the supply of Iranian natural gas, while the recent visit was used for the discussion of a study on the construction of a pipeline to carry Iranian oil to the Turkish Mediterranean terminal of Ceyhan. Besides several other trade agreements were concluded, such as mutual grant of most-favoured nation status, encouraging and promoting of mutual investment, outlining new co-operation in maritime trade, and establishment of a joint Chamber of commerce.

It was reported that the visit antagonized the US which is trying to isolate Iran. A state department's spokesman said: "We strongly advise the Turkish government not to improve its relationship with Iran". (IHT 20 and 23-12-96)

China – Russia

(see also: Borders)

The Chinese prime minister visited Russia in late December 1996.(IHT 28/29-12-96) An agreement was signed on the purchase of two destroyers. On his return the prime minister referred to a 'strategic partnership' between the two countries which would help offset the influence of the US as the world's only remaining superpower.(IHT 20-01-97) A mutual commitment was earlier established at the summit meeting of April 1996 (*see* 6 AsYIL 406).

A summit meeting took place on the occasion of the visit by the Chinese president to Russia on 22-26 April 1997.(IHT 23-04-97) The two presidents on 23 April signed a "Declaration on a Multipolar World and Formation of a New World Order" to counterbalance US power. The Declaration called for a greater peace-keeping role for the UN, a strengthened UN Security Council, and a new conception of international security. It recommended that peace-keeping operations be carried out only with the Security Council's consent and only with the agreement of the countries involved, in strict accord with the Security Council's mandate.

Other issues dealt with at the summit were the promotion of trade and investments, twice-yearly meetings of prime ministers, the development of projects in various fields.(IHT 24-04,25-04-97;FEER 08-05-97:16)

Japan - Southeast Asia

The Japanese prime minister visited five Southeast Asian countries (Brunei, Malaysia, Indonesia, Vietnam, Singapore) in early January 1997 after having been to Thailand and the Philippines in 1996.(IHT 08-01-97) During his visit the Japanese premier proposed summit meetings at least once a year to deepen ties. In a speech held on 14 January 1997 in Singapore, described by Japanese officials as an important new statement of Japanese policy toward Asia (so-called 'Hashimoto Doctrine'), he proposed a wide-ranging partnership that would extend Japan's relations with Southeast Asian countries beyond economic ties into high-level political and security cooperation.(IHT 14,15-01-97) It was reported that the response was 'lukewarm' out of fear of a more assertive Japan and the possible complications of the regional balance of power resulting from a new approach. The Japanese initiative would imply an emphasis on bilateral links, while ASEAN appeared to prefer a multilateral context.(FEER 30-01-97:14)

Asia-Europe Foreign Ministers Meeting

The first meeting of Asian and European foreign ministers took place on 15 February 1997.(IHT 04-02-97)

Iran - Russia - US

The US issued a diplomatic warning to Russia about alleged Russian assistance to Iran's missile program, which could potentially threaten US troops in Saudi Arabia, several US allies in the Gulf, and Israel. The allegations referred to transfer of technology on the Russian SS-4 missile with a range of 2,000 kilometres. The Russian prime minister denied that his government had authorized such transfer.(IHT 13-02-97)

Pakistan – Russia – Ukraine – India

Russia tried to stop the sale of tanks from Ukraine to Pakistan, by banning the export of guns and targeting systems for the Russian-designed tanks. The sale may offend India with which Russia traditionally had friendly relations.(FEER 06-03-97:13)

Malaysia – Singapore

In an affidavit filed in a court case the Singapore senior minister and the deputy prime minister referred to the Malaysian state of Johore as being “notorious for shootings, muggings and carjackings. ... It did not make any sense for a person who claims to be fearful for his life to go to a place like Johore”. [The case concerned a law suit by the ministers against an opposition politician who had fled to Johore in Malaysia after allegedly receiving threats.]

In an unusually strong protest, Malaysia asked the senior minister to apologize and retract his statement.(IHT 13-03-97) The apology was given ‘unreservedly’ on 13 March 1997: “The senior minister had no intention to cause offense and apologizes unreservedly for the offense he has caused to the government and people of Malaysia by his statement on Johor.”(IHT 14-03-97) When this apology did little to ease Malaysian tempers, the senior minister made a second statement some days later, telling that he had asked the court to have the offending paragraphs deleted from the affidavit. In granting the request, the High Court judge said: “The powers of the court must be used to maintain friendly relations between Singapore and every other country”. Two days later the Malaysian cabinet accepted the apology.(IHT 20-03,29-04-97;FEER 27-03-97:16)

No similar request was made by the deputy prime minister. It was reported that for this and other reasons referred to by Malaysian officials as “lack of sincerity in the behaviour of other Singapore leaders”, Malaysia would temporarily freeze official ties with Singapore but these reports were later played down by a statement that no decision had been taken.(IHT 27-03,28-03-97)

US forces in the Asian region

US officials in March 1997 gave assurances that the US presence would not be reduced and that there were strong reasons for keeping the US forces at current levels of about 100,000 men. It was reported that the American forces were regarded as a key counterweight to the emerging power of China and a deterrent to the rearmament of Japan with offensive weapons.(IHT 17-03-97)

Vietnam – US

The US finance secretary visited Vietnam in early April 1997, being the highest ranking US economics official to visit the country since the end of the Vietnam War. He signed a debt-rescheduling agreement under which Vietnam agreed to pay back debts incurred by the former South Vietnamese government.

Vietnam asked the US to waive its so-called ‘Jackson-Vanick amendment’ under which most-favoured nation status was blocked for Communist countries that deny their citizens the right to emigrate.(IHT 07-04,08-04-97)

India – Afghanistan

India as the host state had invited the president of Afghanistan to attend the Non-Aligned Movement conference held in New Delhi in early April 1997 (*infra* p.464), despite the fact that he was in fact already ousted by the Taleban movement. Member states of the NAM had not yet given formal recognition to the Taleban government. India had abandoned its embassy in Kabul the day before the Taleban took control of the capital in September 1996.

The Taleban information minister said that “the Indian government [had] insulted the Afghan people”.(AsT 08-04-97)

Iran-Europe relations

After the verdict of the Berlin court of 10 April 1997 in the so-called *Mykonos* case (*see*: Jurisdiction) the member states of the European Union recalled their ambassadors from Tehran, thus suspending the EU’s ‘critical dialogue’ with Iran. A similar recall took place eight years ago after the verdict against the British author RUSHDIE for blasphemy.(NRC 11-04-97)

China – EU

The Taiwanese foreign minister addressed a committee of the European Parliament on 22 May 1997, despite sharp protests from the Chinese government. The chairman of the committee had specified before that the speech was part of an ‘information meeting’ that did not constitute a recognition.(IHT 23-05-97)

Japanese women living in North Korea

Japan rejected a North Korean offer of approving home visits by Japanese women in exchange of one million tons of rice. The women in question had married ethnic Koreans in Japan and had left Japan for North Korea, mostly in the 1950s and 1960s.-(IHT 24/25-05-97)

Philippines – Singapore

During a postponed visit by the prime minister of Singapore to the Philippines the two states concluded a series of agreements on 10 June 1997 aimed at improving relations. These were strained as a result of the so-called FLOR CONTEMPLACION case in 1994 (*see* 5 AsYIL 400).(IHT 11-06-97)

Iran – US

During a five-country Gulf tour the US defence secretary stressed at each stop that Iran posed a danger to its militarily weaker neighbours and did not deserve to be invited as a full member of the world community. He said at a news conference that Iran “continues to support terrorism in addition to developing weapons of mass destruction, improving missiles that can strike neighbouring nations and boosting the facility to close the Strait of Hormuz”. With reference to these allegations he said: “The US will not allow this to happen”.(IHT 18-06-97)

(NON-)INTERFERENCE

See also: Arms sales and supplies, Association of South East Asian nations, Civil war, Dissidents, Inter-state relations (Myanmar, China-Australia, China-Vatican)

Thailand on dialogue between government and opposition in Myanmar

The Thai foreign minister, urging a dialogue, said: "We would, of course, encourage any dialogue that would lead to stability and peace, but we would not go out of our way in any way that could be perceived as interference". (IHT 09-07-96)

Dalai Lama in the UK

The Chinese foreign ministry protested against the scheduled visit by the Dalai Lama to the British parliament in mid-July 1996: "Tibetan affairs are purely Chinese affairs, which brook no interference by any foreign government organizations or individuals." By offering the spiritual leader a forum Britain "is supporting and abetting the Dalai Lama's activities to split the motherland". (IHT 09-07-96)

While in Britain the Dalai Lama called for a concerted international effort to pressure China to improve human rights in Tibet and to start negotiations with his government in exile. (IHT 17-07-96)

China - Australia

China threatened Australia with commercial and economic sanctions over meetings between the Australian foreign minister and the Dalai Lama. Nevertheless the Australian prime minister did meet the Dalai Lama as a 'significant religious leader'. The Chinese foreign ministry said that the meeting represented "an interference in China's internal affairs" and rejected the description of the Dalai Lama as a religious leader. (IHT 20 and 25-09-96; JT 26 and 27-09-96)

China - Germany

Expressing of its displeasure over a German parliamentary resolution in June 1996 on Tibet (*see* 6 AsYIL 456) China withdrew an invitation to the German foreign minister for a visit to China in July 1996. The incident was ended by a meeting between the two foreign ministers in September during the UN General Assembly meeting, and the invitation was renewed in late September, together with an invitation to the German president. The German foreign minister stressed the German position that Tibet is part of the Chinese state. He started his visit on 21 October. (IHT 26-09-96, 22-10-96)

Dalai Lama meetings in France

The Dalai lama met members of the French legislature during his visit to France late October 1996, and had an informal 'spiritual' meeting with the minister of justice. (IHT 30-10-96; JT 01-11-96)

US involvement in Sino-Japanese island dispute

China warned the US on 15 October 1996 not to intervene in the dispute between China and Japan over the Diaoyu (Senkaku) islands. The statement was given in reac-

tion to a US Congressional report that urged the US government to defend the islands on the basis of a new security arrangement between the US and Japan concluded in April 1996.(AsahiEN 16-10-96;JT 17-10-96)

Indo-Iranian attitude toward the civil war in Afghanistan

During a visit of the Iranian foreign minister to India the two countries on 17 October 1996 urged the warring factions in Afghanistan to end their civil war and called on neighbouring countries to use their influence to help work out a solution. The Indian minister also said that both countries wanted an end to 'outside involvement': "The problem of Afghanistan should be left to the Afghan people. All parties in Afghanistan should get together and should solve the problems of Afghanistan peacefully." The Iranian minister said that "any kind of foreign intervention will deteriorate the situation".(IHT 18-10-96)

Conference on East Timor banned in Malaysia

The Malaysian government said on 7 November 1996 that it would block human rights groups from holding a planned conference on East Timor in Kuala Lumpur. It would seek all legal avenues to prevent the conference. The deputy prime minister said: "Malaysia should not interfere with Indonesia's domestic problems." A number of foreigners who had come to Malaysia to attend the conference were later deported.(IHT 08 and 12-11-96)

China - Vatican

China responded to an appeal from the Pope to legalize the Roman Catholic Church by saying that it wanted better relations with the Vatican but would not allow interference in its internal affairs. The foreign ministry's spokesman said: "The Vatican must ... stop interfering in China's internal affairs, including using religion ..." China also demands the severance of relations between the Vatican and Taiwan.(JT 06-12-96)

US criticism of Singapore elections campaign tactics

The prime minister of Singapore strongly rejected a comment by the US state department criticizing the elections campaign tactics of the ruling party in Singapore. The Singapore foreign ministry called the comments "undisguised interference in Singapore's domestic politics".(IHT 27-12-96)

INTERNATIONAL ECONOMIC RELATIONS AND TRADE

See also: World Trade Organization

World Semiconductor Council

The 1991 Japanese-US semiconductor arrangement, created with the aim of opening Japan's chip-market to foreign companies, was to expire on 31 July 1996 (*see* 6 AsYIL 413). The US initially preferred a 'transitional' bilateral agreement to re-

place it instead of a World Semiconductor Council including Europe, as proposed by the Japanese and endorsed by the EU in July 1996.(IHT 10-07-96)

On 2 August 1996, however, the two governments agreed that the 1991 agreement would be succeeded in March 1997 by a World Semiconductor Council, an industry-level multilateral forum that would be operated in line with the WTO rules. The council would extend membership only to industry groups whose governments had abolished or pledged to repeal chip tariffs. A first preparatory meeting was held in October 1996 by Japanese and US industries.(IHT 3/4-08-96;JT 10-10-96)

Since the production was no more restricted to the US and Japan, and since a substantially bigger part of the Japanese chipmarket was supplied by foreign manufacturers, the US-Japanese dispute had in fact lost much of its importance.(IHT 06-08-96)

Japan-US dispute on Japanese insurance market

The dispute centred on the implementation of a 1994 bilateral agreement. The US accused Japan of reneging on the agreement by preparing to deregulate the so-called third sector of its insurance market (covering sickness, accident, nursing care and other products falling into a gray zone between the primary life and non-life insurance sectors) in which foreign firms already had a strong foothold and preferred no new competition, while deferring the opening of the primary life and casualty insurance markets.

Parties failed to reach agreement during a ministerial meeting at the end of September 1996. Following this meeting Japan withdrew its proposal to deregulate automobile insurance premiums as part of the liberalization of the country's primary insurance sector. Talks were resumed on 15 November with a self-imposed December 15 deadline. These talks were not successful.(IHT 29-07-96,26-09-96; JT 01-10-96,17-11 and 20-11-96)

In early December 1996 the Japanese side decided to propose the abolition in 1999 of restrictions on the entry by Japanese newcomers into the third-sector insurance market, paving the way for non-life insurance subsidiaries of Japanese life insurers to enter the market dealing with personal accident coverage. This sector was a major source of earnings for US insurance companies and the US had consequently insisted that removal of the market entry restrictions should take place in 2001 at the earliest. The 1994 Japan-US insurance agreement called for the avoidance of 'radical change' in the third sector for a 'reasonable period' after life and non-life insurers were allowed to enter each other's field in Japan.

The US hinted at sanctions in case of failure of the talks, and on the Japanese side there were hints that the issue would be taken to the WTO in case of failure.(JT 08-12-96) Unless more liberalization in Japan's life and non-life insurance market were secured, the US would remain opposed to Japanese subsidiaries handling certain products in the so-called third sector.(JT 12-12-96)

The two countries finally reached agreement on 14 December 1996 with Japan pledging to undertake sweeping deregulation of its non-life insurance market, such as automobile- and fire insurance, phased in over two years. The deregulation aimed at eliminating the rate-setting power of insurance councils. Before the agreement was

reached, the US had spelled out the type of economic penalties Japan would face had no agreement been reached.

The Japanese insurance market is the second largest in the world after the US.(JT 15-12-96;AsahiEN 16-12-96)

On the so-called third sector, non-life subsidiaries of domestic life insurers would be able to sell personal accident insurance as of 1 January 1997, but special measures would be taken to avoid 'radical change' in the market.(JT 17-12-96)

US trade deficit with China and Japan

In June 1996 the US trade deficit with China had exceeded that with Japan for the first time. While the US trade gap with Japan showed a declining trend, that with China was increasing. On the other hand, the Chinese market was more open to investment and imports than Japan's.(IHT 22-09-96)

Later Japan's trade surplus increased again as a result of the decline in the value of the yen. During a visit by the Japanese prime minister to the US in late April 1997, the two countries agreed on the need to avert such increase and on stepping up talks on deregulating the Japanese economy under the 1993 framework agreement (*see* 4 AsYIL 468).(IHT 26/27-04-97)

Phase-out of Multifibre Arrangement and imposition of EU anti-dumping duties on Asian textiles

While Asian countries worried about a proper implementation of the phase-out of the Multifibre Arrangement (*see* 6 AsYIL 414) the EU planned to impose anti-dumping duties on import of Asian textiles in 1996. In view of the existing quota system, the anti-dumping fines constituted an additional discrimination.

By way of illustration reference is made to the anti-dumping procedure concerning exports of unbleached cotton from China, India, Indonesia and Pakistan. The EU imposed provisional duties up to 36% for five years on complaints in November 1996 from Eurocotton, representing the interests of European cotton manufacturers. After further investigation the EU Commission recommended a duty of 19%. In view of objections from European users of unbleached cotton (including dyers, fabric printers, home-furnishers and clothing manufacturers) Britain and Germany and six other EU countries voted against the fines, while France had backed the anti-dumping proposals in view of the interests of the French cotton-producing and weaving sector.(FEER 03-10-96:100)

EU anti-dumping policies

The WTO allows its members to raise import prices by imposing anti-dumping fines when there is proof that the low import prices, resulting from being lower than the cost of production, hurt domestic industry.

Asian exporters complain that the EU is using anti-dumping instruments to keep out low-cost Asian exports, even when there is no proof of dumping or damage to European producers, thus using anti-dumping as a substitute form of trade barrier. Besides the frequency of the anti-dumping actions, it was argued that the methods for determining injury to domestic industry and calculating dumping margins before imposing the fines are flawed. Further, it was contended that the interests of European

manufacturers were granted priority over other European economic players. In contrast to these policies the EU continued moves to liberalize imports from Eastern Europe, North African countries and Turkey. (FEER 03-10-96:100, 12-06-97:68)

The procedure for determining dumping is also considered unfavourable for Asian exporters. While the European manufacturers have plenty time to gather incriminating data against exporters, the latter have about a month only to provide details on prices and production costs. Besides they have to employ expensive anti-dumping lawyers in Brussels who are familiar with the system.

It was said that future WTO agreement on harmonizing international-competition rules, including guidelines on curbing industrial subsidies, might prevent European arguments about the use of government funds to keep export prices deliberately low. (FEER 12-06-97:68)

Mutual demands for deregulation

The US made demands to Japan on deregulation in 14 areas, including a ban on holding companies, easing standards for mergers and acquisitions, allowing foreign access to Japan's satellite business, liberalization of the pension funds market, and further administrative reforms. It requested these topics to be reflected in the planned new Japanese deregulatory package to be released in March 1997.

The requests, the third comprehensive package of its kind since 1994, also reflected US concern over intransparency of Japan's bureaucracy resulting from connections between private and public sectors through former senior bureaucrats transferring to companies on their retirement in the 'amakudari' practice. (JT 16-11-96)

On its part, Japan put forward the lack of a system for accepting foreign lawyers in some US states, maritime transport regulations and tariffs on medical equipment. (AsahiEN 21-11-96)

G-15 attitude on international economic relations

The Group of 15 (G-15) countries held a trade promotion summit conference in Harare early November 1996. They accused the industrialized states of an expansive interpretation of the WTO rules and of pressing internationally binding trade arrangements under the WTO which erode their sovereignty.

The Malaysian prime minister criticised the enactment of extraterritorial laws to which everybody was to submit, referring to US threat of sanctions against Malaysian investment in an Iranian oil exploration project. The Malaysian share was 30 percent in the \$600 million project, thus exceeding the \$40 million per year level fixed by US law for investment by non-US firms in Iranian and Libyan oil and gas sectors (*infra* p.474). The prime minister also said that the promotion of social clauses by the West were aimed at negating the advantage of cheap labour in developing countries, and that globalization of trade was being used to impede developing countries. (JT 05-11-96)

Sino-Japanese textile trade

China and Japan agreed on measures to check soaring Chinese cotton textile exports to Japan. Under the accord China would strengthen controls by establishing quotas for cotton textile exports to Japan. The 1999 level of Japan-bound exports as

measured by Chinese customs statistics is expected to equal the average annual figure for four to five years through 1996.

The dispute broke out in July 1996 when the Japan Spinners Association and the Japan Cotton and Staple Fiber Wearers Association filed for a so-called 'safeguard' curb to limit surging imports from China. The Japanese government began investigations in August to study the possibility of invoking the curb, which is allowed by the WTO Textile Agreement to be imposed as a temporary step to protect domestic industries. The WTO Agreement primarily calls for trade control by exporting countries. (AsahiEN 07-11-96)

Chinese retaliation to US penalty for alleged textile trade violations

The US had introduced new rules on the import of textiles and garments as of 1 July 1996. Under the rules, the origin for garments is the country where the cloth is cut rather than where it is sewn; for fabrics, it is the country where the material is made rather than finished.

In early September 1996 the US penalized China \$19 million for allegedly attempting to circumvent quotas on its textile exports to the US by shipping more than 2 million garments through seven other countries (mislabeling and transshipment). China, which controlled 8% of the US textile market, denied the accusation, on its part accusing the US that the latter had not provided evidence and had not consulted China before applying sanctions, thus violating the 1994 textile agreement between the two countries. By way of retaliation, China announced a temporary ban on the import of a number of US goods, but later decided to delay the ban due to plans for further talks and to a pledge by the US to review the issue.

In early December the two parties broke off talks on the textile dispute but decided to resume them later in the month. On 2 February 1997 an agreement was finally reached, extending the 1994 agreement for four years. (IHT 09-09-96,11 and 12-11-96,09-12-96,1/2 and 3-02-97; JT 12-11-96,07 and 10-12-96; FEER 22-08-96:71,19-12-96:75,13-02-97:57)

International trade of Least Developed Countries

The Secretary General of the WTO had proposed a plan in June 1996 aiming at improving market access for these countries by eliminating all tariff and non-tariff barriers on their exports. The category of Least Developed Countries (LDC) refers to 48 countries classified as such for having an average per capita income of less than \$320 a year. Twenty-nine LDCs are WTO members, among which is Bangladesh. The plan could only succeed, however, if other developing countries not belonging to the category would accept the risk of their manufacturing capacity being moved to LDC countries. (IHT 10-12-96)

Japanese-US conflict on treatment of foreign shipping companies

The US Federal Maritime Commission had accused Japan of unfair treatment of foreign shipping companies in Japanese harbours resulting from discriminatory practices by the Japan Harbor Transportation Association. The Commission threatened to retaliate by imposing penalties of up to \$100,000 for each Japanese vessel calling at

US ports. Thereupon Japanese officials hinted that in that case Japanese shipping might unload their cargo in Canada instead of in US ports.(IHT 22/23-02-97)

US demand for a 'fair share' of Chinese government procurement

It was reported in early March 1997 that the US government handed a list of 20 Chinese infrastructure projects to the Chinese government and asked that specific US firms be chosen to build them. The choice of US firms would give them a fair share and would help ease the effects of the widening US trade gap with China.(FEER 13-03-97:63)

Revocation of Myanmar eligibility for GSP

The EU decided to strip Myanmar of special trading privileges in response to concerns over its human rights record. This implied the loss of eligibility for trade benefits under the Generalized System of Preferences.(IHT 22/23-03-97)

Japanese report on international trade

In the sixth annual report of the Japanese ministry of international trade and industry (MITI) on the practices of Japan's biggest trading partners, it was said that "[a]ll countries, to some extent, employ trade policies and measures that fail to conform to international norms".

The report attacked the US over, *inter alia*, continuing import restrictions on yellow-fin tuna and shrimp, but said it was improving in the area of anti-dumping duties. By contrast, the EU anti-dumping policies were considered to have become less transparent: the EU was allegedly increasingly using discretionary powers to impose duties in violation of WTO rules.(IHT 01-04-97)

Iran-German/Europe trade

It was reported that high debts and political differences had begun to strain economic ties between the two countries. German exports to Iran in 1996 amounted to \$1.3 billion (down from \$8 billion five years earlier), as against \$1.1 billion in German imports from Iran. Exports to Iran had fallen sharply because of Iran's foreign debt of about \$22 billion at the end of 1996.

Iran had a trade surplus of \$1 billion with the European Union as a whole, exporting \$6.1 billion worth of goods and importing 5.1 billion worth.(IHT 11-04-97)

China's most-favoured nation status in the US

The US president on 19 May 1997 announced his intention to renew China's MFN-status for the following year. The US Congress had 30 days in which to act on his recommendation or seek to overturn it, but the president said that he would veto a rejection by the Congress.(IHT 20-05-97) On 24 June 1997 the US House of Representatives approved the one-year extension.(IHT 25-06-97) China welcomed the vote and reiterated a call for permanent most-favoured nation status.(IHT 26-06-97)

Phase-out of Indian import barriers

The EU threatened to sue India before the WTO if it would not act quicker in implementing the phase-out of over 2,700 import barriers. The EU, the US and Canada argued that India was no more justified to maintain quotas on balance-of-payments grounds and that it must dismantle the barriers in the next two years. India, however, held the opinion that it needed nine years.(FEER 26-06-97:73)

JAPAN'S MILITARY ROLE**Increased deployment of Japanese military forces**

During the Gulf (Iraq) War Japan provided its allies with money but not with personnel. Since 1991, however, Japan had participated in UN peacekeeping operations in Cambodia, Zaire, Mozambique and the Golan Heights.

In 1996 Japan indicated it may be willing to contribute funds to a US-proposed African Crisis Response Force. The US made the proposal to the Organization of African Unity on 10 October 1996. All the Force's missions would have to be authorized by the UN. The US indicated its willingness to put up half of the amount needed in the initial stage and was looking to European countries and Japan to bear the rest.(FEER 19-09-96:16;JT 13-10-96)

JOINT DEVELOPMENT AND JOINT VENTURES

See also: Foreign investment (Myanmar), Oil and gas

Trans-ASEAN Gas Pipe System

It was reported that ASEAN contemplated a regional gas-transmission system linking the (then) seven member states.

The only existing international gas pipeline was the one providing Singapore with gas from the east coast of peninsular Malaysia under a 15-year contract that was to expire in 2007. Thailand and Myanmar had signed an agreement to pipe gas from Myanmar gas fields in the Gulf of Martaban to the shore and then overland to Thailand (*supra* p.423). The Indonesian Natuna gas field is scheduled to begin shipments of liquefied natural gas to Japan, Korea and Taiwan by 2005.(IHT 05-07-96)

It was reported that the Indonesian state oil company Pertamina and the Petroleum Authority of Thailand (PTT) had agreed on 21 August 1996 to proceed with discussions on the feasibility of a natural gas pipeline between the Natuna gasfield and the Thai maritime border, a distance of about 800-900 kilometre. Thailand would then pump it a further 200 kilometre to the mainland. While Pertamina would not be able to compete with other suppliers nearer Thailand on price, it could offer security of long-term gas supply.(ST 13-09-96;FEER 12-09-96:54-55,24-10-96:70;JT 19-11-96)

Iranian refinery in Pakistan

It was reported that Iran agreed to build a \$1.2 billion crude-oil refinery in the southwestern Pakistani province of Baluchistan. It was said that the two countries also

agreed to conduct a feasibility study for a \$3.5 billion natural-gas pipeline.(FEER 29-08-96:65)

Iranian petrochemical plant

Iran announced on 8 October 1996 that it had reached agreement with a Dubai-based consortium of German and South Korean companies to build a \$600 million petro-chemical plant at Kermanshah, 650 km west of Tehran. The plant would fall under a buy-back scheme.(AsahiEN 09-10-96)

Kazakh-Iranian oil co-operation

(*see also*: Oil and gas)

It was disclosed in August 1996 that Iran and Kazakhstan had concluded an agreement, under which Kazakhstan would export oil for use in Iran while Iran would export Iranian oil under a Kazakhstan label. The Kazakh export would start in November 1996. It was estimated that Kazakhstan would export 14 million barrels annually through Iran, possibly reaching 42 million barrels in a decade. It has reserves of more than 14 billion barrels.

Kazakh oil fields are on the Caspian Sea but the best transport routes to customers are through the Persian Gulf.(JT 05-11-96)

Pipelines for the transport of Kazakh oil

(*see also*: 3 AsYIL 380,434; 6 AsYIL 420)

Kazakhstan, Russia and Oman reached agreement on the building of a pipeline connecting the Tengiz oil fields with a port to be built on the Black Sea. The final agreement including the three states and eight oil companies was finally signed on 16 May 1997. Construction would start in 1998 and be completed in about two years.(IHT 20-11-96,17/18-05-97)

The Nam Theun-2 hydropower project in Laos

The 900-megawatt project, to be carried out on the Nam Theun River, was proposed by the Nam Theun-2 Electricity Consortium (NTEC) consisting of Transfield construction company of Australia, Electricité de France, Italian-Thai Development, Thai telecoms firm Jasmine International and another Thai financier. The government had given its approval in principle in 1993 and would hold a quarter share in the project.

The implementation of the project was stemmed by protests from some environmentalist movements, although other organizations in the same field disagreed and even supported the plans.

According to the Lao government the project is crucial to Laos's bid to catch up with the booming economies of other Southeast Asian countries. It insisted that Laos had no choice but to build hydroelectric stations and sell power to its wealthier neighbours, particularly Thailand. In July 1996 Laos also reached an agreement with Vietnam to sell electricity from two proposed facilities in southern Xekong province.(FEER 13-02-97:48)

JUDICIAL ASSISTANCE

The Bofors arms case

The case stemmed from a \$1.3 billion arms deal in 1986 between India and Bofors arms manufacturers of Sweden. The Indian government had been trying to find out whether leading Indian politicians had received bribes in connection with the deal. After it was established that Bofors had paid millions of dollars into Swiss bank accounts, India asked Switzerland to provide details. After seven years the Swiss Supreme Court ruled on 26 November 1996 allowing the government to grant the Indian request. The government accordingly decided to hand over secret bank documents to India. These were handed over to the Indian ambassador on 21 January 1997.(IHT 16-01-97)

JURISDICTION

See also: Inter-state relations (North Korea-Russia), International economic relations (G-15)

German court verdict on Iranian involvement in crimes

In the so-called *Mykonos* case (*see* 6 AsYIL 422) the German public prosecutor had asked the court for a life sentence for two Iranians, among whom an alleged intelligence official. He had also accused the religious leader of Iran and its president of complicity in the crimes. The Berlin District Court on 10 April 1997 pronounced its verdict in which it held that Iranian government organs and “the highest authorities of the Iranian state” were actively involved in the killing of the four persons by planning, directing and preparing the attempt. The verdict said that the killings were based on an assassination decree issued by the Committee for Special Operations. Of the five defendants, an Iranian and four Lebanese, two were sentenced to life-long imprisonment, two others received long prison sentences and one was acquitted.(IHT 11-04,12/13-04,18-04,29-04-97)

A warrant was issued in 1996 for the Iranian intelligence minister on suspicion of ordering the killing. After the court decision further arrest warrants were issued for 3 Iranian secret service officials, but the German public prosecutor decided not to take legal action against other Iranian leaders who were judged to be implicated in the assassination.(IHT 16-05-97)

In a letter sent to foreign ambassadors in Tehran the Iranian foreign minister described the German court decision as ‘biased and illegal’, and characterizing it as “more like a political manifesto than a legal document”.(IHT 17-04-97) Demonstrations were held outside the German embassy in Tehran while hundreds of policemen shielded the compound.(IHT 19/20-04-97)

On 29 April 1997 the EU endorsed a declaration calling on Iran to respect international law and renounce terrorism. It reaffirmed the suspension of its ‘critical dialogue’ with Iran, and maintained a long-standing European embargo on arms sales to Iran. The EU decision committed EU governments to co-operate in ensuring that visas were not granted to Iranian intelligence agents, and to work together to exclude intelligence agents from Iranian embassies in Europe.(IHT 29-04,30-04-97)

No FBI office in Beijing

China refused approval to the US to open an office of the US Federal Bureau of Investigation in Beijing. (IHT 11-04-97)

Pakistani citizen employed by US Drug Enforcement Agency

Pakistan rejected a US demand for the release of a detained local employee of the US DEA because the man was a Pakistani citizen and consequently fell under Pakistani jurisdiction. The man was accused of "involvement in drug trafficking and anti-state activities". (IHT 16-05-97)

KOREAN WAR**Alleged US POWs**

According to an internal US Defense Department report published in June 1996 there was credible evidence that 10-15 American prisoners from the Korean War were still in North Korea. The official North Korean news agency denied the report as a false rumour.

Under an agreement of May 1996 the two countries were scheduled to begin joint recovery of American remains in July 1996. (IHT 01-07-96)

Temporary ('tentative') peace accord

Repeating a similar offer made in February, North Korea urged the US on 25 July 1996 to sign a temporary peace accord and in that case envisaged a breakthrough in the negotiations for a permanent one, the returning of remains of US servicemen and the curbing of North Korean missile exports. (IHT 26-07-96)

LABOUR**Prohibition of child-labour**

Faced with threats of trade sanctions, the minister of labour of Pakistan ordered raids against factories that used child labour. (IHT 17-07-96)

US and EU pressures on labour rights

At the ASEAN meeting with its dialogue partners in July 1996 the US and the EU again raised the issue of global workers' rights, but the ASEAN warned the West not to raise divisive 'social clauses' in trade. (IHT 25-07-96)

The US and Europe complained that low wages and an absence of collective bargaining rights give developing countries an unfair trading advantage, while the developing countries consider efforts to promote labour standards a form of protectionism. The developed countries contend that competition from products made with cheap labour in Asia is costing them employment possibilities. But Japan opposed linking human rights and labour standards to trade: "Our position is that human rights [and]

labour standards are very important issues in their own right, but they should not be used as a pretext for protectionism".(IHT 26 and 27/28-07-96)

Abolition of child labour

Facing US threats to cut imports, the garment industry in Bangladesh announced it had discharged all child workers. Under an agreement of July 1995 the Bangladesh Garment Manufacturers and Exporters Association, together with ILO and UNICEF, would take more than 10,500 former child workers to schools. Under the agreement child workers had to be phased out by 31 October 1996.(JT 02-11-96)

LITIGATION

World Court accepts jurisdiction in Iran-US dispute

The International Court of Justice decided on 12 December 1996 that it had jurisdiction in the case of the claim of Iran relating to the destruction by the US of oil platforms in 1987 and 1988, during the Iran-Iraq War.(IHT 13-12-96;ICJ Communiqué No.96/33)

LOANS

World Bank loans in 1996 fiscal year

According to the World Bank annual report the bank made new loan commitments during the year ending 30 June 1996 amounting to \$5.42 billion for the Asian region. Of the amount China borrowed \$2.97 billion or 55 percent, equaling 13.9 percent of the total commitments.

China topped the world list of borrowers, followed by India with \$2.08 billion. Vietnam was the 10th biggest borrower, at \$502 million.(JT 27-09-96)

Pakistan accepts IMF conditions

Pakistan bowed to IMF demands in October 1996 to impose new taxes, reduce its budget deficit and slash its tariffs. This was done in order to get the IMF to release the final payment of a \$600 million emergency standby loan negotiated in 1995. The IMF had withheld the money because it said Pakistan had not lived up to its end of the bargain.(MainichiDN 12-10-96)

Chinese loan for Pakistan

In early 1997 the economic situation of Pakistan and its foreign exchange reserves were precarious. It had short term debt repayment obligations and had already borrowed 96 billion rupees from the domestic banking system. In December 1996 China granted a loan of \$150 million and in late May another \$200 million.(FEER 29-05-97:12)

MACAO

Sino-Portuguese talks

The two countries on 1 November 1996 finished their latest round of talks on Macao's transfer to Chinese rule in 1999 with two new accords, and progress toward a consensus on the gambling industry.

The two initialed accords concerned the maintenance of Macao's air transport agreements with Pakistan, Brunei and Korea and its membership in international postal and telecommunications unions.

Negotiations continued on questions of nationality and passports, civil servant pensions, state concession contracts and a Portuguese-language school beyond 1999.(JT 03-11-96)

MERCENARIES

Use of mercenaries in Papua New Guinea

It was reported that PNG had used mercenaries in its fight against insurgents on the island of Bougainville. The mercenaries were hired by the government from 'Sandline International', a British-based supplier which sub-contracted to 'Executive Outcome', a private South African army.(IHT 03-03-97)

The mercenary contract outraged the military, and on 17 March 1997 the commander of the army moved against the government, demanding that the prime minister resign. The latter dismissed the general. Meanwhile the mercenaries left the country on 21 March.(IHT 22/23-03,04-04-97;FEER 27-03-97:13)

MIGRANT WORKERS

The Malaysian situation

It was reported that out of a work force of 8 million, there were 1.75 million foreign workers in Malaysia, of whom only 750,000 were legally employed. In the 1980s Indonesians were the main unskilled migrants. In the 1990s, however, unskilled workers had come from various countries, with most illegals coming from Indonesia and Bangladesh.(FEER 31-10-96:17)

MILITARY ALLIANCES

South Korean-US military exercises

By way of response to the incursion by a North Korean submarine (*see supra* p.415) the South Korean defence ministry said it would seek to restart joint military exercises with the US. The exercises had been held annually since 1976 but were suspended in 1994 as part of the arrangements concerning the alleged North Korean nuclear programs.(IHT 25-09-96)

US bases on Okinawa

(see 6 AsYIL 421,425)

Okinawa accounts for 0.6 percent of Japan's total land area but provided about 75 percent of the land taken up by US military facilities in Japan. About 28,000 of the 47,000 US troops stationed in Japan are in Okinawa. (JT 10-10,24-10-96)

In April 1996 Japan and the US agreed on the total or partial return of 11 military bases at Okinawa, or about 5,000 of the approximately 25,000 hectares now used by the US. On 31 October the agreement was partially implemented by the partial reversion of four bases. (JT 01-11-96)

Japan had also formally agreed to provide the US navy with a floating dock for maintenance work following the refusal of a Japanese private dry dock to have its dry dock used as it would jeopardize its business. (JT 09-11-96)

During his visit to Japan early December 1996 the US defense secretary and the Japanese government announced the final consolidation and relocation plans for the US military bases in Okinawa. It was agreed to build a sea-based (offshore) facility for relocating a key marine corps heliport from Futenma Air Station that was to be closed. It was widely believed that it would be built on an open sea area. (JT 30-11,03-12-96) An agreement was concluded on reducing the US military presence on Okinawa, the return of about 12,000 of the 58,000 acres used by the US military, changes in training of marines and flight operations and reduction of aircraft noise. (IHT 01-12-96)

The Japanese prime minister assured the US on 31 March 1997 that Japan would continue to provide land for the US bases on Okinawa (see 6 AsYIL 421,425) so as to fulfill its obligation under the Japan-US Security Treaty. For that purpose the land expropriation laws would be revised, giving the government a temporary extension of its leases on land occupied by the bases after the current contracts expired on 14 May 1997. Under the current legislation the case of landowners who refused to renew their contracts was dealt with by an Okinawa land expropriation committee which would not render its decision before that date. (IHT 01-04-97)

US - Japan

(see also: Inter-state relations (China-Japan-US))

Japan and the US had been contemplating ways of improving their responses to crises under an agreement reached at a summit meeting in April 1996 (see 6 AsYIL 426). Repeating its objections, China through its embassy in Washington on 8 October 1996 again voiced concern about a proposed expansion of the scope of Japan-US security co-operation outside Japanese territory. Such expansion would make the Asian security situation complicated. (JT 10-10-96)

The US defense secretary visited Japan in early April 1997. The purpose of his visit was to "discuss regional security issues and the role that Japan and the US will play". More specifically, he came to seek assurance of non-combat support from Japanese forces in a Korean conflict and to urge Japan to join a US missile-defence initiative (see: Military co-operation). In the same month the Japanese prime minister visited the US and assured that Japan was not seeking a cut in US military forces in Asia.

The two countries were negotiating an update of their 1978 joint 'defence guidelines' for security co-operation. The US wanted firm assurances for the use of Japanese bases for operations and transportation in case of a new war in Korea. (ST 08-04-97; IHT 01 and 08-04, 27-05-97)

Tentative new guidelines were released on 7 June 1997, contained in an interim report of six months of talks to review the 1960 US-Japan Security Treaty. The revision of the existing guidelines resulted from the near-crisis in 1994 over the alleged North Korean nuclear weapons program, when gaps in the US-Japan understanding over their co-operation on crisis-management became obvious. The need for revision was enhanced by the Sino-US tension over Taiwan in March 1996. The new guidelines, of which the consistency with the Japanese constitution was considered questionable by some, gave Japan an enhanced military role in the Asia-Pacific region in the event of "situations in areas surrounding Japan". (IHT 7/8-06, 09-06-97; FEER 26-06-97:18, 40) A final version of the guidelines was released on 23 September 1997.

Even before the release of the tentative guidelines, the 'China Daily' wrote in early April 1997 that "since the US views China as a potential threat in Asia, it strengthened its military ties with Japan and embarked on a policy of containing China". (IHT 10-04-97)

According to Japan's Kyodo news agency the guidelines "appear to allow the US to get Japan's assistance when the former dispatches troops in an emergency on the Korean Peninsula, the Taiwan Straits, the disputed Spratly Islands in the South China Sea or anywhere else in areas surrounding Japan". Among other things, the Japanese military should conduct minesweeping in international waters and supply air and naval facilities, materials and fuel, although not weapons and ammunition, to US forces in the event of an Asian conflict. The new guidelines were deliberately vague in defining what 'situations' could give rise to such co-operation. Japanese officials said they could not define the specific geographical area where the regional contingencies envisaged in the guidelines could take place. (IHT 10-06, 11-06-97; FEER 19-06-97:13, 26-06-97:18)

MILITARY CO-OPERATION

Singapore-UK military ties

A visit to Singapore by the British Defence Secretary was hailed in a statement by the Singapore Ministry of Defence as a reflection of the close bilateral defence ties between the two countries and the UK's commitment to the Five-Power Defence Arrangement (FPDA, between Singapore, Malaysia, Australia, New Zealand and the UK). The statement added that Singapore valued its close and historical ties with Britain. (ST 13-09-96)

South Korean-US military exercises

By way of response to the incursion by a North Korean submarine (*see supra* p.415) the South Korean defence ministry said it would seek to restart joint military exercises with the US. The exercises had been held annually since 1976 but were sus-

pended in 1994 as part of the arrangements concerning the alleged North Korean nuclear programs.(IHT 25-09-96)

British navy visit to China

The first British navy ship to visit China in 10 years docked in Qingdao on 7 October 1996.(AsahiEN 08-10-96)

Singapore-Australian naval exercises

The two navies held their annual exercise off northern Australia.(IHT 12/13-10-96)

China - US Joint Defense Conversion Commission

It was reported that the US defense secretary decided to abolish the Joint Defense Conversion Commission (*see* 5AsYIL 464), because he considered it to have achieved little. When the Commission was set up in October 1994, the two sides agreed "to promote the orderly use, for peaceful purposes, of defence industrial, technological and scientific facilities and personnel not needed for defence requirements". Later, in the context of deteriorating Sino-US relations resulting from the US visit of the Taiwanese president, US sympathy with the project swiftly diminished. Among other things the continued flow of technology from the US to China raised concerns in America that export controls on such know-how were too lax.(FEER 15-08-96:13, 22-08-96:26) However, it was reported in November 1996 that the US General Accounting Office had found no evidence that the Commission activities had resulted in the transfer of technology or funds to the Chinese Army.(FEER 21-11-96:15)

Sino-US naval agreements

The Chinese defence minister said during his US visit in December 1996 that China had tentatively approved continued US naval visits to Hongkong after the colony would be turned over to China in 1997.(IHT 11-12-96;JT 11-12-96)

The two parties also agreed to hold periodic high-level defence consultations and exchanges of ship visits. In addition the US proposed a 'rules of the road' agreement for naval operations modeled on a similar US-Soviet agreement of 1989 for the purpose of avoiding military conflicts when ships come too close to one another or their intentions are suspect. It was agreed that the draft would be formalized in a series of working groups.(IHT 11-12-96;FEER 26-12-96/02-01-97:13)

In March 1997 Chinese navy ships made their first port visit to the US, sailing into San Diego Bay.(IHT 24-03-97)

France - China

During the first visit to China ever since the establishment of diplomatic relations in 1964, the French defence minister on 7 April 1997 urged China to increase Sino-French co-operation in all military fields. He said that France wanted to engage in a strategic dialogue with China to develop exchanges between the armed forces and study possible co-operation in technical matters.(ST 08-04-97)

Myanmar – China

China and Myanmar concluded an agreement to strengthen military co-operation, consisting of, *inter alia*, training of members of the Myanmar armed forces and ‘fiscal assistance’. (FEER 30-01-97:12)

US-Japanese anti-missile defence project

It was reported that exploratory talks on the issue which had been held during the past three years might end in a negative way with Japan deciding not to join the project. It was said that the US would press ahead with the project to protect US forces based in Japan from a possible North Korean or Chinese attack. The US-Japanese discussions began shortly after North Korea test-fired a Rodong-I missile into the Sea of Japan in 1993.

The Chinese argued that a Japanese anti-missile program would undermine regional arms control efforts and China’s nuclear deterrent, particularly against US military bases in the region. (IHT 15/16-02-97)

US-Vietnam links

The commander of the US Asia-Pacific forces on 21 March 1997 called for stronger links with Vietnam, to help “promote greater Pacific Rim security”. (IHT 22/23-03-97)

Five Powers Defence Arrangement (FPDA)

The FPDA, consisting of Australia, Malaysia, New Zealand, Singapore and the UK held naval exercises in late April 1997. The FPDA was formed in 1971 to protect Singapore and Malaysia from communist invasion. Nowadays and in the future, it will be more a focal point for military training rather than a strategic body. For the non-Asian members, it provides benefits: through it Britain as well as Australia can project power in Southeast Asia without drawing regional criticism. (FEER 15-05-97:26)

Renewed US use of Philippine port

Five years after its abandonment of the Subic Bay naval base, the US started negotiations with the Philippines to use the port and its facilities more frequently in order to maintain a stronger naval presence in the South China Sea. (IHT 21-05-97)

Indonesian withdrawal from US training program

It was reported that Indonesia had withdrawn from a US-sponsored military education and training program from which it was barred in 1992 after the killing of demonstrators in East Timor and to which it was re-instated in late 1995 (*see* 5 AsYIL 467; *infra* p. 476). (IHT 7/8-06-97)

Russian navy visit to Japan

A Russian navy vessel arrived in Tokyo harbour on 27 June 1997 for a goodwill visit, the first to Japan by a Russian warship in 103 years. (IHT 28/29-06-97)

MINORITIES

Koreans in Japan

At the end of World War II there were about 2.5 million ethnic Koreans in Japan. After repatriation of most, 600,000 remained in 1948. Most of these originated from the southern half of Korea. In October 1945 the League of Koreans in Japan, closely linked to the Japanese Communist Party, was founded, while other, anti-communist, organizations which were also established, merged to become the Korean Residents Union in Japan (*Mindan*) in 1946. The division was originally not related to the subsequent division of the country. The League was reorganized and became the General Association of Korean Residents in Japan (*Chongryun*) in 1955, severing its ties with the Japanese Communist Party.

At present most of the 670,000 Koreans in Japan and their descendants have been granted permanent residence status, while 190,000 have acquired Japanese nationality since 1952. The annual number of naturalized Koreans reached 10,000 in 1995. According to estimates by the Japanese authorities, 369,000 of the permanent residents are affiliated with *Mindan* while 247,000 are affiliated with *Chongryun*, with 63,000 being neutral. The Japanese authorities had not publicized statistical breakdowns since 1971 to avoid feeding conflict between the organizations.

Each organization considers all Koreans their compatriots. Affiliation with either ethnic organization appears not to reflect the nationality of the person concerned. North Korean nationality is not recognized by the Japanese government because Japan has not recognized the DPRK.

The Japanese aliens registration provides for two asymmetrical categories: 'South Korea' for those who identify themselves as South Korean nationals, and 'Korea' for those who do not do so, including those being 'neutral'. It is said that as of 1992, 540,000 were registered as South Koreans and 150,000 as 'Koreans'. (JT 19-11-96)

Ethnic Nepalis from Bhutan

As a result of several reasons (*see* 2 AsYIL 349, 3 AsYIL 423) more than 100,000 ethnic Nepalis from Bhutan were reported living in refugee camps in southern Nepal, with uncertain nationality. According to the Bhutanese foreign minister many of these persons had never been Bhutanese citizens, but just illegal immigrants who had been living in southern Bhutan. This would be part of the generally acknowledged fact of Nepalese emigration to neighbouring countries. Such Nepalese newcomers were to be distinguished from a long-existing ethnic Nepalese minority settled in the Bhutanese lowland. An enormous increase of ethnic Nepalese in the country was shown by a 1988 census and led to a Bhutanese nationalist policy, *Driglam Namzha*, including the promotion of the national language (*Dzongkha*) and an obligation for citizens to wear the traditional Bhutanese dress. This in turn resulted in conflicts between the Bhutanese government and the ethnic Nepali, leading to an exodus of the latter to Nepal.

It was agreed that Nepal was entitled to send back those among the refugees who had Bhutanese nationality. The two sides had agreed to jointly verify the citizenship of the refugees, with technical assistance from the UN High Commissioner for Refugees. However, Bhutan insisted that the nationality laws of both countries be the basis for

the verification. This was rejected by Nepal because under Bhutanese law citizenship is lost automatically by emigration.(FEER 25-07-96:30)

[Among the population of Bhutan the *Drukpa* (Tibetan descendants) form approximately 20% and occupy the northern part of the country. They speak Dzongkha and practise Himalayan Lamaist Buddhism. *Sharchhops* of Indo-Burmese origin live in the eastern region and constitute around 30% and practise the same religion. The *Lhotshampa* are Nepali-speaking Hindus of Indo-Aryan origin, began immigrating from Nepal since the late 1800s, make up about half of the population, and tend to dominate the south. The king belongs to the Drukpa part of the population.

In 1958 the first Citizenship Act was introduced: Ethnic Nepalese who had been in the country for at least 10 years and owned agricultural land became Bhutanese citizens. Under a new Citizenship Act of 1985 “[A] person permanently domiciled in Bhutan on or before 31 December 1958, and whose name is registered in the census registration ... shall be deemed a citizen by registration”. Many of the southern Lhotshampas were declared non-nationals and illegal immigrants by lack of formal proof of fulfilling the requirements.]

MISSILE TECHNOLOGY

North Korean missile tests and proliferation

US reconnaissance satellite images had led to reports about North Korean preparations for a missile test-launch in the Sea of Japan, but these conclusions were later denied by the US itself. Yet the US sent “a very strong message” to North Korea not to carry out a medium-range ballistic missile test. The latest test-launch of a medium-range missile by North Korea took place in May 1993.(JT 17-10,18-10,20-10-96)

Later North Korea agreed to meet the US on 12-13 May 1997 in New York for talks about missile proliferation.(IHT 15-04-97)

Development of long-range missiles by South Korea

South Korea and the US were to hold talks on allowing South Korea to develop long-range missiles. Under a US-South Korean agreement of 1979 the latter had promised not to develop missiles with a range of more than 180 km, but it wanted this ceiling to be lifted to 300 km in order to counter threats from North Korea. 300 km is the maximum range allowed under the (currently 31-state) Missile Technology Control Regime (*see* 1 AsYIL 270) to which South Korea was not yet a member. Meanwhile South Korea denied that it was already developing a long-range missile.(FEER 12-09-96:36;JT 30-11,04-12,05-12-96)

India shelves missile production

In August 1996 the Indian foreign minister divulged in an interview that India was likely to resume long-range missile testing after a halt of more than two years, despite US pressure for a permanent cessation. It would start its own program to make cryogenic rocket engines. In 1993 the US had blocked a move by Russia to transfer their technology to India (*see* 4 AsYIL 484). There had been no further test firing of the

long-range 'Agni' missile since February 1994. The Agni has a range of 2,500 kilometres.

In December 1996, however, India shelved the development of the 'Agni', although it would keep its options open to resume the program. (JT 07-12-96; IHT 21-08,30-12-96)

In February 1997 it was announced that India would test the Prithvi missile on 24 February. (IHT 22/23-02-97)

MONETARY MATTERS

Asian central banks co-operation

It was reported that 11 Asian-Pacific central banks from Australia, Japan, Indonesia, South Korea, Malaysia, New Zealand, the Philippines, Singapore, Thailand, China and Hongkong – members of the Executives Meeting of East Asian and Pacific Central Banks – had decided to set up permanent working groups to discuss ways of enhancing co-operation. The banks were already negotiating repurchase agreements, giving them access to the financial resources needed to defend local currencies during a flight of capital.

The governor of the Reserve Bank of Australia who had pursued the closer co-operation, questioned the ability of multilateral monetary authorities to react to regional crises, such as major attacks on a local currency, as they were not keeping up with such market developments. He envisaged Asian central banks moving towards setting up the equivalent of the Bank of International Settlements. (IHT 09-08-96)

Financial and central-bank officials from six Asia-Pacific countries ('Six Markets Group') met for the first time in early March 1997 and agreed to work closely together to avert Mexico-style (1994) currency crises in the region. The six countries were: Japan, US, China, Hongkong, Singapore, and Australia, and accounted for 48 percent of the world's economic activity, a third of its foreign exchange reserves and 31 percent of its trade.

Since 1992 Japan, Australia, Hongkong and Singapore had been meeting regularly to discuss financial issues. After the Mexican peso crisis they agreed to co-operate on intervention to stabilize regional currencies, and invited the US and China to join the meetings. The Bank of Japan had forged agreements in 1996 establishing it as a lender of last resort for seven other Asian central banks in stemming any attacks against their currencies. (IHT 05-03-97)

Expansion of membership of the Bank for International Settlements

The BIS announced on 9 September 1996 that it would expand its membership from 32 (33 since the dismemberment of Czechoslovakia) to 41 (42) by March 1997, by including, *inter alia*, Brazil, China, Hongkong, India, Mexico, Russia, Saudi Arabia, Singapore, and South Korea. The BIS was originally set up in 1930 to process German reparations payments from World War I, but evolved into an informal co-ordinating centre for central banks. It helps to process international payments, to manage currency reserves and to offer a monthly meeting place for top monetary officials. It is dominated by the so-called Group of 10 (G-10) that actually has 11 members:

Belgium, Canada, France, Germany, Italy, Japan, The Netherlands, Sweden, Switzerland, UK, US. The other members of the BIS are: Australia, Austria, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Iceland, Ireland, Latvia, Lithuania, Norway, Poland, Portugal, Romania, Slovakia, South Africa, Spain, Turkey and Yugoslavia. (IHT 10-09-96)

Chinese yuan convertible under the current account

China decided to make the yuan convertible under the current account as of 1 December 1996 in conformity with its obligations to the IMF.

[Convertibility under the current account is trade-related and covers payment for goods and services as well as repatriation of profits by foreign companies from operations in China] (JT 29-11-96)

Speculation on the Thai baht

According to the Thai central bank on 24 June 1997 the foreign financier GEORGE SOROS had led an attack on the Thai baht in May 1997 that drove the currency to an 11-year low. Traders betting the baht would fall, borrowed the currency [to buy foreign currency] with the intention to buy it later [in order to pay back] at a cheaper rate. This prompted Thailand to impose currency controls and raise interest rates. (IHT 25-06-97) It was said that Thailand spent about \$5 billion in May 1997 to shore up its currency and it was not clear how long Thailand could fend off a devaluation. (IHT 26-06-97)

NATIONALITY

See: Hongkong, Inter-state relations (China-South Korea), Minorities

NON-ALIGNED MOVEMENT (NAM)

New Delhi ministerial conference

The NAM, under chairmanship of Colombia, held a ministerial conference in New Delhi on 7 and 8 April 1997. It was attended by 74 ministers (from a membership of 113). The conference dealt with UN reforms and an enhanced role of the NAM, nuclear disarmament, and economic development of the Third World.

On UN reforms the declaration adopted by the conference said, *inter alia*: "The use of the veto should be curtailed with a view to its eventual elimination. There shall be no partial or selective expansion or enlargement of the Security Council to the detriment of the developing countries."

The conference also elected South Africa as chairman of the movement [for the term 1998-2001, starting at the 12th Summit at Durban, August-September 1998]. (ST 08-04, 09-04-97; IHT 07-04-97)

NUCLEAR ENERGY MATTERS

Implementation of KEDO agreement

It was reported that the implementation of the 1994 agreements relating to the replacement of existing North Korean nuclear installations with safer ones met with problems (*see* 5 AsYIL 545).

Among the participants it was agreed that the US would pay \$50 million, or about half of the amount needed, for the supply to North Korea of 500,000 tons of heavy oil annually during the time the new reactors are under construction.

Since 1994 the US had financed \$26.5 million. In early July 1996 the US Congress initially cut further funding from \$25 million to \$13 million. North Korea denounced the decision and threatened that if the oil was not supplied on time, it would reconsider its nuclear freeze. The full amount was eventually appropriated, but a \$19 million Japanese emergency contribution was needed to keep the oil supply running. (*see* 6 AsYIL 435).

In 1997 the US on behalf of KEDO asked a contribution of \$15 million from the Arab Gulf states but was rebuffed.

The participants also agreed that the cost of the new reactors, about \$4 billion, would be borne by Japan and South Korea, since the US was already spending \$2.5 billion annually for its forces in Korea. (IHT 03-07, 22-07-96, 26-02-97; FEER 25-07-96 p.22)

The projected building of KEDO nuclear reactors

In July 1996 the executive director of KEDO announced that the project of building two nuclear plants in North Korea was proceeding smoothly and that the building could begin during the year. The price of the project would be \$4.9 billion. (IHT 25 and 27/28-07-96) Within KEDO it was agreed that the Korean Electric Power Corporation of South Korea would be the prime contractor for the reactor project. (IHT 26-03-97) However, the Organization decided to freeze the building of the reactors in North Korea due to the North Korean submarine incident in September 1996 (*see above* p.415). On the other hand North Korea threatened to lift the freeze on its nuclear program if KEDO failed to start construction work at the scheduled time, i.e. by the end of 1996. (JT 23-10-96) On 15 November 1996 North Korea warned again it could not keep its nuclear program frozen "only to get heavy oil, the shipments of which may be suspended any time, with no importance given to when the light-water reactors will be provided". (IHT 16/17-11-96)

By March 1997 KEDO already had ten members with additional states making financial contributions. It was reported that the EU would also become a member and member of the executive board (*see* KEDO constitution in 5 AsYIL 547). (IHT 26-03-97)

Planned Chinese sale of nuclear facility to Iran

China notified the IAEA in 1996 that it planned to go ahead with the sale of a nuclear plant to Iran which needed the facility to make fuel rods for its civilian nuclear program. Being a party to the Nuclear Non-proliferation Treaty the plant would be open to international inspections.

The US, however, suspected Iran to use the treaty as a cover to develop nuclear weapons, and tried to prevent the Chinese sale. In fact, Russia provided more assistance in the nuclear field to Iran than China. (IHT 09/10-11-96; JT 10-11-96)

Developments in Sino-US nuclear co-operation

(*see also*: Embargo)

In 1985 the two countries concluded an agreement on co-operation in the field of peaceful use of nuclear energy. This agreement would enable China to procure nuclear reactors from the US for the implementation of its energy planning. The agreement had not yet been put into effect since under US law the US president has to certify that China is not assisting unsafeguarded nuclear facilities or, in other words, that it is not engaging in nuclear proliferation.

In the late 1980s when certification was under way, the US claimed evidence of Chinese sales and other assistance to Pakistan, and since the Tienanmen incident in 1989 the whole process was frozen.

In the meantime China had become a party to several treaties on the matter, such as the Non-proliferation Treaty, the Comprehensive Test Ban Treaty and the Chemical Weapons Convention. On 11 May 1996 China agreed not to provide aid in the form of devices used in nuclear arms production to unsafeguarded nuclear facilities, and said it would join the so-called Zangger Committee, which draws up a list of items that should be subject to IAEA inspections if exported by a signatory of the NPT. This set the stage for new talks with the US. (JT 01-11-96; FEER 19-06-97:14)

The talks started in November 1996 when the US secretary of state said that the US "is prepared to consider, as consistent with US law, further steps in the area of peaceful nuclear co-operation even in advance of our full implementation of the 1985 agreement". It was later said that certification would require three steps: a further curtailment of China's nuclear co-operation with Iran, full membership in the Zangger Committee, and the adoption of nationwide regulations to control exports of sensitive items. That is, provided the US Congress did not pass a law making the standard for certification even stricter, such as requiring the non-export of other than nuclear technology, such as chemical and biological weapons, and the non-diversion of US-made civilian supercomputers to military use. (AsahiEN 21-11-96; JT 22-11-96; FEER 19-06-97:15)

It was reported that China had agreed to establish a system for tracking the exports of nuclear materials, constituting a step toward the implementation of the 1985 agreement. (IHT 21-11-96)

Regional co-operation in the field of nuclear safety

Australia, China, Indonesia, Japan, Malaysia, the Philippines, South Korea, Thailand and Vietnam held a conference in Tokyo in early November 1996 to discuss ways to ensure the safety of nuclear power plants and increase the transparency of nuclear power generation in the region. Participating as observers were the G-7 states apart from Japan, India, Pakistan, Russia, Singapore, Uzbekistan, the EU, the IAEA and the NEA of the OECD. The conference was an Asian follow-up to a nuclear safety summit held in April 1996 by the G-7 and Russia. (JT 06-11-96)

Resumption of IAEA-North Korean talks

After having failed to reach agreement in September 1996, the two parties would resume talks in January 1997 on the monitoring of the freezing of North Korea's nuclear program, particularly the aspect of provision of data on the trafficking of nuclear material.(JT 05-12-96)

Second Chinese nuclear reactor for Pakistan

(*see also*: Inter-state relations (China-Pakistan))

According to the Pakistani foreign ministry, China was willing in principle to provide a second nuclear power plant to Pakistan, next to the one at Chasma in Punjab, under the safeguards of the IAEA. The question of financing was not yet resolved.(IHT 06-12-96;AsahiEN 06-12-96)

Second shipment of nuclear waste for Japan

The French state-owned nuclear power company COGEMA sent a second shipment of radioactive reprocessed nuclear waste to Japan (*see* AsYIL Vol.2:357, Vol.3:428, Vol.5:476) in early 1997.(AsahiEN 06-12-96) The British ship 'Pacific Teal' left Cherbourg, France, on 13 January 1997 and charted a course around the Cape of Good Hope, across the Indian Ocean and through the southwest Pacific. The ship would arrive at the Japanese port of Mutsu Ogawara in mid-March 1997. New Zealand expressed strong concern about the planned route, and Malaysia banned the ship from its waters.(IHT 15,16-01-97)

Taiwan-North Korean nuclear waste pact

Under a contract of 11 January 1997, the state-owned Taiwan Power Co. (Taipower) would ship 200,000 barrels of low-level nuclear waste over two years to North Korea. It was reported that Taipower had agreed to pay \$1,150 per barrel taken by North Korea. The Taiwanese foreign ministry said it was satisfied that North Korea was capable of handling low-level radioactive nuclear waste and that the contract complied with international regulations. South Korea strongly objected to the arrangement, saying that there was no verification that North Korea could store the nuclear waste safely. The disposal site was less than 65 kilometres from the North-South border.(IHT 28-01,8/9-02-97;FEER 06-02-97:16)

India - Russia

The two countries failed to reach agreement on the sale by Russia of two nuclear reactors on 25 March during a visit by the Indian prime minister to Moscow in March 1997. Talks on the \$2 billion sale of two reactors to be built in the state of Tamil Nadu began in 1988.(IHT 26-03-97)

Iran - Ukraine

Ukraine responded to US and Israeli pressures by deciding not to supply turbines for a nuclear reactor that Russia was to build for Iran (*see* 6 AsYIL 436).(IHT 16-04-97)

OIL AND GAS

See also: Divided states:China, Foreign investment, Joint development

Natural gas consumption, production, reserves

It was reported that three quarters of the world's liquid natural gas (LNG) was being sold to Japan, South Korea and Taiwan, with new consumers like China, India and Thailand entering the market. Asian demand would more than double to as much as 138 million tons a year by 2010, compared to about 55 million tons in 1995. The fuel comes mainly from Abu Dhabi, Alaska, Australia, Brunei, Indonesia, and Malaysia, with Indonesia being the largest exporter. The Middle East accounts for a third of the world's proven gas reserves but only 6 percent of world production.(IHT 06-08-96)

Atlantic Richfield Co.(Arco) of the US, under production sharing contracts with Pertamina (the Indonesian state-owned oil company), had found new natural gas reserves at Irian Jaya province ('Wiriagar Deep'), and British Gas had found significant gas flows in its concession, adjacent to the Wiriagar Deep fields. These reserves were believed to be less large than the Natuna gas deposit ('D-Alpha'), at present considered the world's largest, but the Irian Jaya fields were said to be much easier and cheaper to tap than Natuna.(FEER 12-09-96:54-55,24-10-96:70;JT 19-11-96)

Philippine gas field

Occidental Philippines and Shell Philippines Exploration would reportedly join National Power Corp. of the Philippines in tapping the Camago-Malampaya gas field, the country's largest, and build a pipeline to the island of Luzon.(FEER 05-12-96:75)

Oil, gas, and pipelines politics in Central Asia

The Karakorum desert holds the third-largest gas reserves in the world and has estimated oil reserves of 6 billion barrels. Attempts by Turkmenistan to build the necessary pipelines to convey the oil and gas through the territory of its neighbours had, however, been blocked by various reasons, and for years the former Soviet pipeline system had been the only means to export oil and gas from Central Asia westwards.

Lately the US had been vying for influence in Uzbekistan by making investments and enhancing trade, as a counterweight to Russian hegemonism and Iranian influence. Uzbekistan plays an important role in the whole Central Asian region, with large Uzbek minorities in the surrounding Central Asian states. It was reported that there were thus two major coalitions emerging: the US lining up with Uzbekistan and Turkmenistan on the one hand, and Russia together with Kazakhstan, Kyrgyzstan, Tajikistan and Iran on the other.

Feasibility studies were being made for a new network of pipelines from Turkmenistan, such as a project involving Mitsubishi of Japan, China National Petroleum Corp. and an affiliate of Exxon of the US, concerning an 8,000-kilometre gas pipeline stretching from Turkmenistan to Japan. Another project is concerned with a pipeline heading south through Afghanistan to Pakistan. This project is the subject of fierce competition between Unocal of the US and Bidas of Argentina. Still another scheme

is a pipeline from Central Asia towards Iran, which offers the shortest route to the Arabian Sea.

In April 1995 Turkmenistan concluded a deal with Iran and Turkey for a pipeline, with Iran offering to pay for the first part linking the gas fields in western Turkmenistan with northern Iran. Under a 29 December 1996 agreement Turkey committed to purchase an annual 8 bcm of gas via the new pipeline. Iran would provide Turkey the gas in a swap deal until the rest of the pipeline would be laid. Turkmenistan too had signed an oil-swap deal with Iran to export oil to Europe. (see for similar schemes: *supra* p.451)

The US is supporting the Turkmenistan-Afghanistan-Pakistan pipeline project, which would offer an exit point to Central Asian oil and gas while bypassing Russia and Iran. (FEER 10-04-97:22) The project might forge peace in Afghanistan and prevent future energy shortages in Pakistan.

The idea of a pipeline from Turkmenistan south through Afghanistan to Pakistan, originated in the award, in early 1992, to Bidas oil company of Argentina, of the Yashlar oil and gas block in the Dauletabad fields of eastern Turkmenistan, and of the Keimar oil block a year later. The plan includes a 1,300-kilometre gas pipeline from Yashlar, crossing western and southern Afghanistan to Sui in central Pakistan. The line could be extended to India as well as Karachi for gas exports to East Asia. Bidas signed an agreement with the Afghan government of president RABBANI in February 1996, and also with the Taleban (*supra*). It had set up TAP Pipelines, a partnership with the Saudi company Ningharco which is being linked to members of the Saudi power elite.

In April 1995, however, Turkmen officials met Unocal, and reportedly with the backing of the US government the Turkmen president signed an agreement with Unocal and its Saudi partner, Delta Oil, to build a(nother) gas pipeline. Unocal's proposal is for a pipeline extending from the Dauletabad gas fields through Afghanistan to Multan in eastern central Pakistan. It set up a consortium which included itself, Delta Oil, Gazprom of Russia, and Turkmenrosgaz, and which had to be announced by 1 October 1997. Unocal was committed to present a final report on the project by 30 June 1997, and to start construction by 31 December 1997. There was, however, no certainty whether the Taleban would give permission to build the pipeline across their country.

Unocal also signed another agreement relating to the Central Asian Oil Pipeline Project including a pipeline from Chardzhou in northeast Turkmenistan to an oil terminal on Pakistan's coast west of Karachi.

In the same year, Turkmenistan moved against Bidas, banning its oil exports, shutting down its other operations, and demanding renegotiation of all Bidas contracts. In response, Bidas filed a suit against Unocal in the US, seeking damages for alleged interference with its gas fields and pipeline project. Unocal's main defence against Bidas was that in May 1996 Uzbekistan, Pakistan, Turkmenistan and Afghanistan had signed an agreement allowing Turkmenistan to nominate Unocal's consortium to build the pipelines.

Bidas also began arbitration proceedings with the International Chamber of Commerce against Turkmenistan for breach of contract in three separate cases. On 28 January 1997 the ICC issued an interim order under which Turkmenistan was to allow

Bridas to resume oil exports from Keimar. There were no signs that Turkmenistan would comply.(FEER 10-04-97:22-28,19-06-97:73)

ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

South Korea invited for membership

The OECD on 11 October 1996 decided to offer membership to South Korea. An agreement on its entry as member would be signed on 25 October 1996.(JT 13-10-96) The South Korean parliament approved the membership on 26 November 1996.(JT 27-11-96) Korea finally became member on 12 December 1996.(JT 14-12-96)

RAIL TRAFFIC AND TRANSPORT

Trans-Asian railways

It was reported that plans put forward in the 1960s concerning a trans-Asian railway between the region and Europe were being revived. In Southeast Asia gaps exist between Thailand and Vietnam and between Vietnam and Cambodia. In ASEAN Malaysia was appointed in 1996 to co-ordinate a regionwide rail study.(IHT 31-07-96)

The 'Silk Road' rail cargo link between China and Europe through Central Asia (the third one next to those through the Russian Far East and through Mongolia) was reported to be finally in operation in early August 1996.(IHT 06-08-96)

Iran-Turkmenistan rail link

A rail link between the two countries was completed and opened on a limited basis in May 1996. The railroad originates in Mashhad, 450 miles east of Tehran, and runs east for 105 miles to Sarakhs. After crossing the Bridge of Friendship into Turkmenistan, it turns north to Tedzhen, where it links to the network serving Central Asia, Russia and the Caucasus. The new line represents an opportunity for the Central Asian republics to reduce their economic dependence on Russia by gaining access to new international markets through Iranian ports on the Persian Gulf.(IHT 11-12-96)

RECOGNITION

See: Civil war

REFUGEES

See also: Borders

Admission of Vietnamese refugees for settlement in the Philippines

The Philippines gave a reprieve to 1,000 Vietnamese asylum seekers, allowing them to stay in the country.(IHT 18-07-96)

Repatriation of Vietnamese refugees

The last 486 of more than 10,000 Vietnamese asylum seekers in Indonesia were repatriated from Galang Island to Vietnam on 2 September 1996.(FEER 19-09-96:13)

Repatriation of refugees from Bangladesh to Pakistan

The Pakistan government declared its willingness to take back thousands of Urdu-speaking refugees stranded in Bangladesh for more than two decades, since the establishment of the state of Bangladesh in the former territory of East Pakistan.

There were about 238,000 Urdu-speaking persons who sided with Pakistan during the war in 1971 and later opted for Pakistan as their homeland. Nearly 127,000 of the refugees, known as Biharis, were already resettled in Pakistan in the early 1970s.(IHT 19-08-96)

North Korean refugees

In view of the worsening economic situation in North Korea the question arose about the reason of the relatively small number of North Korean refugees, particularly to China. It was said that up to late 1996 some 1,000 persons had fled to China since 1992. One of the reasons listed was a 1986 treaty on the handover of illegal immigrants, under which those apprehended in China were instantly turned over.(FEER 10-10-96:27)

In May 1997 South Korean navy officials rescued a group of 14 persons who had fled North Korea by boat, the first to do so. They were the largest group of defectors since the arrival in December 1996 of a group of 17 who trekked through China and Hongkong.(FEER 22-05-97:13)

Eviction of Chinese refugees

It was reported that Indonesia had ordered a vessel with 200 Chinese refugees to leave when it came ashore on an island in West Nusa Tenggara Province (south eastern Indonesia). The refugees were heading to New Zealand.(IHT 24-02-97)

Myanmar Karen refugees in Thailand

(*see also*: Borders)

A Myanmar army offensive aimed at wiping out Karen National Union rebels in February 1997 resulted in nearly 15,000 refugees entering Thailand. It was reported that in order to prevent Karen rebels among them from operating from its territory, Thailand had forced about 5,000, mainly male, Karen, back into Myanmar in late February 1997. It would thereby reverse a decades-old policy of sheltering refugees from Myanmar. The commander of the Thai forces in the area concerned, however, denied the forcible repatriation of refugees. Both countries stood to gain economically from an end to the Karen insurgency (*see* Foreign investment).(IHT 28-02,01/02-03-97)

REGIONAL SECURITY

See also: Military alliances

Asean Regional Forum

The Asean Regional Forum met in July 1996 for the third time. Its membership was enlarged to 21 states and organizations by the inclusion of India and Myanmar. Except the annual ministers conference, civilian and military officials meet more frequently on confidence-building measures. It was reported that Western members had expressed reservations about Myanmar's entry, that India had agreed not to raise its disputes with Pakistan, and that the forum did not deal with the Taiwan dispute. (IHT 23-07-96; FEER 11-07-96:36)

First multilateral discussion of regional security

An (unofficial) Forum for Defence Authorities in the Asia-Pacific Region held its first meeting in late October 1996 since it was established in 1994 as a consultative body for security in the region. It was attended by all 21 members of the ASEAN Regional Forum except Brunei.

It was reported that the US maintained that the current military balance in the region owes much to the presence of the US armed forces, calling the US military the premise for regional security. The meeting also dealt with the importance of UN peace-keeping operations and humanitarian relief activities, anti-disaster measures, removal of anti-personnel land mines and prevention of international crimes. (JT 31-10-96)

Japanese-Canadian consultations

At talks between the Japanese and Canadian prime ministers during the latter's stay in Japan on his way back to Canada from the Manila APEC meeting, it was agreed to launch bilateral consultations on security in the Asia-Pacific region. (JT 28-11-96)

Stationing of US forces in Asia

During a trip to several Asian countries, the US defense secretary warned that any reduction of US troop numbers could trigger a dangerous arms race in Asia. In response the Chinese foreign ministry said that China opposed the stationing of foreign forces in the region: "We believe Asian nations should preserve the peace and stability of the Asian region. We believe Asian nations are fully capable of doing so." The spokesman recalled that the Chinese position had always been to oppose the stationing of foreign troops in Asia. During a meeting of the ASEAN Regional Forum in July 1996 (*see supra*) the Chinese foreign minister said that the presence of US forces in Asia was "a matter left over from history". (IHT 10-04-97)

In the first major defence review in four years by the US Defense Department the US defense secretary proposed maintaining 100,000 military personnel in Asia to preserve the balance of power. (FEER 29-05-97:13)

RIVERS

Indo-Bangladesh sharing of water from the Ganges River (Hindi: Ganga, Bengali: Padma)

The two countries signed a new treaty on 11 December 1996 (text in 6 AsYIL 516) which has a 30-year validity period, replacing previous agreements of 1977 and 1982.

The level of water of the Ganges can vary dramatically between that during the monsoon and during the January-June dry period. The Ganges water is of crucial importance for millions of farmers in both countries, and the future of the port of Calcutta also depends on the quantity of water.

The Indian Farakka Barrage, built in 1974 near the border between the two countries, grew into a major source of friction. The dam curbed the flow of the river which irrigates much of northern India before flowing into Bangladesh. It also aimed at diverting Ganges water through the Hooghly River to Calcutta in order to prevent the port of Calcutta from silting up. Bangladesh charged that the dam held back too much water during the annual dry season and released too much during monsoon rains, causing flooding. The dispute caused Bangladesh to ignore Indian desires, such as a transit route to its northeastern state of Assam.

In 1977 an agreement was reached under which Bangladesh was allowed a guaranteed minimum of 1,020 cubic meters per second between October and June. That guarantee lapsed in 1982 and was not maintained in a new 1982 six-year agreement. Some years ago the Bangladeshi prime minister raised the question in the UN General Assembly, but to no avail. An increasing number of Bangladeshi farmers left the country out of desperation and settled illegally across the border in India.

Under the new treaty, if the water flow at Farakka is below 2,100 cubic meters per second, as it usually is between March and May every year, the two parties will split the water equally. If the flow is between 2,100 and 2,250 cubic meters per second, Bangladesh will receive 1,050 cubic meters per second with the rest going to India. Above 2,250 cubic meters per second, India will be guaranteed 1,200 cubic meters per second and Bangladesh the rest. The treaty is to be reviewed every five years.

It was said that the treaty would last unless the overall flow of water at Farakka is reduced by upstream dams in India before the water reached the border region. (JT 14 and 20-12-96; NRC 12-12-96; IHT 13-12-96; FEER 26-12-96/02-01-97:16)

Unfortunately, in late March 1997, at a critical moment in the planting season, river levels dropped to such a low level that Bangladesh got only one sixth of the water pledged to it under the treaty. The treaty sets ten-day periods from March to May in which India and Bangladesh alternately take most of the water reaching Farakka, set at a minimum of 34,500 cubic feet a second. On 27 March 1997, during a period when the flows were supposed to favour Bangladesh, only 6,500 cubic feet was recorded, resulting in Bangladeshi officials accusing India of cheating and Indian officials angrily denying. (IHT 26-05-97)

Mekong River basin co-operation

The littoral states of the Mekong river held a conference under the auspices of the ADB in early April 1997 for the promotion of co-operation in various fields in the Greater Mekong sub-region. (AsT 08-04-97)

SANCTIONS

See also: Foreign investment, Inter-state relations (China-Japan), (Non-)Interference, International economic relations (G-15, Myanmar), Nuclear energy matters

US sanctions against Iran and Libya

The US promulgated an act under which sanctions were to be imposed on foreign firms that invest \$40 million or more in the weapons production, the energy (oil) industry or the aviation capabilities of either country, both of which had been accused by the US of sponsoring terrorism. In case of violation of the prohibition the US president is directed to choose two of six possible sanctions: denying (US) Export-Import Bank loans, denying export licenses, barring US banks from making loans of more than \$10 million a year to the sanctioned party, barring sanctioned financial institutions from being primary dealers of US government bonds, banning US government procurement of goods and services from sanctioned entities, imposing import sanctions. The act allows the president to waive sanctions against foreign citizens whose countries impose their own sanctions. The act does not affect existing investments. The US had earlier banned trade by US companies with the two countries. (IHT 18 and 24-07-96)

The EU and Japan condemned the act vehemently. (IHT 18,24 and 25-07-96,06-08-96)

On 12 August 1996 Turkey signed a \$20 billion contract with Iran for the construction of pipelines to eventually carry up to 10 billion cubic metres of natural gas a year to Turkey. Turkey insisted that the agreement dealt with trade, not investment, and consequently did not violate the US sanction law. It was said that each party would build its own side of the pipeline although Turkey might help the Iranian side by supplying materials in a barter deal. (IHT 13-08-96)

In early February 1997 the governor of the Iranian Central Bank divulged that Iran had managed to obtain offers of more than \$5 billion in government-backed loan guarantees from Europe, particularly Germany, and Japan, over the past 18 months, and that it had succeeded to reschedule about \$22 billion of its foreign debts: the short-term debts were reduced from 76% in 1993 to 20%. The loan guarantees did not technically violate the US sanction act because they were government-to-government commitments. (IHT 03-02-97)

Sanctions against Myanmar

(*see:* Association of South East Asian Nations, Inter-state relations)

On 30 September 1996 a US law, the Cohen-Feinstein Amendment, was signed, threatening a ban on all new US investments in Myanmar in case the government "has physically harmed, re-arrested for political acts or exiled Daw Aung San Suu Kyi, or

has committed large-scale repression of or violence against the democratic opposition”.

On 3 October 1996 the US introduced legislation declaring illegal the “formulating, implementing or benefiting from policies that are impeding the transition to democracy in Burma . . .”(IHT 04,5/6 and 07-10-96)

The US imposed a ban on new US investments in Myanmar in April 1997, under the 1996 legislation and after the US president had declared that “a state of large-scale repression” existed in the country. The sanction went into effect on 21 May 1997. (IHT 23-04,23-05-97;FEER 01-05-97:13)

It was reported in early November 1996 that the EU had banned entry visas for senior members of the ruling Council in Myanmar, their families and the military, while high-level governmental contacts were to be suspended. The EU had already withdrawn all diplomatic missions and halted development aid.(FEER 07-11-96:15)

On 18 December 1996 the Commission of the European Union called for Myanmar to be stripped of trade privileges accorded by the European Union, on grounds of alleged widespread use of forced labour. It also recommended the suspension of Myanmar from benefiting from the EU Generalized System of Preferences. The competent EU Council of Ministers decided accordingly late March 1997.

The EU move became inevitable when Myanmar in November refused entry to a committee of experts to investigate allegations of forced labour.(IHT 19-12-96;FEER 03-04-97:57)

In April 1997 a US federal district court held that Unocal Corp., a US company doing business and making investments in Myanmar (*see supra*: Foreign investment) can be held liable for human rights abuses allegedly committed by the Myanmar government. The decision was being appealed.(IHT 18-04-97)

Cancellation of F-16 sale to Indonesia

It was reported that the US government was considering to cancel the sale to Indonesia of at least 9 F-16 fighter planes (*see* 6 AsYIL 339,449), as a response to the Indonesian crackdown on political dissent in July 1996 (the ‘Democratic Party incident’). Reacting to the US delay of the sale the Indonesian government said it did not bother, since the purchase was not a priority.(IHT 22-08,7/8-09-96;FEER 29-08-96:12, 19-09-96:13)

The cancellation was confirmed by Indonesia on 6 June 1997, which also announced pulling out of a US-sponsored military education and training program (International Military Education and Training scheme, ‘Imet’). The decision was motivated in part by the ‘wholly unjustified criticism’ of Indonesia in the US Congress.(IHT 7/8-06-97;FEER 19-06-97:16)

US export license for North Korean barter deal

A US company was given permission by the US Treasury to export 500,000 tons of food to North Korea as part of a barter transaction.(IHT 07-01-97)

EU ban on arms sales to China

Since the Tiananmen incident in 1989 an embargo had been imposed by the EU on arms sales to China. The French defence minister visited China in early April 1997. He called for a 'strategic dialogue' and expanded military ties, highlighting the question of the eventual lifting of the sanction. (AsT 09-04-97)

Since the arms ban was imposed unanimously, its lifting requires the same kind of decision. Yet, even with the embargo still in place, most EU member states interpreted the ban to mean a ban on lethal weapons, in contradistinction to other equipment. (FEER 24-04-97:25)

Sanctions on the sale of chemical weapons technology

On 22 May 1997 the US announced it would punish two Chinese companies and one Hongkong company for selling chemical weapons technology (precursors) to Iran, by banning them from US government trade for at least a year. The sanction was applied under the 1991 Chemical and Biological Weapons Control Act for "knowingly and materially contributing to Iran's chemical weapons program". Companies in other countries - Australia, Austria, Germany, Italy and Thailand - had been punished for similar violations. China protested and demanded cancellation of the sanctions. (IHT 23-05,24/25-05-97)

SEA AND SEA TRAFFIC

US response to Chinese declaration on passage of warships

It was reported that the US advised China by diplomatic note of 21 August 1996 that it regarded the territorial sea baselines determined in the Chinese declaration of 16 May 1996 on the matter (*cf.* 5 AsYIL 211 n.5) to be contrary to international law. Consequently the US rejected the Chinese restrictions of free navigation by foreign warships in waters that would be part of the high seas but for the Chinese baselines. These Chinese restrictions were contained in its 1992 Law on the Territorial Sea and the Contiguous Zone and the May 1996 declaration (*see* 2 AsYIL 165 and 5 AsYIL 225). (IHT 19-09-96)

Thai contiguous zone

It was reported that the Thai decision to establish a contiguous zone in the Gulf of Thailand (by way of implementation of the 1995 Royal Proclamation, *see* 6 AsYIL 228) caused surprise in Cambodia because it and Vietnam were still engaged in discussions with Thailand on overlapping claims. (FEER 20-02-97:12)

US attitude toward Strait of Hormuz

As Iranian air and naval forces began exercises in the Gulf, the commander-in-chief of the US Central Command said that the US would take immediate action to defend the Strait against any Iranian threat to close the waterway. (IHT 12-05-97)

SOCIAL MATTERS

Asian welfare ministers meeting

Social welfare ministers from East and Southeast Asia met on 5 December 1996 in Japan and agreed to hold a high-level meeting in 1997 to promote exchanges of knowledge and ideas on social welfare, particularly in the fight against AIDS and in view of aging-society problems. They also agreed on the need to establish an international system to collect information on infectious diseases and promote exchanges of trainees and specialists.

The meeting was attended by ministers from Brunei, Cambodia, China, Indonesia, South Korea, Laos, Malaysia, The Philippines, Singapore, Thailand, Vietnam and Japan. (AsahiEN 06-12-96)

SOUTH ASIAN ASSOCIATION FOR REGIONAL CO-OPERATION (SAARC)

1997 Summit Meeting in Maldives

At the ninth summit meeting that ended 14 May 1997 the seven leaders conceded their failure to curb hostilities that had set the pattern of relationships in the region for the past fifty years. Trade between the seven member states accounted for barely 1 percent of total world trade while the population constituted 20 percent of all mankind. (IHT 15-05-97)

Target year for implementation of SAPTA

At the Maldives summit meeting the member states moved their target year for free trade under the 1993 "Agreement on SAARC Preferential Trading Arrangement" (see 3 AsYIL 481) to 2001 from the earlier target year of 2005. (IHT 15-05-97)

SPECIFIC TERRITORIES IN A STATE: EAST TIMOR

See also: Association of South East Asian Nations

Nobel Peace Prize for East Timorese

The Nobel Peace Prize for 1996 was awarded on 11 October 1996 to the Roman Catholic bishop of East Timor, CARLOS F.X. BELO and J. RAMOS-HORTA, a spokesman of one of the resistance movements in East Timor. The prize was received on 10 December 1996. (IHT 12/13-10, 11-12-96)

EU action

The European Union in a declaration of 15 December 1996 repeated calls for Indonesia to improve its human rights record in East Timor. In November the Indonesian ambassador to the EU told Europe to keep out of the East Timor issue and warned that European measures there could have 'grave repercussions'. (JT 16-12-96)

SPECIFIC TERRITORIES WITHIN A STATE: KASHMIR

See: Inter-state relations (India-Pakistan)

SPECIFIC TERRITORIES WITHIN A STATE: TIBET

See: (Non-)Interference

STATE SUCCESSION

See also: Air traffic and transport

Assumption of former South Vietnamese debts by Vietnam

After several years of negotiations an agreement was reached between Vietnam and the US on 8 March 1997 under which Vietnam agreed to take over debts incurred by the former South Vietnamese government *vis-à-vis* the US for roads, power stations and grain shipments. Most of these debts were incurred to bolster South Vietnam's war effort and involved an amount of about \$140 million. The debt is to be repaid within 20 years. Vietnam refused to repay \$12 million in outstanding loans for the 'Food for Peace' program, arguing that through a series of complex transactions the US used money that was earmarked for grain purchases, to help finance the Vietnam War. (IHT 12-03-97)

Under the 1993 so-called Paris Club agreement, Vietnam agreed in principle to assume government-to-government debts of the former South Vietnamese government. (FEER 20-03-97:13)

TAXATION**Thai – US double taxation agreement**

The two countries concluded an agreement to prevent double taxation for citizens of one side doing business in the other. The treaty concluded three decades of dispute. (IHT 26-11-96; JT 27-11-96)

TECHNOLOGY

See: Military co-operation (China-US)

TELECOMMUNICATIONS**Coincidence of orbital slots of satellites**

Indonesia had reportedly complained to China that the Chinese APT Satellite company had put its APTStar 1A broadcast satellite into an orbital slot above longitude 134 degrees east, the same spot registered by Indonesia for its Palapa Pacific 1 satellite in October 1993. A relevant complaint would be made to the ITU. (FEER 21-11-96:14)

TERRITORIAL CLAIMS AND DISPUTES

See also: Fisheries

Chinese monument at Paracel Islands

A Chinese archeological expedition to the Paracel Islands in May 1996 erected a 'cultural relics protection monument' on a reef where ships in the Song dynasty had capsized and spilled their cargoes of pottery. It was said that the monument was meant to show that the site was under the jurisdiction of Hainan province.(FEER 11-07-96:28)

Dispute over the Senkaku (Diaoyu) Islands

(see also: (Non-)Interference)

In July 1996 a rightist Japanese group, Nihon Seishinsha (Japan Youth Federation) built a makeshift lighthouse on Kitakojima, one of the disputed Senkaku (Diaoyu) Islands to bolster Japan's claim to the territory. In August 1996 Japanese rightists planted a flag and erected a war memorial on the islands.

The five islands and three reefs are situated about 200 kilometres north-east of Taiwan and 300 kilometres west of the island of Okinawa, and are surrounded by rich fishing grounds and potentially lucrative reserves of oil and natural gas. China claims the islands on historical grounds dating from the 16th century, but according to Japanese officials China and Taiwan showed little interest until an academic UN study in 1978 (1968?) showed the possibility of oil and gas nearby. Japan bases its claim on annexation in 1879 as formalized by treaty in 1895.

The islands were occupied by the US after the war and turned over to Japan in 1972, together with Okinawa. On that occasion the US said that any outstanding territorial issue should be settled among the countries concerned. From Taiwanese perspective the islands fall under Ilan County jurisdiction. Taiwanese fishermen live closest to the islands and it was estimated that Taiwanese ships bring in about 40,000 tons of fish a year from nearby waters within the Taiwanese EEZ.

In 1978 the then Chinese leader suggested that the sovereignty issue be put aside and that the islands be developed co-operatively.(IHT 20/21-07-96,01 and 22-08-96,17-09-96,16-10-96;FEER 19-09-96 p.14-15;JT 26 and 27-09-96)

The incident sparked a strong official Chinese reaction and popular protest, most strongly in Hongkong and Taiwan. Early September a Japanese Coast Guard patrol blocked a Taiwanese vessel from reaching one of the islands, and Japan also lodged an official protest with China after a Chinese ocean research vessel entered the territorial waters of the islands without permission.

While China is of the opinion that the dispute over sovereignty will "require a long time to resolve", it held that the Japanese government had to "stop construction of the illegal facility by a Japanese group". Japanese sources said that the government could not order the tearing down of the lighthouse because it stood on what is officially viewed as private land on an island claimed by Japan as its territory. The Japanese prime minister referred to the limits what the government of Japan could do "as a law-governed state".

In an effort to soothe bilateral tensions the two countries discussed the matter in high-level talks between the foreign ministers during their presence in New York during the UN General Assembly meeting in late September.

The Japanese foreign minister promised his Chinese counterpart on 24 September 1996 that Japan would refrain from officially recognizing (registering) the lighthouse as an official one in spite of an application to that effect by the group concerned and by fishermen on Ishigaki Island, Okinawa Prefecture. This policy was affirmed by a government decision in early October. Under the Japanese navigational beacon law, the Maritime Safety Agency has authority to grant official recognition to privately built lighthouses.(IHT 7/8 and 20-09-96,5/6-10-96; AsahiEN 04-10-96;JT 26 and 27-09-96,05 and 31-10-96)

In spite of the above restraints China kept urging Japan to take measures to cool down the territorial dispute, warning that a do-nothing policy would hurt China's feelings and undermine bilateral ties. The foreign ministry spokesman said that China "still hopes to shelve the dispute and jointly develop (the region)"(JT 10-10-96)

During an annual Sino-Japanese vice-ministerial meeting in late October 1996 the two countries agreed to resolve the territorial issue in a calm manner although there were no major developments over the question of sovereignty. Japan repeated its assertion that no territorial issue exists because the islands historically belong to Japan.(AsahiEN 30-10-96)

The anger of China and Taiwan was again provoked when a Japanese member of Parliament traveled to the islands in early May 1997, declaring it his duty to inspect Japanese territory.(IHT 07-05-97) In late May there was a flare-up of the dispute when Japanese coast guard ships blocked 28 protest boats with Hongkong and Taiwan protesters from approaching the islands, and allegedly damaged some of them.(IHT 27-05-97)

ASEAN attitude toward Chinese claims to South China Sea areas (*see also*: Association of South East Asian Nations)

It was reported that the ASEAN foreign ministers during the post-ministerial meeting with China in July 1996 (*supra* p.397) collectively expressed their opposition against the Chinese declaration of May 1996 on the delimitation of the territorial sea around the disputed islands (*see* AsYIL Vol.5:219, Vol.6:459).(IHT 22 and 25-07-96)

At the dialogue meeting of April 1997 held at Huang Shan, China for the first time agreed to talk about the contrasting territorial claims in the South China Sea in a multilateral context.(FEER 08-05-97:15)

Sino-Philippine disagreements over Spratly Islands

During the APEC summit meeting at Manila in November 1996 the Chinese and Philippine presidents discussed the islands disputed by their countries. It was reported that the Chinese president proposed the "joint development of the resources beneath the islands, reefs and shoals" .(IHT 27-11-96)

On 25 December 1996 the Philippines opened a runway on one of the disputed islands, pledging to develop the area as a tourist destination. The eight-island Kalayaan group, a cluster of largely uninhabited isles, shoals and reefs claimed by the

Philippines, are a part of the Spratly Islands. The Philippine move was criticized by China. (IHT 26 and 31-12-96)

The Philippines proposed to include the issue of the Spratly Islands in the agenda of a meeting of the US-Philippine mutual defence board in December 1996, but the proposal was rejected by the US. (IHT 11-12-96)

In late April 1997 the Philippine government launched a protest over the entry of three Chinese frigates into an area of the Spratly Islands claimed by the Philippines. The vessels were spotted on 25 April 1997 close to *Kota* and *Panata* islands. The two islands lie between *Pagasa*, which was occupied by the Philippines, and *Mischief Reef*, claimed by the Philippines and occupied by China. Besides the Philippine armed forces reported that it had discovered a new hut-like structure built over a reef 6 miles northeast of *Kota* island, without saying who had built the structure. (IHT 30-04-97) The chairman of the Philippine Senate Foreign Relations Committee urged the government to seek help from the US to have China withdraw the vessels. On 2 May 1997 it was reported that the ships were withdrawn from the area concerned. (IHT 03/04-05-97)

It was reported that the Philippines on 25 June 1997 ordered its troops to avoid using weapons in driving Chinese fishing boats away from isles occupied by the Philippine forces. The Philippine forces had fired warning shots a week before when Chinese fishing boats came near *Kota* Island. (IHT 26-06-97)

Scarborough Shoal / Huangyan Island

On 20 May 1997 21 Chinese fishermen were arrested by the Philippine navy near what is referred to in Western sources as Scarborough shoal and called Huangyan island by the Chinese, about 215 kilometres off Zambales Province on the Philippine island of Luzon. They were to be charged with illegal entry and poaching in the Philippine exclusive economic zone. The Chinese embassy protested since, it said, the area belonged to China. This and other disputes over South China Sea islands between China and the Philippines were among the issues in bilateral talks on 26 May. (IHT 27-05-97; FEER 29-05-97:13)

The importance of the island lay in the surrounding fishing grounds and possibly oil-rich seabed. The Philippines pointed out that the island is within its exclusive economic zone, and that the island was used for target practice by the Americans when they operated bases in the Philippines. On the other hand, the Chinese foreign ministry said the island had been Chinese territory since ancient times. China had claimed the island as its territory in documents published in 1935, 1947 and 1983, and had reaffirmed them since. It bases its right to the surrounding waters on its title to the island(s). As the Chinese embassy in the Philippines said, "[t]he land dominates the sea is a basic principle of international law. ... Maritime rights and interests do not generate territorial sovereignty". (FEER 05-06-97:40, 12-06-97:17)

Natuna Islands and Natuna gas field*(see: 5 AsYIL 500)*

In order to assert its sovereignty Indonesia held its largest air, land and sea manoeuvres in four years in the area. (FEER 19-09-96:17)

Sipadan and Ligitan Islands*(see: 6 AsYIL 460)*

Indonesia and Malaysia agreed on 7 October 1996 to submit their dispute on sovereignty over the two islands off the east coast of Borneo to the International Court of Justice. The two countries had tried unsuccessfully to resolve the issue through diplomatic and political channels for the past five years. Each side would appoint an official of ministerial rank to speed along the matter. (IHT 08-10-96; AsahiEN 08-10-96; FEER 17-10-96:14; JT 01-12-96)

Japan-Russia island dispute*(see: AsYIL Vol.1:346, Vol.2:376, Vol.3:448, Vol.4:512, Vol.5:499, Vol.6:461)*

The two countries reaffirmed at the sixth round of sub-Cabinet-level talks on 2 October 1996 the importance of resolving the long-standing territorial row over the Northern Territories and concluding a bilateral peace treaty. (AsahiEN 03-10-96)

However, it was announced on 9 October 1996 that the Russian president had approved a basic document on border policies, including rejection of any territorial claim against Russia. (Daily Yomiuri 10-10-96)

Japan waives claim to southern Sakhalin

In a major shift in its territorial policy Japan was to accept Russia's control of the southern half of Sakhalin Island by setting up a branch consulate at Yuzhno-Sakhalinsk in spring 1997. By setting up the consulate Japan hoped to normalize its relations with the Sakhalin provincial government, which has jurisdiction over the four disputed islands off Hokkaido.

[In the 1951 Peace Treaty Japan renounced all rights to the Chishima Islets, located between the four disputed islands and the Kamchatka Peninsula. But Japan did not acknowledge Soviet sovereignty as it might affect the territorial dispute, and consequently the Soviet Union did not participate in the Treaty. In October 1995 a Japanese diplomat visited southern Sakhalin for the first time. In September 1996 the Japanese government opened a Japan Center in Yuzhno-Sakhalinsk.] (JT 02-12-96)

Takeshima/Tok-do islands*(see: 6 AsYIL 460)*

The Japanese foreign ministry filed a request with the South Korean embassy in Tokyo on 31 October 1996 for halting the construction of harbour facilities on the disputed islands that had been under way since February 1996.

However, a spokesman of the Korean foreign ministry said: "Our government rejected the Japanese call, stressing that Tok-do is an inherent territory of South Korea both historically and under international law."

The uninhabited 'Takeshima' or 'Tok-do' islets which have a total area of 23 hectares, lie halfway between Japan and South Korea in the Sea of Japan.(JT 03-11-96;FEER 14-11-96:15)

In December 1996 it was reported that the Korean government had decided to solidify South Korea's claim by building a manned lighthouse that would be completed in 1998.(JT 13-12-96)

Chinese attitude toward Indian control of Sikkim

The Indian foreign minister said that it was his impression that China was moving toward conceding India's take-over of Sikkim in 1975.(IHT 17-12-96)

Sino-Vietnamese dispute over oil exploration in disputed areas

In March 1997 Vietnam demanded that China stop drilling for oil close to the Spratly Islands, as it violated Vietnam's sovereignty over its exclusive economic zone and continental shelf. On 7 March 1997 a Chinese exploration rig, the 'Kantan III', had been moved to a place in a portion of the Song Hong Basin in the South China Sea, an area designated by the Vietnamese as Block 113 for exploration purposes.

The disputed zone lies south of the Tonkin Gulf, almost equidistant from the central-Vietnamese coast (65 miles) and the Chinese island of Hainan (75 miles), about 600 miles north of the Spratlys. It is also claimed by China to be part of its continental shelf and exclusive economic zone, and was not covered by regular bilateral talks on either contested areas in the South China Sea, or disputed areas further north in the Gulf of Tonkin. The area lies some 50 kilometres west of the Yacheng deposit, where China was already drilling for gas in partnership with the Atlantic Richfield oil company of the US.

Early April 1997 the director of the maritime department of the Vietnamese border commission had said that the platform and its support boats were withdrawn on 1 April. This was denied by the Chinese side, but on 7 April 1997 the China National Offshore Oil Corp.(CNOOC) said that the exploratory oil rig was withdrawn from the disputed area.(IHT 17-03,21-03,28-03,5/6-04,08-04-97;FEER 03-04-97:14;ST 08-04-97)

Both parties agreed to discuss the disagreement, and Vietnamese and Chinese experts started to hold talks on 9 April 1997 in a bid to determine who controls the area. Earlier, however, Vietnam briefed ASEAN on 20 March and enlisted support from its fellow member-states. The incident was raised at a third meeting of senior officials of ASEAN and China (as an ASEAN 'dialogue partner'), held at Huang Shan, China, in April 1997. China acknowledged that the South China Sea was an important component in ASEAN-China relations, and offered to insert a code-of-conduct clause, referring to the peaceful settlement of disputes in the sea, in a joint political declaration.(IHT 02-04,04-04-97;FEER 03-04-97:14,01-05-97:12;AsT 08-04-97)

Singapore - Malaysia

The Malaysian railroad company, KTM Berhad, owns over 200 hectares of land in Singapore on a 999-year lease, most of it on either side of a rail line from downtown Singapore to Kuala Lumpur. The Malaysian side accuses Singapore that the latter was

pressing Malaysia to give up the land and to move its train station to the suburbs. Singapore, on its part, said that Malaysia backed out of a 1990 agreement on such transfer. It was reported in March 1997 that KTM was to take legal action to evict people who were occupying parts of the land. (IHT 28-03-97; FEER 05-06-97:24)

TERRORISM

See: Civil war

TRANSIT

See also: Rivers

Transit rights for Nepal

India agreed to let traders from Nepal to cross its territory to reach ports in Bangladesh. So far the only access to the sea was through the Indian port of Calcutta. Transit through a land corridor across northeastern India using the 60 (70?)-kilometre Kakkarbhitta-Phulwari (Kakarvitta-Banglabandh?) route would cut transport costs and shipping delays in Calcutta. The route was opened in June 1997 on a trial basis for six months. (IHT 15-08-96, FEER 19-06-97:13)

UNITED NATIONS

See also: Divided states: China, Non-aligned Movement

Japanese attitude

In his speech to the UN General Assembly on 24 September 1996 the Japanese prime minister outlined his vision of Japan assuming a leading role in the world's political and economic affairs through the UN. He expressed disappointment over the lack of progress in efforts to reform the organization. He reiterated Japan's proposals for carrying out reforms 'in a balanced manner' in three areas: reforming the UN Security Council, streamlining financial and administrative structures, and strengthening global social and economic development programs. He stressed that such reforms are needed for Japan to assume a leading role, including a permanent seat on the Security Council.

The prime minister repeated that Japan "is prepared to discharge its responsibilities as a permanent member of the Security Council" in accordance with its basic philosophy of abstaining from the use of force, which is prohibited by its Constitution. (JT 26-09-96)

Review of role and composition of the World Court

Through its representative at the UN, Malaysia had called for a review of the role and composition of the International Court of Justice. The representative said that the credentials of aspiring candidates to the court should be scrutinized instead of endorsing them on the basis of geopolitical considerations. (JT 17-10-96)

India and Japan compete for Security Council seat

On 21 October 1996 Japan was elected to a non-permanent seat for the 1997-1998 period, defeating India by 142 to 40 votes.(JT 23-10-96) Japan's election was its eighth; India has served six turns on the Council.(FEER 31-10-96:13)

Representation of Afghanistan

In the United Nations a decision on the credentials of the Afghan delegation was deferred on 11 October 1996, despite a challenge from the Taleban. The representatives of the ousted president RABBANI consequently retained their seat for the time being.(IHT 12/13-10-96)

On 17 November 1996 the Taleban authorities asked the UN to recognize it as the legitimate authority in Afghanistan and to grant it the seat of Afghanistan.(IHT 18-11-96)

Motivation for use of right to veto

China had vetoed a UN Security Council resolution on the deployment of UN peace-keeping forces to Guatemala for the implementation of an agreement to end the civil war in that country. According to the government spokesman China had used its veto because of Guatemala's long-standing diplomatic recognition of [the government of] Taiwan and its support for Taiwan's bid to rejoin the UN. Although China had no objection to the principle of sending UN monitors, he said: "we had no choice". ... "Clearly, the government of Guatemala must be responsible".

It was the first time in 24 years that China had used its right to veto in a matter outside the selection of a secretary-general.(IHT 13-01-97;FEER 23-01-97:13)

In view of a subsequent Guatemalan change of its Taiwan policy China and its promise to cease support to Taiwan's attempt to enter the UN, China reversed its position 10 days later and voted in support of sending the peacekeeping mission.(FEER 06-02-97:30)

UNRECOGNIZED ENTITIES

See also: Inter-state relations (China-South Africa, China-US)

Japan – Taiwan

According to a Taipei newspaper the Taiwanese authorities would cancel some privileges enjoyed by Japan's de facto diplomats to reciprocate for Japan's refusal to upgrade treatment of Taiwan's unofficial representatives in Japan. Japan's representatives would be stripped of tax exemptions and their car registrations would be downgraded to those of foreign organizations rather than diplomats.(AsahiEN 03-10-96)

US – Taiwan

On the occasion of a visit to Taiwan the US deputy Treasury secretary said that the economic ties between the US and Taiwan were becoming increasingly close. It

was the highest-level US mission to Taiwan since the transport secretary made a visit in 1994. (IHT 16 and 18-09-96)

North Korea – Taiwan

It was reported in July 1996 that North Korea planned to set up a representative office in Taiwan by the end of the year to enhance economic ties and encourage investment. It had already an office in Taipei since April 1996 to issue travel certificates. (FEER 15-08-96 p.13)

WEAPONS

See also: Disarmament, Nuclear energy matters

China against ban on landmines

China opposed a total ban on anti-personnel landmines when the issue was discussed in the Disarmament and International Security Committee of the UN General Assembly on 18 October 1996. The Chinese representative said that especially to countries with a long land-border landmines remained an effective weapon of self-defence. He referred to the Chinese experience with the use of landmines in its war against Japan. (JT 20-10-96)

Comprehensive nuclear test ban treaty

It was reported on 26 October 1996 that 129 countries had signed the treaty, including all but three of the state that must sign and ratify it before it could enter into force. The three are North Korea, India and Pakistan.

The treaty stipulates that 44 states known to have nuclear reactors and research programs must sign and ratify before the treaty can enter into force 180 days after ratification by the 44 states. Only Fiji had ratified. (JT 27-10-96)

WORLD TRADE ORGANIZATION (WTO)

See also: Asia-Pacific Economic Co-operation, International economic relations

The issue of China's admission

China and the US again discussed the issue of China's admission to the Organization. The Chinese trade minister said that China was prepared to show greater flexibility in upcoming negotiations over China's acceptance, but that China should be admitted under the more lenient rules for developing countries. The US, on the contrary, was of the opinion that China should meet a stricter standard, taking into account its huge economy. The Chinese minister said: "If the admission fee is too high, we cannot afford it. I do not have so much money in my pocket." (AsahiEN 28-09-96)

Japan and some European countries had criticized the US for demanding that China make too many market-opening reforms before it is granted WTO membership. The US responded to that criticism by accusing other countries to let the US take the lead rather than risk offending China. (JT 16-11-96)

The Chinese foreign minister said in November 1996 that China hoped to conclude talks with the US on China's membership by mid-1997.

It was reported meanwhile that among the reasons of the continuing stalemate was the absence of consensus in either country on the desirability of Chinese membership and its consequences. (IHT 26-11-96)

Agreements at quadrilateral meeting

Trade ministers from Japan, the US, Canada and the EU agreed on setting up a working committee in the WTO to discuss issues left unsettled under the Uruguay Round, such as the issue of investment rules.

The ministers argued that the WTO should keep in close touch with the ILO on the issue of permissibility of import restrictions on goods manufactured in countries with poor labour conditions.

The ministers also discussed the proposals for an Information Technology Agreement which would eliminate tariffs on semiconductors, computers and similar products by the year 2000. (JT 29-09-96)

The case of the Indonesian 'national car' policy (the 'Timor' case)

(see: 6 AsYIL 416)

An Indonesian national car policy which was introduced in February 1996 granted an exclusive three-year exemption from import duties and luxury taxes to a joint venture between an Indonesian car company and Kia Motors Corp. of South Korea.

The policy was challenged as an unfair trade barrier. The European Union filed a complaint on 3 October 1996 with the WTO, followed by Japan on 4 October 1996 and by the US on 13 June 1997.

Specifically Japan charged Indonesia on three main points: the duty-free import from South Korea violates most-favoured nation treatment, exempting luxury tax discriminates against foreign car manufacturers (Art.I GATT), and linking local contents with tax incentives violates trade-related investment rules. (AsahiEN 03-10-96; JT 05-10-96; IHT 16-06-97)

[The Uruguay Round resulted in, *inter alia*, an Agreement on Trade Related Investment Measures. This agreement, to which Indonesia was a party, contains a 'standstill' provision, under which signatories were barred from implementing new investment measures after January 1995. Indonesia argued that its measures represented a mere modification of a 1993 national car policy that predates the Agreement and had been duly reported to GATT.]

Consultations in bilateral form at the request of Indonesia started on 1 November 1996. As no accord was reached on 3 December 1996 (i.e. within sixty days), the claimant could ask for the creation of a WTO panel that would have to deliver a ruling within nine months. (JT 31-10, 05-12-96; FEER 17-10-96:97)

The WTO agreed in June 1997 to create a panel to look into the complaints. (IHT 13-06-97)

US vs. Japan over Japanese photographic film and paper market

The US in June 1996 had called for Japan to accept bilateral consultations, in accordance with a 1960 GATT decision, on alleged restrictive business practices in the photographic film and paper market. The US complained that the Japanese government was blocking foreign access to the local market through restrictive laws. Japan replied that it would agree to the talks, but only on condition that the US accept similar talks on business practices in the US film market.

The US did not accept the condition and instead it filed a request for a panel with the WTO in August-September 1996. Japan rejected the establishment of a panel in a 3 October meeting of the WTO Dispute Settlement Body on grounds that the US claims lacked specifics. However, the panel was automatically set up under WTO rules on 16 October. It was expected to deliver its verdict in spring 1997. The EU reserved its right to take part in the proceedings.

The dispute took place against the background of a struggle between Eastman Kodak Co. and Fuji Photo Film Co. to penetrate each other's markets. Kodak holds 36% and Fuji 33% of the global market in photofilm. Kodak argued that Fuji blocked Kodak's access to the Japanese market through anti-competitive practices in collaboration with the Japanese government. In 1995 it lodged a petition with the US government under Section 301 of the US trade law. After 11 months of investigation the US government decided to freeze the 301-process and to take the case to the WTO.

The US blamed Japanese laws, such as the Large-Scale Retail Stores Law and the Premiums Law, for blocking Kodak's access to the local market in violation of the GATT and the GATS (General Agreement on Trade in Services). The law allegedly limited the number and size of large retail stores, resulting in an unfairly limited volume of imports. Fuji denied the allegations and, on its part, accused Kodak of unfair business practices impeding Fuji's access to the US market. (IHT 14-08-96; AsahiEN 03-10, 16-10, 17-10-96; JT 17-10-96)

India/Malaysia/Pakistan/Thailand vs. US on shrimp imports

The US Court of International Trade found in favour of an environmental group which had complained that many imported shrimps were caught with methods that were harmful to sea turtles, an endangered species. The Court ruled that so-called wild shrimps, caught at sea by ships not using devices or techniques to protect turtles, could not be imported into the US. The ban came into force in May 1996.

Asian countries which were heavily engaged in marine shrimp fishing, were especially badly hit by the decision which, they argue, effectively sought to impose US environmental law on other countries. The US National Fisheries Institute had estimated that the ban would block between \$200 to \$500 million worth of shrimps, or about 25% of all imports into the US.

India, Malaysia, Pakistan and Thailand launched a case against the US over the ban. The four countries sent a letter to the US mission to the WTO asking for consultations on the issue. The US would have ten days to reply, and would have to start consultations within 30 days. If no solution were reached within this period, the claimants could ask for the creation of a full dispute panel. If the panel ruling and eventual appeal ruling would go against the US, the ban would have to be lifted or compensation paid for the value of lost trade.

The current WTO procedure (Understanding on Rules and Procedures governing the Settlement of Disputes) had replaced the old GATT procedure under which any country could block approval of a panel decision by preventing consensus.(JT 10-10-96)

European Union vs. Japan on shipping practices

The EU has called for consultations under Article VIII of the GATT with Japan on allegedly unfair Japanese harbour practices: a monopoly on stevedore services by the Japanese Harbor Transportation Authority (JHTA) allegedly resulted in discrimination of European ship operators.

Shipping lines wishing at short notice to change the docking schedules of their vessels at Japanese ports could not do so as loading and unloading 'slots' were controlled entirely by the JHTA, which allocated stevedores to vessels on a rota basis. In comparison, once a vessel was given a slot at a EU port, shipowners could negotiate with stevedores for the best rates. The Japanese stand was that as the stevedore business was privately run, the government had no say in the matter.(AsahiEN 15-10-96)

US/EU/Canada vs. Japan on liquor tax

An appellate panel delivered a ruling in this case on 4 October 1996, deciding against Japan. It found that Japanese taxes on shochu (distilled spirits) were too low and urged Japan to narrow the tax-rate gap between shochu and other spirits, such as whiskey and vodka. Japan had already been forced to rectify its liquor taxation rules in 1989 and 1994, following a 1987 ruling by the GATT, but taxes on whiskey were still six times higher than those on shochu.

A special meeting of the WTO was called by the EU to adopt the ruling, but the meeting was suspended at the request of Japan because only 35 of the 125 member countries of the dispute settlement body were represented at the meeting, less than the required simple majority of 63.[Usually business was proceeded even lacking a quorum. An appellate report is automatically adopted 30 days after its distribution, unless there is a consensus against adoption] (JT 17-10-96,31-10-96) The ruling was later declared adopted on 1 November. Japan was expected to inform the dispute settlement body within 30 days of its intention to comply with the ruling and to implement the recommendations within 18 months.(JT 02-11-96) The notification of acceptance took place later in the month.(AsahiEN 21-11-96)

Japan-US dispute on alleged Japanese dumping

Japan was considering filing a complaint with the WTO against the US over the latter's unilateral action regarding alleged dumping of supercomputers by NEC and of printing press systems by Mitsubishi and other Japanese companies.(JT 23-10-96)

[NEC Corp. of Japan was accused by Cray Research Inc. of the US of having unfairly won a \$35 million contract from the (US) National Center for Atmospheric Research to supply weather-forecasting computers by 'dumping' its supercomputer. The US Commerce Department accordingly started an investigation.](FEER 08-08-96:65;JT 31-10-96)

Japan-US dispute over access for imported goods in Japanese markets

The US had complained to the WTO about Japanese laws restricting the number of large stores as one of the best outlets for imported goods. Subsequent discussions under the auspices of the WTO in November 1996, however, had failed to produce any agreement.(JT 10-11-96)

Disagreement between developed and developing countries over issues to be dealt with by the WTO

Asian and African states, including Japan, rejected efforts by the US and some western countries in November 1996 to include the issue of labour standards in the agenda of the WTO and to have it discussed at the WTO ministerial conference to be held at Singapore in December 1996. A similar rejection was demonstrated against efforts to start WTO talks on global rules for investment. The developing countries feared that discussion of these issues would inevitably lead to binding rules that could then be enforced through the WTO's dispute-settlement mechanism. They argued that the labour standard issue was essentially a protectionist device, while the issues of investment rules and competition policy were aimed at enabling Western and Japanese companies to control the markets of developing countries. Labour matters should be handled by the ILO. Other proposals for the WTO agenda included the impact of regional groups on global trade, the updating of existing anti-dumping rules, worldwide regulations to ensure free and fair competition, business corruption. As to the connection between trade and investment and between trade and competition, a number of developing countries, among which India and Pakistan, preferred the relevant studies to be carried out by the UNCTAD.(JT 24-11-96;IHT 09 and 12-12-96;FEER 04-07-96:69)

WTO and anti-dumping

Less than a week before the first WTO ministerial conference in December 1996 the Japanese chief trade negotiator said that WTO should not limit itself to investigating competition policy, but should also look into abuses of anti-dumping measures, which also distort international trade. He thus referred to two sides of the issue: competition policy affecting trade and trade measures affecting competition policy. This attitude was in conformity with the South Korean position but in contradistinction to those, such as the US and Europe, who insisted on a 'partial approach', focusing on competition policy.(JT 05-12-96)

Information Technology Agreement (ITA)

The US had been pushing hard for an agreement to remove tariffs by 2000 on the information technology industry at the first ministerial meeting of the WTO in December 1996. But some developing countries, particularly in Asia, were not convinced that free trade in these products would benefit them and were of the opinion that a deal must extend to cover lower technology consumer goods such as television sets which they produce.(JT 07-12-96) Besides, these countries worried about the consequences of the slash of tariffs for their industrial policy: the advent of global trading without impediment would curb nascent national industries.(FEER 12-12-96:60)

Agreement was finally reached on abolishing tariffs on trade in computers, chips, software and telecommunications equipment by the year 2000. Among the Asian countries adhering to such tariff-cuts were Japan, Hongkong, Indonesia, South Korea, Singapore, and Taiwan. (IHT 13-12-96) (*see infra*) On 4 March 1997 the WTO announced that it expected a formal agreement shortly. The first round of tariff cuts was scheduled for 1 July 1997. (IHT 05-03-97)

Rejection of address by ILO Director General

An invitation to the Director General of the ILO to address the WTO ministerial conference, extended by the Swiss chairman of the WTO General Council, was withdrawn after complaints by developing countries. These countries argue that the West wanted working conditions to be subjected to trade rules to undermine the poorer countries' advantage from lower wage costs. (*see infra*) Meanwhile the ICFTU stepped up pressure on the WTO to enforce human rights in workplaces, joining western criticism against poorer countries opposing the proposal. (JT 07-12-96)

Results of First Ministerial Conference

A ministerial declaration adopted on 13 December 1996 at the end of the first ministerial conference of the WTO at Singapore endorsed an Information Technology Agreement to scrap tariffs on the market of computer-related products. The declaration did not cover telecommunications. While Japan, Taiwan and the Philippines welcomed the effort to lessen trade restrictions in this field, China was said to be against.

The declaration rejected the use of labour standards for protectionist purposes and referred to the ILO as the competent body to deal with the issue of these standards.

There was also agreement on an action plan to boost trade with the world's least developed countries.

The conference also decided to create two new groups to study treatment of foreign investment and competition. (JT 14-and 15-12-96)

WORLD WAR II

Right of comfort women to sue the state of Japan

In view of the reluctance of many former 'comfort women' to receive payments from the Japanese government-sponsored 'Asian Peace National Fund' ('Asian Women's Fund'), the Japanese government indicated that such payments would be completely separate from the legal issues involved and that it would not bar ("does not discourage") the women's groups from taking their cases to court. Those who rejected donations from the 'private' Fund had insisted on direct compensation from the Japanese government.

The official Japanese stance is that Japan need not compensate anymore because the issue had already been legally resolved with the respective governments (*see* 6 AsYIL 468). (MainichiDN 12-10-96; JT 17-10-96; FEER 25-07-96:26)

Aid to former Indonesian 'comfort women'

It was reported that the Japanese government was to give 380 million Yen over a ten-year period to provide help for Indonesian women forced to work as sex slaves during World War II. The money would not be given directly to the individuals concerned but would be handled by the Indonesian government.

Historians estimated that some 60,000 Indonesian women were forced into sexual slavery, but so far only around 300 had contacted the Indonesian Legal Aid Foundation for help in seeking an apology from Japan or to ask for compensation. (JT 16-11-96)

Japanese chemical weapons in China

Owing to the limited size and capacity of the Japanese 'Ground Self-Defence Force's' chemical unit, Japan considered it impossible to destroy the chemical weapons it left in China at the end of the Second World War in the period of 10 years as prescribed by the Chemical Weapons Convention.

Japan intended to enter negotiations with China on an extension of the period and would make the same request to the supervising body under the Convention. Under the Convention the period for disposal can be extended to 15 years with the approval of the board members and the signatory states. Technically speaking there was no Convention obligation yet for Japan *vis-à-vis* China since the latter had not yet ratified the Convention, but the two countries had reached an agreement bilaterally on Japan's responsibility for the disposal process. The overall cost of the disposal was expected to run several hundred billion yen.

Japan estimates there are about 700,000 shells containing lethal substances still in China, of which the disposal could be complicated by the age of the shells. China, however, estimates the number at 2 million, and demands that Japan ships them out of China before disposing of them. It claims that left-over Japanese poison had claimed 2,000 victims since the war. (JT 10-11-96)

It was reported in early December 1996 that a group of Chinese filed a suit for damages in the Tokyo District Court against the Japanese government for injuries and deaths caused by Japanese chemical weapons left in China following World War II. (JT 10-12-96)

LITERATURE

BOOK REVIEWS*

Multinational Enterprises and the Law, by PETER MUCHLINSKI, Blackwell Publishers, Oxford, 1995, pp. 674 and liv, ISBN 0-631-17311-0.

There is quite a wealth of literature available on the regulation of multinational enterprises but none is as comprehensive, thorough and cohesive as this book. The ideas of host and home country control and regulation of the activities of multinational companies have long attracted many international lawyers. This was especially so in the aftermath of the introduction of the concept of a New International Economic Order in the 1970s. But this book which "seeks to give a comprehensive introduction to the regulation of multinational enterprises (MNEs) as the principal vehicles for foreign direct investment" (p. lv), is a competent analysis of the legal issues involved rather than the politico-economic issues relating to the activities of MNEs. The author provides a thorough treatment of almost all legal aspects of the operation of MNEs in different states. It is a very well documented book, providing a great deal of information about the present state of affairs on MNEs and the law.

The book is divided into three parts and 17 Chapters. The first part, in Chapters 1 to 4, deals with the conceptual framework outlining the ongoing economic and ideological debate about the nature and scope of the activities of MNEs as well the concern over such enterprises. It traces the origin and evolution of MNEs and goes on to examine the characteristics of different types of MNEs. Part II, Chapters 5 to 13, provides an extensive analysis of the regulation of MNEs by home and host States. It constitutes perhaps the hard core of the book. In this part the author deals with a broad variety of issues ranging from the jurisdictional limits of regulation through national or regional law, the control of inward investment by host states to taxation problems associated with MNEs, regulation through antitrust law, technology transfer, to labour relations and other aspects. The final Part III comprises four Chapters, i.e. Chapters 14 to 17, and presents a detailed picture of the emerging

system of international regulation of MNEs. In so doing, it covers issues such as re-negotiation and expropriation in international law, the settlement of international disputes and the efforts to codify international standards for the treatment of foreign investors. The last chapter examines the practice of states concerning regulation of foreign investment under bilateral investment treaties.

The approach taken in the book is quite 'reader-friendly'. Most chapters begin by telling the reader what to expect in that chapter and conclude by wrapping up the discussion in the concluding section. This approach can be quite useful for any reader looking to read specific sections of the book relating to specific issues concerning MNEs only, rather than the whole book which runs into more than 600 pages. The reader is helped further by tables of cases, statutes, treaties as well as a list of publications of governments and international organisations.

Chapter 1 presents a review of the origins of the post-war concern over MNEs and goes on to put them in their contemporary setting. The remainder of the book is devoted to analysing the history of the regulation of MNEs over the past thirty years or so and to presenting the current state of the law. After surveying various jurisdictional limits of regulation of MNEs, the author goes on to suggest that "the state-centred model of international business regulation can be supplanted as states agree to develop new harmonised standards of international economic regulation, and create new conflict avoidance procedures". (p. 157) Indeed, it is perhaps in this direction that the world will have to move in the years to come in order to cope with the ever expanding activities of MNEs since the widespread adoption of privatisation programmes world over has already accelerated the process of liberalisation of foreign investment regimes in many states. MUCHLINSKI also appears to argue for less regulation of the activities of MNEs and more protection for foreign investment. He appears less concerned about the negative consequences of such a policy on developing states.

* Edited by Surya P. Subedi, Book Review Editor.

If one looks at the literature available today on MNEs one will see that many market-oriented authors have spared no time and effort to reject the idea behind the New International Economic Order (NIEO) and have said that the days for such ideas are over. They are too easily influenced by the current economic and political reality of the world and appear to be under the impression that the current situation will prevail for some time to come. They do not envisage a revival of interest for ideas similar to those embodied in the NIEO nor see an alternative to the current economic policy dominated by Western states. Consequently, they are prepared to join in the populist bandwagon without questioning the long-term impact of such a policy on other states. Although MUCHLINSKI has a very well-balanced approach to the issues discussed and has done a very good job by presenting his analysis in as objective a manner as possible, many readers might be tempted to put him in the category of authors just mentioned. This is a risk that the author has not done enough to avoid in his book.

Although all chapters have their own concluding sections, it would have been better if the author had written a concluding chapter in order to present his own overarching views as to what future was held for the regulation of MNEs at the threshold of the twentieth century. A chapter such as this would have nicely woven all the chapters together to make the book a definitive word on MNEs for many years to come and would have fulfilled the promise to this extent made by the author in the introductory chapter. Apart from these suggestions of improvement, the present reviewer can find no major deficiencies in the book. It is a well-organised and neatly put together book. There is not much room for lofty ideals or sentiments: all what is written is for lawyers.

All in all, this book represents a good example of fine legal scholarship and is a welcome addition to the literature on the subject matter. No doubt that this book will remain a valuable source of reference on MNEs and the law for many years to come for teachers and students alike.

SURYA P. SUBEDI
Hull University Law School

The Law of Non-Navigational Uses of International Watercourses, by J. BRUHACS, Martinus Nijhoff

Publishers, Dordrecht/Boston/London, 1992, translated from Hungarian to English by M. ZEHERY, pp. 251, ISBN 0-7923-1822-6.

Unfortunately, not many books written by academics of Eastern Europe find their way to the Western world. Yet, those who do are normally of very high quality and this book is a good example. It is written by BRUHACS, a professor of law at Janus Pannonius University in Pecs, Hungary, and is the English translation of a revised version of the Hungarian *Nemzetközi vízjog*, which was originally published by Akadémiai Kiado of Budapest. The book appears to have been written at a time when Slovakia (formerly Czechoslovakia) and Hungary were at loggerheads regarding the construction of two dams at Gabčíkovo and Nagymaros on the River Danube. The dispute was eventually referred to the ICJ and the judgement of the World Court and various opinions of individual judges reflect some of the very issues discussed here.

This book was written before the ILC adopted its draft articles on the Non-Navigational Uses of International Watercourses in 1994, let alone the 1997 UN Convention on the Non-Navigational Uses of International Watercourses. There is now a considerable amount of literature available on the non-navigational uses of international watercourses. This is especially true after the judgement of the ICJ on the Gabčíkovo/Nagymaros case. Even then, not much has been written on the practice of Central and Eastern European states in this area. Most of the literature on the subject focuses on the legal regimes applicable to international rivers outside Eastern Europe. From this point of view alone this book, which draws heavily on the problems and practices of Eastern European states, is a very welcome addition to the literature on the subject matter.

The book is divided into nine chapters. Chapter I outlines the development of regulations relating to the non-navigational uses of international watercourses. The very opening paragraph of the book nicely expresses the underlying idea behind the evolution of the law and practice on this subject:

"In times past, rivers (aqua profluens) were classified in Roman law as being within the group of *res extra patrimonium*, being so broad a field that their exclusive possession was beyond doubt; in fact, their utilisation was available to anybody and to any extent. This

legal thesis became, however, untenable in modern times." (p. 9)

The author then goes on to explore the evolution of the law on the non-navigational uses of international watercourses during the later part of the eighteenth as well as the nineteenth and twentieth centuries. Next is a survey of the views of writers since the time of Hugo Grotius. Chapter I also covers the efforts to develop international law on the subject matter made by international scientific bodies such as the Institute of International Law and the International Law Association.

Chapter II introduces and analyses the concept of international watercourses. It discusses both the traditional and modern approaches to the definition of an international watercourse. The author rightly states that the starting point for the traditional definition of international watercourses is found in Article 108 of the Final Act of the Vienna Congress of 1815. However, as stated by the author, "at the same time the criteria of a river to qualify as an international watercourse have changed several times in practice." (p. 26). Chapter III is perhaps the most interesting chapter of this book in which the author goes on to examine the problem of territorial sovereignty in international relations arising from the non-navigational uses of watercourses. Indeed, "It has been beyond doubt, both in international practice and in legal opinion in general that, irrespective of their national and international character, the watercourses belonging to the fluvial territory of a state are subject to the sovereignty of the riparian state, i.e. the state within the territory of which they are found." (p. 41) It is in this context that the author assesses the extreme concept of territorial sovereignty with reference to the Harmon doctrine.

Chapter IV is devoted to examining international law making to establish the regime of non-navigational uses of international watercourses. The author presents a useful and informative survey of both bilateral and multilateral treaties that have had some impact on the development of international watercourses law. A careful and competent attempt has been made to apply the sources of international law to argue the existence of the principles governing the activities of states concerning the utilisation of international watercourses. The water management regime of the Danube basin is the subject of detailed analysis in Chapter V. It is here that the author mentions the dispute between Hungary and Slovakia regarding the construction of two dams on the river Danube.

It is a bit disappointing that the author does not analyse in detail the developments leading up to the referral of the dispute to the ICJ. One would have liked to see a more detailed account of the background to the dispute between Hungary and Slovakia in a book of this nature.

The next three chapters, i.e. Chapters VI-VIII, deal with the international watercourses law principles governing the use of watercourses. The principles covered include the principle of reasonable and equitable use of international watercourses, the principle of no significant harm and the duty to prevent pollution of international watercourses. Chapter IX, the final chapter, assesses the application of international legal norms relating to non-navigational uses of international watercourses. Among the principal norms examined by the author is the principle of state responsibility. In summing up the analysis of this Chapter, the author concludes that "international responsibility has a very limited role in respect of the utilisation regime of international watercourses. This necessarily gives rise to the question whether it would be convenient to look for other ways and means to compensate damage, e.g., at the private international law level, while maintaining and, even more, developing international responsibility. This problem nevertheless reaches beyond the subject-matter of the present work." (p. 220) This is where other authors can come in and start adding their own building block to the body of knowledge on this subject.

Of course, many changes have taken place since the publication of this book both in terms of the development of the law on the subject and in terms of the practical situation on the ground in very many lower and upper riparian States of various international watercourses. However, this book is likely to continue attracting readership because of its beautiful combination of law, theory and practice relating to the non-navigational uses of international watercourses. After all, whatever new developments have taken place recently in this area have their roots in the past and this book provides a useful account of past practice of states and provides a fine expose of the background to the modern principles of international watercourses law. Therefore, the present reviewer can happily recommend this book to all individuals interested in the development of the law in this area.

SURYA P. SUBEDI
Hull University Law School

Precedent in the World Court, by MOHAMED SHAHABUDEEN, Grotius Publications, Cambridge University Press, 1996, pp. 245, ISBN 0-521-56310-0.

While clearly acknowledged by all, the place of decisions of the International Court of Justice in the realm of the judicial authority of the Court and of the sources of international law, as well as their role in the development of this law, is not very clearly defined. Scholars from the Common Law tradition and those from the Continental legal thinking as well, have frequently cited decisions of the Court in support of their arguments, either in their pleadings before the Court or in their academic writings. Yet, most of their writings or pleadings have not been very clear regarding the precedential value of the Court's decisions, either in terms of the specific context in which they were cited or within the doctrine of sources of international law.

It is not an exaggeration to say that most writers have tended to forget that decisions of the International Court of Justice are not formally among the sources of international law, as stipulated in Article 38(1) of the Statute of the Court. Nor do they fall within the ambit of the principle of *stare decisis*, in view of the provision of Article 59 of the Statute. This is confirmed by the fact, also expressed by ICJ Judge SHAHABUDEEN in the Preface to his book, that "the World Court was established on the Continental model, which knows no doctrine of precedent." Yet, the question has persisted and decisions of the World Court have always been a source of inspiration, and, indeed, a source of strong reliance in the fields of theory and practice, both for scholars and the Court itself. Thus, the book addresses a very challenging question.

The author has started from the premise that the absence of the rule of *stare decisis* has not prevented the Court, and the counsel appearing before the Court and publicists alike, from relying on the decisions of the Court as "precedents", if not as "binding precedents". Further, the Court, normally, "seeks guidance from its previous decisions, that it regards them as reliable expositions of the law, and that though having the power to depart from them, it will not lightly exercise that power". (pp. 2-3) This has led the author to pose and pursue the following very worthy and relevant questions in his book: do decisions of the Court

create law?; if decisions of the Court can relate in the creation of law, how and at what point is that law created?; does the phenomenon occur within the judicial process itself, or outside of it?; does the Court make a distinction *between ratio decidendi* and *obiter dictum*?; can it depart from its previous decisions, and if so, in what circumstances? (p. 2-3).

A further inquiry by the author in this book is that while "judicial decision has become so important in the development of international law, it is surprising that so little has been done to elaborate principles governing the use of precedents in international law" (p. 8). Judge SHAHABUDEEN clearly seems to hold the view that international law qualifies as a system of law in which the case law of the Court can be "the inevitable accompaniment of a body of law based on case law". When outlining the conditions for the development of a system of precedents,¹ he suggests that such conditions may be met in the case of the World Court. That is that the main rules of international law are unwritten, and further, that even in relation to codified international law the development of a system of precedents is not excluded (p. 8).

A further interesting classification developed by the author is that a system of precedents may operate in different ways. A system may authorise the judge to consider previous decisions as part of the general legal material from which the law may be ascertained; or it may oblige him to decide the case in the same way as a previous case unless he can give a good reason for not doing so; or, still, it may oblige him to decide in the same way as the previous case even if he can give a good reason for not doing so. (ibid. p. 9) The Continental systems, in view of the author, are of the first kind and Common Law courts of the last kind. In the meantime, however, at the higher courts of both systems the differences between the two systems may be relatively narrowed.

Bearing the above classification in mind and the fact that the International Court of Justice has clearly spoken of its "settled Jurisprudence", the Court's reliance on its previous decisions, in Judge SHAHABUDEEN's view, appears to represent

¹ These conditions have been identified as (1) the unwritten character of the main rules; (2) the functioning of the court as a unifying element in a legal system characterised by centrifugal forces; and (3) the necessity of resorting to principles. (p. 8)

more than acting on the *jurisprudence constante* model of the Continent. The reason for this conclusion of the author is that "even when there is no question of consolidating the previous case law, a particular decision may be relied on". The author says:

"Obviously and rightly, any Court regards its own authority, and that of its predecessor, as supreme in the field of international adjudication. Several cases may be cited, but often only as further illustrations of the principle decided in a particular case. In the presence of a clear precedent set by itself or its predecessor, the Court will not normally undertake fresh research.

... [A]lthough the Court does not regard its previous decisions as laying down the law with binding effect, for practical purposes it "treats them as sufficient authority for the principle under consideration. It will consequently follow them unless they can be distinguished on valid grounds or shown to be clearly wrong, or, possibly, where they no longer meet the new conditions of the evolving international community". (pp. 11-12)

The book is divided into 15 chapters, including an introduction and a conclusion. Generally speaking, chapters 2 to 8 deal, in different ways, with establishing the imperatives and the bases of the system of precedent in the World Court and its main characteristics. Chapters 9 to 14, on the other hand, attempt to identify the scope and mode of operation of the system. Chapter 15 is a conclusion.

Obviously, the significance of the doctrine of precedent can only become apparent when there is a considerable body of case law developed through the years. That is why the author has found it necessary to examine the growth of the case law of the International Court of Justice, and its predecessor the Permanent Court of International Justice, and the extent to which, in practice, the Court and individual judges have relied on previous cases. (Ch. 2) The result of this examination is that, the Court has, indeed, pursued a policy of precedential consistency. (p. 31)

Further, the author has attempted to identify the range of precedential resources. (Ch. 3) Here, the notions of "accessibility" and "the range of admissible precedents" are explored. As to the first, the importance of both the judgements and the pleadings are emphasised by the author. As to the second, while the range of admissible precedential material appears to be wide, only general-

ised, as distinguished from specific, references may be made to non-World Court material. However, the Court's own decisions are specifically relied on. (p. 35-39)

Chapter 4 examines the doctrinal bases of the system of precedent. In particular, one finds persuasive the argument that the Court as the judicial organ of the United Nations shares in the responsibility of the Organisation to maintain peace, and that in order to do so, it has an implied power to ensure consistency. Moreover, the permanent institutional character of the Court equally warrants consistency in the administration of justice and continuity in its contribution to the formulation and the development of international law. In the author's view some specific statutory basis for the doctrine of precedent can even be found in Article 38 paragraph 1(d) of the ICJ Statute. That is that the Court has to consider any relevant judicial decisions, while, by contrast in a legal system in which there is no doctrine of precedent, courts do not have to consider case law.

Chapters 5 and 6 are an inquiry into the statutory bases of the system of precedent in the *travaux préparatoires* of the ICJ Statute through a thorough examination of the work of the Advisory Committee of Jurists by which the Statute of the Permanent Court of International Justice was drafted, and the view adopted by the League of Nations, respectively. The result of this inquiry is that *stare decisis* is not applicable to the Court and that judicial decisions would enable the Court to find the existing law and not to create new law. However, that historical background did not go far enough to prevent acknowledgement that decisions of the Court could at least contribute to the development of international law.

In examining the possibility of judge-made international law (Ch.7), the author rightly acknowledges a significant factor, which militates against a system of precedent in international law. That is, there is nothing to hold the international adjudicating machinery, which consists of a number of tribunals, as a coherent system. Further, the absence of a hierarchical authority to impose order is a prescription for conflicting precepts. Nevertheless, the author seems to suggest that the Court's function in developing, adapting, filling gaps and interpreting the law, and in other words, the modular nature of these activities, should not obscure the creative nature of the function. The author has made this statement, of course, while being aware that the Court itself takes care to avoid expressions suggestive of judicial law mak-

ing. A similar line of reasoning and tendency is apparent when the author has discussed the applicability of *stare decisis* to decisions of the Court. (Ch. 8) In view of Article 59 of the Statute, he accepts that this principle is not formally applicable to decisions of the Court. Again, this does not prevent the Court from regarding the law as stated in a decision as part of international law.

Further, the author has attempted very elaborately and skilfully to examine the circumstances of application and non-application of the system of precedent in the World Court, mostly from the perspective of the common law requirements of distinguishing circumstances of departure from a previous case and the distinction between *obiter dictum* and *ratio decidendi*. (Chs. 9-11) Moreover, the author has come to the conclusion that the Court makes no distinction between the precedential value of its decisions in contentious cases and advisory opinions. (Ch. 12) As to the scope and effects of the Court's case law, the author seems prepared to accept that the nature of international society, based as it is on relations between sovereign states, imposes limits on the extent to which the Court can exercise a law-making function.

Judge SHAHABUDEEN concludes his book with a favourable view of the application of the doctrine of precedent to decisions of the Court. One cannot lose sight of the reality expressed in this book that:

"The Court has not had occasion to consider whether its decisions create law. It may incline towards avoiding the question, if it has to give an answer, it would probably do so in the negative. But, on balance, it is possible to hold that the arguments, which run both ways, support the view that the Court has a power of limited creativity." (p. 238)

Indeed, the absence of a legislature may be a cause for recognising a greater role for the Court in developing international law along the lines of consensus of the international community. However, it must not be lightly overlooked that international law, as confirmed by the Court on various occasions, is essentially based on consent of sovereign states, to the exclusion of any other form of law-making, which may run counter to this basic principle.

The book is based on extensive research and is written by a highly distinguished member of the International Court of Justice as a person most

qualified to speak on the matter. It is, indeed, an excellent and most welcome contribution to the literature of international law on the topic.

JAMAL SEIFI
Faculty of Law
Beheshti (National) University of Iran

Principles of the Institutional Law of International Organizations, by C.F. AMERASINGHE, Cambridge Studies in International and Comparative Law, Cambridge University Press 1996, pp. xxx and 519 pp., ISBN 0 521 56254 6, price £ 60.00.

The book under review finds its place among the *genre* of international law literature that arose as a result of the emergence of international organizations, particularly 'public' or 'intergovernmental' ones, and that deals with that phenomenon from various perspectives, such as political science, economics, and law. In the latter category, and especially among those treating the general aspects of the matter as a whole since the Second World War, we may refer to, *inter alia*, the works by LEONARD (1951), REUTER (1st ed. 1955), BOWETT (id. 1963), MONACO (1965), SCHERMERS (id. 1972), SCHWARZENBERGER (1976), and SEIDL-HOHENVELDERN (id. 1966). The basic rationale for the genre lies in the fact that a number of sovereign states jointly set up standing organs in order to be better able to fulfil common needs or reach common aims in one or more specific areas. Their relations are thus placed within a context different from that provided by general international law, including the general law of treaties. Moreover, the common institutions may be granted the competence to act separately from the member states, giving rise to questions of their status as a separate subject of international law. Within this delimitation, there developed a tendency in the literature of perceiving the beginnings of a quasi-constitutional order in the society of states, giving rise to the presentation of 'international institutional law'.

The author of the present volume justifies his work by the perceived need for a work of "both an academic and practical nature" on the institutional law concerned. (p. xi) He is of the opinion that the existing literature "either does not

have an adequate academic orientation" or is "not sufficiently specialized". (p. xi) This raises intriguing questions which, unfortunately, are not directly answered as the author's impressions are not elaborated nor further explained. But answers might be found by determining what is in fact the author's special approach that should make the book substantively distinct from other existing books on the same subject and with the same scope.

It is acknowledged that each organization has in fact its own law ('proper law' after the terminology of C.W. JENKS) and that, consequently, there is, by way of starting point, no such thing as a general 'law of international organization'. However, the author refers to evidence that "there have come into existence ... certain general principles ... for certain purposes and in certain areas ...". Such principles have evolved as a result of interpretation and the fact of existing similarities between the constitutions of the various organizations. (pp. 15-16) Similarity "does not necessarily establish principles", "the purpose [of the examination of constitutional texts] being generally to establish a pattern or an absence of pattern". (p. 21) Understandably, to the extent general principles have evolved "stricter juridical analysis and exposition become possible" whereas "[i]n other areas what is called for is description and comparison". (p. 19) In putting forward his preferred methodology the author clarifies that "[t]he interest in this work is mainly in the analysis, elucidation and discussion of principles" which are "naturally" found in case decisions to the extent available, but may also be established "where appropriate, in other ways too, e.g., by reference to general principles of law or reasoned inferences". There are areas, meanwhile, "where results are dependent more on provisions of individual constitutions". (p. 20)

After a first introductory chapter, a second chapter deals with the problem of interpretation of texts, doubtlessly most relevant in view of the essential role of the constitutional documents of the organizations. The following chapters deal with the familiar topics of the *genre*, such as legal personality, membership and representation, organs, acts of organs (legal effects, acts *ultra vires*), responsibility toward and of the organizations, the liability of member states, financing, employment relations, privileges and immunities, amendment of constitutions, settlement of disputes, and dissolution and succession. Within

the limits of this review no more than a haphazard commentary will be made.

Against the backdrop of the *opus magnus* of the International Law Commission in the field of responsibility of states it would have been most welcome had the author set up an outline of the parallel issue of the ('secondary rules' of the) (international) law on responsibility for that second major category of subjects of international law, the international organizations (with international legal personality). Unfortunately such endeavour has not been undertaken, possibly because it might have, even in the form of an outline, exceeded the parameters of the book. Yet, in the introductory part of the relevant chapter the author quite rightly emphasized the danger of obfuscation and inconsistency in the legal discourse concerning responsibility resulting from confusion in terminology: "What is important in any context is that it be made clear in what sense terms are being used. Uniformity is not an end in itself but consistency is a virtue that cannot be overemphasized and, if possible, avoidance of variance in the same context is desirable in order that clarity may be achieved". (p. 225 n. 5)

In the relevant sub-chapter on "Substantive obligations" (p. 240 et seq.) the author acknowledges the possibility of liability for breach of obligations under treaty as well as international customary law "for the acts of their servants or agents, when they are acting in the performance of their functions, or of persons or groups acting under the control of the organizations, such as armed forces in the case of the UN". This appears similar to Articles 5-8 of the ILC draft articles on state responsibility. It is not quite clear whether the author adheres to the doctrine of responsibility by the mere breach of an obligation (as in the system of the ILC draft), or whether resulting damage is supposed to be an inherent requirement ("Generally, organizations have been found to be at fault in connection with damage resulting from conduct ..."). Remarkably, he suggests that, for the determination of responsibility, "analogies should ... be borrowed from the principles of imputability applied in the ... law of state responsibility".

In view of the fact that this is the first book on the subject written by an Asian scholar, some curiosity as to specific remarks relating to the region or the existing regional organizations seems justified. The regional scope does not, or hardly seems to, have any impact on the institutional features of an organization, as no special

comment is devoted to this phenomenon except its closed nature. Among the Asian regional organizations of, admittedly, diverse character (ASEAN, SAARC, ESCAP, ADB) the Asian Development Bank is the only one which have merited a reference.

As to the relevance of views and practices of Asian countries for the subject as a whole, India, Pakistan and Sri Lanka are mentioned in the context of the question of succession of membership, India and the Philippines in regard to recognition of immunity of international organizations, China in regard to the question of representation and regular contributions to the UN (see above), Cambodia in regard to representation, North Korea in regard to suspension of withdrawal.

A perusal of the volume under review alone does not, of course, offer an answer to the question whether the author has, after all, succeeded in writing a book that has a more 'adequate academic orientation' and is more 'specialized' than the existing literature on the subject. What can be said is that he has undoubtedly succeeded in producing a conveniently sized, clearly written volume on a subject that has grown so much in substance as to render it difficult to be included in a general manual on international law. The book should be warmly recommended to all those, both very and less academic, who seek to obtain either specialized or more general knowledge and understanding of the subject.

KO SWAN SIK

Public International Law - a Malaysian Perspective, by Tunku SOFIAH JEWAW, with Foreword by Tun MOHAMED SUFFIAN, and Introduction by Tan Sri Datuk AHMAD IBRAHIM, Pacifica Publications, Kuala Lumpur (Suite 22A, Bangunan Dato Zainal, 23 Jalan Melaka, 50100 Kuala Lumpur), 1996, pp.1628 (two vols.), ISBN (pbk) 983-99100-0-0 and 983-99100-1-9, (hbk) 983-991900-2-7 and 983-99100-3-5.

In many, though by no means all, of the 'new' states of Asia international law is still at a relatively early stage of development as a subject of academic pursuit. It is, therefore, a matter of great satisfaction and gratitude to be able to an-

nounce the present work, which is, according to Tun SUFFIAN's foreword, "the first book of its kind - stating the Malaysian experience and views on international law". This qualification invites a clarification in light of similar schemes elsewhere.

For a horizontal legal order whose membership basically consists of sovereign legal subjects, as is still the case with present-day international law, the recording of the practice of states is of utmost importance, both for the determination of their attitude toward the existing law, and, wherever relevant, for the determination of elements relevant in the process of crystallization of international customary law. While this approach to international law with its special reference to one specific state may paradoxically result in national 'versions' of international law, its usefulness and importance are beyond doubt.

Books aiming at the presentation of the practice of a specific state in international law have taken different formats. For its origins we have to turn to the US and go back to 1877, when JOHN L. CADWALADER published his *Digest of the Published Opinions of the Attorneys-General, and of the Leading Decisions of the Federal Courts, with Reference to International Law, Treaties and Kindred Subjects*. This initiative has given rise to a proud US tradition, including F. WHARTON's three-volume *International Law Digest* (1886), the eight volumes under the same title by J.B. MOORE (1906), the eight-volume *Digest of International Law* by G.H. HACKWORTH (1940-1944), the fifteen volumes under the same title by M.M. WHITEMAN (1963-1970), and, from 1973 on, the annual volumes under the title *Digest of United States Practice in International Law* by different authors from the US Department of State. Despite the fact that, presumably for practical reasons, the nature of their contents changed somewhat in the course of time (note the inclusion of reproductions from current academic writing in WHITEMAN's and the later annual digests), all these digests essentially aim at the recording of 'raw materials' of the official, legally relevant, behaviour of the United States of America in its international relations.

The American example has been followed by several other countries which had the necessary funds and human resources for such time-consuming, tedious and relatively unglamorous pro-

jects. Reference may be made to the unfinished British Digest (planned coverage: 1860-1914, 1914-1960) by CLIVE PARRY, the French *Répertoire* (coverage 1800-1960) by A.C. KISS, the *Prassi Italiana* (coverage 1861-1945), and the Swiss *Répertoire* (coverage 1914-1939) by P. GUGGENHEIM. Apart from the above comprehensive volumes of state practice materials covering rather long periods of time (except the yearly periods of the US digests since 1973), various periodicals for international law regularly contain current materials. For example, every Volume of this *Yearbook* endeavours to present 'legal materials' concerning Asian states. (cf. Vol. 1 of the book under review, p. 42)

The views and practices of a state in the field of international law are sometimes presented in a different format. A fine example is C.C. HYDE's three-volume *International Law, Chiefly as Applied and Interpreted by the United States* (2nd ed. 1945), later followed by, *inter alia*, J.G. CASTEL (1965) and R.ST.J. MACDONALD et al. for Canada, D.P. O'CONNELL's *International Law in Australia*, and *International Law in the Netherlands* by H.F. VAN PANHUYNS et al. These are descriptive and analytical manuals of international law which approach the subject from the perspective of a specific state.

Finally, mention should be made of yet another *genre*, originating in the US common law sphere and aiming at non-binding 'restatements' of rules abstracted from the US state practice. This has resulted, as far as international law is concerned, in the *Restatement of the Law: Foreign Relations Law of the United States*, now in its third edition.

The question is how the volumes under review must in fact be classified. This proves to be more complicated than one would expect, since the book seems to include the WHITEMAN and HYDE approaches, and appears to aim at several purposes simultaneously. This impression is to some extent confirmed by the author's preface, where she defines her main objective as "to set forth the Malaysian views on international law in the areas where both its state practice and judicial decisions assert its position", but adds a secondary objective, being "to serve as a basic textbook ... for the country's law schools". According to the author the format chosen 'accomplishes both objectives', but it may be asked whether this is indeed the case, and whether different purposes can in fact be put into a book with impunity. It is difficult to ima-

gine that Malaysian law students would be required to obtain their basic knowledge of international law from a book of 1628 pages, unless it were presented as a 'collection of cases and materials'.

Another set of diverse purposes, which can be suspected from the book's contents, is, however, of a different order. The volumes may be generally characterized by the abundance of primary texts. This is, of course, quite suitable for a presentation of state practice, yet requires a careful selection of more and less relevant materials. Here, it is suggested, the book suffers from an excessive generosity. For example, it includes reproductions of complete texts of some multilateral treaties, even in cases where these are not yet in force. Such texts are undoubtedly most useful, even necessary, for anybody, both student and scholar, to have at one's immediate disposal, but are not really relevant for the presentation of Malaysian state practice in the field of international law. Speculating on a reason why the author has decided to accept such imbalances, one suspects that she found herself caught in the trap familiar to many authors addressing themselves to a readership in the 'developing' (or: poor) world. Aware of the scarcity of materials available to their readers, they feel tempted to include more information than is strictly necessary for the treatment of the subject at hand. A separate volume of international law documents in general, or 'with particular relevance for Malaysia/Asia' would have been preferable.

The profusion of information also refers to an insufficient, though admittedly difficult, distinction between legally relevant and irrelevant materials of international relations and foreign policy, resulting in overflow to these non-legal areas in some cases, such as the reproduction of complete texts of political speeches of Malaysian officials. An extreme case of profusion of unnecessary (though useful) information is a list (17 pp.) of addresses of Malaysian diplomatic and consular missions abroad.

We shall try to present a glimpse of the numerous items dealt with by browsing through the two volumes, as follows: the relevance of doctrine in Malaysian court decisions (p.51), recognition of states and governments (p.56), claim to, and application of, Malaysian jurisdiction (p.97), state immunity (p.104), diplomatic immunity (p.124), jurisdiction over foreign military forces (p.114), treaty-making, interpretation

of treaties, *pacta sunt servanda*, status of multi-lateral treaties (p.148), piracy and individual liability (p.249), nationality (p.257), extradition (p.274), refugees (p.348), acquisition of territory (p.363), territorial disputes (p.388), state succession (p.392), human rights (not limited to human rights under international law, p.507), law of the sea (p.644), air law (p.989), international organization (p.1067), United Nations (p.1120), pacific settlement of disputes (p.1142), international commercial arbitration (p.1231), humanitarian law in armed conflict (p.1258), diplomacy (p.1482), diplomatic privileges (p.1594).

The above remarks dealing with some less fortunate features of the book could easily be joined by other ones. Among other things, one might note the unsharp distinction between 'Asian' and 'Malaysian' matters now and then. However, for the present reviewer they merely serve as an overture to the emphasis on the satisfaction with which the volumes concerned should be received by the Asian international law community. Admittedly, there have been a number of endeavours in Asia in the field of state practice presentation. From India we know AGRAWALA's book *International Law - Indian Courts and Legislature* (1965), from Singapore and Malaysia JAYAKUMAR's collection *Public International Law Cases from Malaysia and Singapore* (1971) and from Japan reference can be made to ODA and OWADA'S *The Practice of Japan in International Law*, the project on practice in the field of specific topics under the auspices of the Kokusai Ho Jirei Kenkyu-kai, and the current multi-volume project in preparation under the auspices of the Kokusai Ho Gak-kai (Japanese Association of International Law, to be distinguished from the Japanese branch of the International Law Association). Yet, this is the first time that one of us has taken the trouble, the time, the energy and the patience to collect the materials available concerning all forms of the state practice of his or her own Asian country in the field of international law. It may be that the author concerned has not been able to do it quite comprehensively, and the book might suffer from some imbalances, but now and so far Malaysia is one of the very few, if not the only, Asian state of which we have a great deal of state practice materials readily available on our bookshelf.

It may be concluded that Tun SUFFIAN's qualification of the book under review as "the first book of its kind" does not only refer to Malaysia, but indeed to the whole of Asia. Tunku SOFIAH's book should, both in its seminal features and its shortages, serve as an indispensable beacon and guide on our way toward an improved presentation of international law as approached from an Asian perspective.

KO SWAN SIK

Report [of the] People's Commission on GATT - on the constitutional implications of the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations, Centre for Study of Global Trade System and Development, New Delhi (A 388, Sarita Vihar, New Delhi 110 044), 1996, pp. 220, price Rs. 250.

The Commission, being a non-official panel of judges consisting of Justices KHRISHNA IYER, CHINNAPPA REDDY and DESAI (retired Judges of the Supreme Court of India) and Justice RAJINDER SACHAR (retired Chief Justice of the Delhi High Court), was constituted by the National Working Group on Patent Laws and the Independent Initiative in New Delhi, to examine the above constitutional implications. The initiative arose from the conviction that the Final Act, which was authenticated in Marrakesh on 15 April 1994, in fact dealt not only with interborder trade issues but also with the internal functioning of domestic economics and their accessibility to foreign corporations in terms of financing, productive infrastructure and as market outlets. The rules contained in the Final Act were allegedly designed to allow the maximum freedom for corporate decision-making and minimize the interference of national governments into the economy. This raised concern over the impact of the Final Act on India's sovereignty and democracy and the Indian constitution, which then led to the initiative. The Commission was requested to take written and oral evidence from a cross-section of scientists, economists, jurists, political scientists, social activists, governments representatives and political personages.

The Report begins with a detailed chronology of events, from the commencement of the Uruguay Round Negotiations in 1986 till the accession by India to the WTO in 1994 and the passing of the Patents (Amendment) Bill, 1995 by the Lok Sabha in 1995. After a brief history of GATT follows a summary of the far-reaching issues on the agenda of the Uruguay Round and the failed resistance against them by developing countries like India and Brazil. The Commission then presents a critical examination of the handling of the Uruguay Round negotiations by the Indian government. The Report follows with an extensive "Summary of the critical sections of the Final Act and their implications" which forms a major part of the Report. After a 'Summary of written submissions' the Report finally formulates its findings on the 'Constitutionality of the Final Act' in respect of: constitutional basics, judicial review, treaty-making power, federalism, fundamental rights, democracy, and sovereignty.

The Report is a fine example of an investigation, by a non-governmental organization, of practices of its government in regard to international issues which have an important impact on the international rights and obligations of the state concerned.

KO SWAN SIK

Land and Maritime Zones of Peace in International Law, by SURYA P. SUBEDI, published in the series Oxford Monographs in International Law by Oxford University Press, 1996, pp. xlvi and 271, ISBN 0-19-826096-2.

In his preface the Editor of the *Oxford Monographs* reminds us that the topic of regional zones of peace has its origins in the *Pancha Shila* principles which first found expression in Indian diplomacy in 1954. Thus, the work under review, which is a revised version of a thesis submitted in 1993 for the doctoral degree at Oxford, provides a significant contribution to the history of Asian diplomacy and international law in the post-colonial era. The author, citizen of Nepal, on his part traces the origin of the concept to the Lusaka Declaration of the 1970 Non-Aligned Summit, and identifies the phenomenon of zones of peace (ZOPs) as "one of the most innovative developments in the post-World War II period" in meeting the challenge

of militarization, modern weapons technology, and interference. On the other hand, he rightly refers to other earlier known concepts of international law and relations for similar purposes, such as neutralization and demilitarization (p. xlii). He also correctly reminds us of the eventual linkage between the political phenomenon of efforts towards the establishment of ZOPs and the legal doctrine of so-called 'objective regimes' of territories with its implied question of feasibility of obligations of 'third' parties.

Apart from an Introduction and Conclusion, the book consists of 7 chapters. Chapter 1 deals with "The UN declarations on maritime zones of peace". It emphasizes the distinction between maritime and land ZOPs and assumes that different processes are followed in endeavouring and, as the case may be, bringing about the creation of such zones. The first mentioned distinction is justified by the different legal norms governing inter-state relationships on land and at sea. The 'different processes' refer to both the different organizational framework of creation (UN, other international organizations, outside any standing organization) and the legal transaction used for their legal creation (the author lists: treaty, resolution of international organizations or conferences, unilateral declarations, estoppel, acquiescence, recognition, see p. 206).

These various aspects of the topic and related questions are further elaborated and analysed in the next chapters. Chapter 2 analyses the compatibility of maritime ZOPs with existing principles of the law of the sea, while Chapter 3 investigates their compatibility with norms and principles of general international law. Chapter 4 proceeds with a discussion of the issue of land ZOPs. The next Chapter then turns to another aspect, referred to above: the "relationship of the doctrine of zones of peace with other doctrines of similar character" such as permanent neutrality, demilitarization and what we could call 'denuclearization', but also the 1954 *Pancha Shila* principles, the 1955 Bandung Declaration, and the principles of the Non-Aligned Movement. The author rightly devotes a separate Chapter 6 to the question whether and to what extent states not directly involved in the establishment of a ZOP are bound by it, and thereby discusses the doctrine of objective regimes. Finally, in Chapter 7, the author reverts to the question of the kinds of legal transactions used to create ZOPs. In discussing the role of UN General Assembly resolutions in the creation of

ZOPS the author (in an earlier chapter) rightly refers to their role in the making of international customary law and, as such, to their indirect role in creating a ZOP. It remains doubtful, however, whether such resolutions could in themselves be a direct source of rights and obligations of states, in spite of the abundant references made by the author to existing literature on the subject. On the other hand, this must be distinguished from the question of their binding force for the United Nations as a separate subject of international law.

In his Conclusion the author recapitulates that the maritime ZOP, while being a "synthesis of already existing and emerging principles" of the international law of the sea, was "brought into existence" as "a new concept" in international law through UN General Assembly Declarations. The corresponding regimes are chiefly based on principles of the UN Charter, especially those embodied in Article 2(4) and the right of self-defence. He then finds a legal base for the UN Declarations in the "present legal order of the seas and oceans" proscribing "non-peaceful activities". Thus the concept of ZOP "as such can be considered as *lex lata*" although the "methods prescribed for [their] realization" are still *de lege ferenda* as "they are still in the process of international negotiation and deliberation". Yet, since the prescribed measures "seem broadly consistent with the principles of international law, they too appear eligible to enter into the body of international law". Consequently the author regards the concept of maritime ZOP "as an emerging rule of international law".

It remains useful to restate the truism that law, including international law, is by its nature in a permanent state of flux and development. Its law-creating and law-enforcing agencies constantly try to adapt it to, and the latter also to interpret it in accordance with, the changing needs and *desiderata* of the society concerned, as they see them. The emergence of the concept of ZOP is a fine example of a development where the law, apart from treaty law, has not quite crystallized yet, with opposite actors still busy with their endeavours to have the law accord with their preferred state of international relations.

The author of the volume under review, at present professor at the University of Hull Law School, has obliged us by presenting a clear and

highly organized analysis of the many issues involved in the subject and of the various factors which play an important role in defining the relevant questions and finding the answers. Accordingly, apart from being the first legal monograph on the topic of ZOPS, the book constitutes, contrary to its limited title, a rich source of information on the discussion of various fundamental issues of international law. Lastly, a review in the present *Yearbook* should not fail to observe the special effort made by the author to include the most valuable references to Asian state practice wherever available. The book, which was awarded the 1997 Prize for Outstanding Legal Scholarship by the British Association of University Teachers of Law, can unhesitatingly be recommended as a seminal work and an excellent reference tool on the subject.

KO SWAN SIK

Cornelius van Bynkershoek: His role in the history of international law, by KINJI AKASHI, International Law in Japanese Perspective Series (SHIGERU ODA ed.), Vol. 4, Kluwer Law International, 1998, pp. xii and 199, ISBN 90-411-0599-9.

This is a thoroughly revised version of a doctoral dissertation defended at the University of Utrecht, The Netherlands, in June 1996. The author (whose name is presented on the cover in a westernized way but should correctly and customarily be referred to as AKASHI KINJI (just as the editor of the series is named ODA SHIGERU rather than the reverse) belongs to the surprisingly large number of Japanese international law scholars with a special interest in the history of the (Western) doctrine of international law. The book is, paradoxically, published in a series on 'International Law in Japanese Perspective', despite the fact that the author has had no intention whatsoever to approach and analyse the subject matter from a specifically Japanese angle, nor has he claimed that BYNKERSHOEK was of Japanese descent. In fact, the 'Japanese perspective' in this case consists solely of the author's Japanese nationality.

A summary review of the nature and contents of the book could best be started with a reference to the author's Introduction. He recalls

that in the early stages of the development of the modern law of nations, scholarly writings were much more influential than nowadays, and that the doctrinal bases of that law have been established to a large extent by texts which are now considered as belonging to the "classics of international law". Against this backdrop, the author justifies his venture: "It is therefore vitally important to approach any of the modern doctrines of international law from their historical aspects if we are to ... understand them correctly". The study of the 'classics' can be undertaken per se, or for the establishment of any doctrinal relations among them, or for the purpose of a critical analysis "in light of contemporary state practices", in other words, the impact of one upon the other. The book under review is intended to present a study from all three perspectives, witness its sub-division: Part One: "Theory per se: Bynkershoek's theory of *Jus Gentium*", Part Two: "Bynkershoek's opinion and the Dutch practice", and Part Three: "Genealogy: Bynkershoek's works in the stream of legal thoughts of the law of nations". As to this third Part the author rightly remarks that it is "no easy task to prove a 'certain relation' and 'influence' among writers", and this review will not deal with this part any further.

The author's conclusion regarding the first sub-topic is that BYNKERSHOEK's writings are unsystematic and of a fragmentary nature, and do not contain a specific, visible, system of *jus gentium*. Besides, the claim of modernity, as far as his *jus gentium* is concerned, may well be considered to be of a dubious nature. Yet the author recognizes that BYNKERSHOEK has, after all, made a distinctive contribution to the development of the positive and modern law of nations. In order to determine whether this is indeed the case, BYNKERSHOEK's writings are put to a treble test of positivist international law theory: his attitude toward natural law and toward the applicability of Roman law to international relations, and his acknowledgement of positive, distinctive, sources of international law. Through comparison, especially with GROTIUS and PUFENDORF, it appears that BYNKERSHOEK had indeed renounced adherence to natural law as well as the applicability of Roman law in international relations.

As to the third test the author compares BYNKERSHOEK's teachings with a number of aspects of the contemporary state practice, viz. the Dutch general policy on neutral commerce and

the Dutch policy on contraband in the 17th century. The result is a feeling of ambiguity in respect to BYNKERSHOEK's positivist reputation. This applies, first, to his lack of consistency in citing practice and, secondly, to his emphasis on *ratio*. As to the former, BYNKERSHOEK appears to confuse *lex lata* and *lex ferenda*, which the author demonstrates on the basis of the famous cannon-shot rule. As to the latter, the author notes its incompatibility with the argument based on precedent. Furthermore, BYNKERSHOEK's reliance on the notion of 'public utility' (or the present-day "public policy") appears to jeopardize his "self-proclaimed objectivity" in dealing with legal issues. Consequently, "it is only partially correct to consider [BYNKERSHOEK] a positivist".

Finally, the author reminds us of another feature of BYNKERSHOEK's teachings which is not quite rare in the field of international law and relations, and which is, for that matter, quite 'modernistic': BYNKERSHOEK's conclusions were advantageous for the Dutch Republic in his days 'regardless of his real intent'. With that the author leads the reader back from the often idealized world of the past to the realities of human nature and the political present.

The author, who now teaches international law at Keio University in Tokyo, has, by presenting his study to us, rightly reminded us of the unceasing need for Asian scholars of international law to study and analyse the historical, Western, roots of present-day international law.

KO SWAN SIK

Cursos Euromediterráneos Bancaja de Derecho Internacional, Vol. 1 - 1997, Editorial Aranzadi, Pamplona, 1998, 456 pp., ISBN 84-8193-920-X.

This is a collection of the lectures delivered in 1997 at the "Bancaja Euromediterranean Courses of International Law" which are annually held under the auspices of the *Centro Internacional Bancaja para la Paz y el Desarrollo* [Bancaja International Centre for Peace and Development]. The annual courses consist of a course on fundamental problems and a number of other ones on particular topics (here six). They are given within a period of about two weeks at the University of Castellón ('Universitat Jaume'), Spain, and are facilitated by simul-

taneous translation into Spanish, French, English and Arabic. The faculty consists mainly of teachers from the mediterranean region. Further information and application forms may be obtained from the aforementioned Centro, Fundación Caja Castellón c/ Enmedio, No.82, 12001 Castellón, Spain, or via e-mail <eboix@guest.uji.es>.

The present collection, which appears to be the first of a series, comprises the following lectures: ALAIN PELLET, *Le droit international à l'aube du XXIème siècle (La société internationale contemporaine-permanence et tendances nouvelles)*; PAZ ANDRÉS SÁENZ DE SANTA MARIA, *La libre determinación de los pueblos en la nueva sociedad internacional*; MOHAMED BENNOUNA, *L'embargo dans la pratique des Nations-Unies (Radioscopie d'un moyen de pression)*; LUIGI CONDORELLI, *Le Tribunal Pénal pour l'Ex-Yougoslavie et sa jurisprudence*; FRANCISCO ORREGO VICUNA, *La responsabilidad por dano al medio ambiente en el derecho internacional*; MANUEL PÉREZ GONZÁLEZ, *Las relaciones entre el derecho internacional de los derechos humanos y el derecho internacional humanitario*; TULLIO TREVES, *Recent trends in the settlement of international disputes*.

KO SWAN SIK

International law and development – Some Asian perspectives, by M.M. KENIG-WITKOWSKA, published by the author at Bangkok, 1996, pp. 140, ISBN 97489760.

The author of this slim book is professor of international law at the Institute of Developing Countries of the University of Warsaw, who joined her husband at Bangkok during the latter's affiliation with the UN Economic and Social Commission for Asia and the Pacific (ESCAP). Her purpose is "to present some of the international legal instruments originated and operating in [the] service of development in the Asian region". Noting the dominating role of development issues in contemporary international relations, she finds it surprising that the legal mechanisms of development in the (then) leading region of economic growth has drawn relatively little attention.

The book consists of eight chapters, on the following diverse topics: (1) "Asian states' perspectives on international law" (pp. 5-18), (2) "Asia-Pacific region's perspective on human rights" (pp. 19-34), (3) "ASEAN – An Asian concept of a regional organization" (pp. 35-52), (4) "Agreement on the ASEAN Free Trade Area (AFTA) – a legal outline" (pp.53-67), (5) "ASEAN countries' foreign investment promotion law (with special emphasis on Thailand's legislation)" (pp. 69-86), (6) "South Asian Association of Regional Cooperation (SAARC) – an attempt in seeking answer for imperative of cooperation within the South" (pp. 87-99), (7) "Asian Development Bank – a regional grassroots financial institution for development. Selected issues of structure and mechanism" (pp.101-124), (8) "The Economic and Social Commission for Asia and the Pacific (ESCAP) – the very first international institution for development in the Asia-Pacific region" (pp. 125-140). It should be clear from the size of the volume that the items covered are treated very concisely, maybe too concise in view of the vast scope of the subject matter.

Yet a number of remarks may be in order. In respect of her first chapter the author notes, rightly, that an enquiry into the Asian perspectives of international law is confronted with, among other things, the 'general problem' of scarcity of relevant materials and documentation. As we know, this scarcity refers to several, unhappy, circumstances: *first*, the constraint which the Asian states observe in, or their lack of defining international behaviour in legal terms; *second*, the inadequate availability of materials on their relevant state practice; *third*, the inadequate accessibility of available materials.

The book was written before the monetary and economic crash of 1997 and thus still represents the optimistic atmosphere of that time. Much of the optimism has proved to be over-optimism. In light of the confusing and un-transparent explications of the real causes of the crash one might almost wish that the author had written her book three years later. The chance is, of course, that she would not have written the book at all.

KO SWAN SIK

One country, two international personalities – the case of Hong Kong, by RODA MUSHKAT, Hong Kong University Press, 1996, with foreword by JEROME A. COHEN, xii and 220 pp., incl. two appendices and index, ISBN 962 209 427 9.

The book purports to analyse the status of Hong Kong from a constitutional and international law perspective, as resulting from the reversion of the British Crown Colony of Hong Kong *cum annexis* to China, the state which, in a time of weakness and almost disintegration, ceded one part and leased another part of the territory concerned to Great Britain in the nineteenth century.

Among the meanings of the word 'case' according to Webster's Dictionary we find, *inter alia*, a "set of circumstances or conditions, a state of affairs", but also "a matter for trial". The sub-title of the volume under review refers, in my opinion, to both. The subject matter of the book is treated by the author as a "matter for trial": she endeavours to construe, with all arguments available, legal as well as otherwise, that Hong Kong be defined and treated as separate as possible from China, and, consequently, as independent as possible of Chinese jurisdiction. The volume can thus be taken as a powerful plea for Hong Kong as a separate subject of international law for all practical purposes, or "global player" (p. x). The author, a most distinguished Israeli scholar who has taught at the University of Hong Kong for many years (see her article in Volume 1 of this *Yearbook*), has accomplished her endeavour as accurately as one could possibly expect from her, and has not failed to underpin her theses with an abundance of references to the rich body of available literature on the various topics.

Understandably, some amount of bias has been difficult to avoid but, subjective approach being inherent to our perception of the law, and particularly international law, that bias need not necessarily lessen our appreciation of the legal reasonings offered in the book on the various issues with respect to Hong Kong. In fact, it appears useful to take the volume as a striking illustration of what may be referred to as an aspect of the political dimension of the present international legal order.

The basic factual difference between the municipal and international legal order consists of the ultimate presence of constitutionally, legally

and physically authoritative central community organs in the former, and their absence in the latter. As a result there is in international law, as compared with municipal law, an infinitely larger 'freedom' (or: free space) for factional understanding of the 'applicable' rules by each of those involved in the determination of the meaning, role and impact of the applicable rule in concrete cases, or, for that matter, in the determination of the existence or non-existence of a relevant rule. Consequently, it is quite possible to reach conclusions different from those presented in the book under review by choosing a perspective different from that of the author, even if one does not intend to deal with the topic of Hong Kong as a 'matter for trial'. Paradoxically, the truth of the above contention seems to be confirmed by the following characterization by the author of her approach: "The approach is grounded in a broad normative framework, which transcends constraints imposed by narrowly-based shifting political configurations". (Epilogue, p. 189) The book aims to serve a very broad readership, namely "the academic and non-academic, commercial and non-commercial, specialized and general, market segments" (p. x) but purports to be selective and not to serve as a "comprehensive introduction to the international law of Hong Kong".

The first chapter, drawing upon an earlier paper by the author in the *Emory International Law Review*, deals with the matter of Hong Kong's international personality, or, in other words, the extent of its competence under international law. In logical sequence, the following three chapters – which also include parts of the author's earlier writings – focus on the territory's jurisdiction *vis-à-vis* the outside world, and *vis-à-vis* China as a consequence of its special status. The next chapter (5) deals with aspects of treaty law and, *inter alia*, with the notion of unequal treaties which lie at the origin of the colonial status of Hong Kong. The sixth and last chapter deals with the interrelationship between international law and Hong Kong domestic law.

It is generally acknowledged at present that the international legal order knows of a rich variety of 'levels' of subjects in accordance with the different quantity and substance of their rights and obligations. If the author had this meaning of legal subject in mind when referring to 'international legal personality', it should not have been necessary for Chapter One, in assessing that quality with respect to Hong Kong, to

refer to 'factual stately attributes' (p. 3) and other factors which usually play a role in determining the quality of a state, i.e. the most comprehensive category of subject of international law, vested with sovereignty. By doing as it does, Chapter One in fact endeavours to argue that Hong Kong is actually something similar to a state, rather than solely prove it to be a (partial) international legal personality *sui generis*. The conclusion of similarity with a state is then taken as a starting point and test for further analysis.

After having concluded that Hong Kong is indeed endowed with international legal personality in the sense of something similar to (though less than) a state, Chapter Two pursues the determination of Hong Kong's jurisdictional competence from an international law perspective. It does so, not exclusively by reference to the Sino-British Joint Declaration and the Basic Law but, assuming Hong Kong's "international legal personality" in the sense referred to earlier, to international law in general and, wherever possible, by analogy with a state.

Chapter Three is entitled "Hong Kong's international legal obligations", referring to the items regarding to which Hong Kong has been assigned specific obligations under international law and granted specific international rights as a separate (partial) subject of international law. It is presumed by the author that "[i]nternational obligations are also imposed on Hong Kong under rules of customary or general international law, which apply to all members of the international community regardless of participation in specific conventions". This is certainly correct but only, it is suggested, if it is taken in relation with the specific obligations concerned.

Chapter 4, entitled "Hong Kong and Human rights" covers a broader field than one would expect from its title. A substantial part of the chapter deals with the complex consequences that resulted from the change of sovereignty over the territory in the field of the nationality status of those having more or less 'genuine links' with Hong Kong. Another sub-chapter under the subtitle of "Access to international remedies" deals with the hot issue of the law on human rights against the backdrop of the well-known but enigmatic wording of section XIII paragraph 4 of the 'Elaboration' by China in Annex I to the Joint Declaration, according to

which "[t]he provisions of" the UN Covenants "as applied to Hong Kong shall remain in force".

Chapter 5, on the law on treaties, deals, *inter alia*, briefly with the issue of "unequal treaties" which, irrespective of one's views about its general relevance, has in any case lost any specific relevance for Hong Kong after June 1997. Another sub-chapter deals with "implementation and breach" of treaties. Here again a clear distinction should be made between the municipal and the international legal order, as well as between treaty obligations of China (including Hong Kong) and specific obligations borne by Hong Kong as a partial subject of international law. The author rightly examines to what extent the 'Basic Law' of Hong Kong is a correct implementation of the Sino-British Joint Declaration. Other issues covered in the chapter are, whether the electoral changes of 1994, the Bill of Rights Ordinance, and the (bilateral) arrangement concerning the 'Court of Final Appeal' were consistent with the Joint Declaration.

Finally, the last chapter of the book deals with the "interrelationship between international and domestic law" in Hong Kong. Unsurprisingly, the British model has been followed in Hong Kong practice although, as characterized by the author, in a 'conservative' way in the sense of a high degree of deference accorded by the judiciary to government acts and affirmations. As to the post-1997 era "it may be tentatively stated that current principles governing the relationship between international law and Hong Kong law should continue to apply".

This brief survey may suffice to indicate the various aspects of the volume under review. Irrespective of whether one agrees or disagrees with the author's perspective, the book offers a clearly written, thought-provoking treatise on a number of very topical matters which far surpassed the issue of Hong Kong. It deserves close attention of all those especially interested in Asian aspects of international law.

KO SWAN SIK

BIBLIOGRAPHY FOR ASIAN YEARBOOK OF INTERNATIONAL LAW*

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. Only English language publications are referred to.

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 Peace Palace Library in The Hague, The Netherlands.

The headings used in this year's bibliography are:

1. General
2. States and groups of states
3. Territory and jurisdiction
4. Sea, rivers and water-resources
5. Air and space
6. Environment
7. International conflict and disputes
8. War, peace and neutrality, armed conflict and peace-keeping
9. International criminal law
10. Peaceful settlement of international disputes
11. Diplomatic and consular relations
12. Individuals, groups of persons – human rights
13. Decolonization and self-determination
14. International economic relations
15. Development
16. Information and communication
17. United Nations and other international/regional organizations.

* Edited by Surya Subedi and compiled by James Sweeney, University of Hull Law School.

1. GENERAL

- CHEE, CHOUNG IL, *Korea and international law*, Seoul, Institute of International Legal Studies, Korea University, 1993, 390p.
- DANNREUTHER, ROLAND, *Creating new states in Central Asia: the strategic implications of the collapse of Soviet power in Central Asia*, London, Brassey's for the International Institute for Strategic Studies, 1994, 83p.
- FORD, CHRISTOPHER A., The indignisation of constitutionalism in the Japanese experience, 28 *Case Western Reserve Journal of International Law* (1) 3-62 (1996).
- From British Colony to Chinese Special Administrative Region: implications for Hong Kong's economy and the rule of law: 1997 Symposium, 18 *University of Pennsylvania Journal of International Business Law* (1) 1-408 (1997).
- GILADI, ROTEM M., The practice and case law of Israel in matters related to international law, 30 *Israel Law Review* (3-4) 373-309 (1996).
- GILADI, ROTEM M., The practice and case law of Israel in matters related to international law: Treaties and other instruments recently concluded by the State of Israel, 30 *Israel Law Review* (3-4), 389-390 (1996).
- HONMA, HIROSHI, Some fundamental relations between US Forces Bases in Japan and the domestic law of Japan, 39 *Japan AnIL* 101-123 (1996).
- HORIGAN, DAMIEN P., Christmas Humphreys: A Buddhist judge in Twenties Century London, 24 *Korean Journal of Comparative Law*, 1-16 (1996).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 922/12-923/13 (September 1996).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 1020/14-1021/12 (October 1996).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 1108/18-1109/19 (November 1996).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell*, 1206/14-1207/15 (December 1996).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 882/1-483/15 (January 1996).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 174/14-175/15 (February 1997).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 377/15-378/16 (April 1997).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 489/13-491/15 (May 1997).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 596/14 (June 1997).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 710/14 (July 1997).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 810/14-811/15 (August 1997).
- JEN-KAI, LIU, PRC Agreements with foreign countries, *China Aktuell* 930/28 (September 1997).
- JUN, DANIEL Y., Bribery among the Korean elite: putting an end to a cultural and restoring honour, 29 *Vanderbilt JTL* (5), 1071-1116 (1996).
- LAU, MARTIN, Introduction to the Pakistani legal system, with special reference to the law of contract, 1 *YIMEL*, 3-28 (1994).
- LEE, DONNA, Discrepancy between theory and reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine, 35 *Columbia JTL* (1), 175-211 (1997).

- LI, ZHAOJIE, Teaching, research, and the dissemination of international law in China: the contribution of Wang Tieya, 31 *Canadian Yearbook of International Law*, 189-218 (1993).
- LUO, WEI, How to find the law of the People's Republic of China: a research guide and selective annotated bibliography, 88 *Law Library Journal* (3) 402-426 (1996).
- MANI, V.S., Effectuation of international law in the municipal legal order: the law and practice of India, 5 *AsYIL* 145-174 (1995).
- MARFORDING, ANNETTE, Cultural relativism and the construction of culture: an examination of Japan, 19 *Human Rights Quarterly* (2) 431-448 (1997).
- MERON, RAJAN, The strategic convergence between Russia and China, 39 *Survival* (London) (2) 101-125 (1997).
- MUSHKAT, RODA, Hong Kong and the succession of treaties, 46 *ICLQ* (1) 181-201 (1997).
- REYES, RAMON, The enforcement of foreign court judgements in the People's Republic of China: what the American lawyer needs to know, 23 *Brooklyn JIL* (1) 241-270 (1997).
- SAUTEMAN, BARRY, Racial nationalism and China's external behaviour, 160 *World Affairs* (2) 78-95 (1997).
- Selected bibliography: The reintegration of Hong Kong into China, 30 *Vanderbilt JTL* (3) 615-634 (1997).
- SUBEDI, SURYA P., When is a treaty a treaty in law? An analysis of the views of the Supreme Court of Nepal on a bilateral agreement between Nepal and India, 5 *AsYIL* 201-210 (1995).
- TAKESITA, MORIO, The recognition of foreign judgements by the Japanese Courts, 39 *Japan AnL* 55-77 (1996).
- VERBIST, HERMAN, Recognition of foreign arbitral awards in China, 1997 *Revue de droit des affaires Internationales* (3) 375-387 (1997).
- VIBHUTE, K. I., Enforcement of foreign commercial arbitral awards in India: law and practice, 32 *India JIL* 60-77 (1992).
- ## 2. STATES AND GROUPS OF STATES
- CHO, KUK, Tension between the national security law and constitutionalism in South Korea: Security for what?, 15 *Boston University International Law Journal* (1) 125-174 (1997).
- DAVIS, MICHAEL C., International commitments to keep: Hong Kong beyond 1997, 160 *World Affairs* (2) 70-77 (1997).
- (The) Future of Jerusalem: a symposium, 45 *Catholic University Law Review* (4) 653-941 (1996).
- GOODBY, JAMES E. & IVANOV, VLADIMIR I. & SHIMOTO NOBUO, "Nothorn Territories" and beyond: Russian, Japanese and American Perspectives, Under the auspices of the United States Institute for Peace, 1995, 11-25.
- HELLER, MARK A., Towards a Palestinian State, 39 *Survival* (London) (2) 5-22 (1997).
- INBAR, EFRAIM & SANDLER, SHUMEL, The risks of Palestinian statehood, 39 *Survival* (London) (2) 23-41 (1997).
- KRIEGER, HEIKE, *East Timor and the international community: basic documents*, Cambridge, Cambridge University Press, 1997.
- KUAN, HSIN-CHI, Does Hong-Kong have a future?, 28 *SecDL* (2) 233-236 (1997).
- MUNI, S.D., Ethnic conflict, federalism, and democracy in India, in *Ethnicity and Power in the Contemporary World* ed. by KUMAR RUPESINGHE AND VALERY A. TISHKOV, 179-198 (1996).
- Preserving the rule of law in Hong Kong after July 1, 1997: a report of a mission of inquiry, 18 *University of Pennsylvania Journal of*

- International Business Law* (1) 367-408 (1997).
- SUKMA, RIZAL, Indonesia's Bebas-Aktif foreign policy and the "Security Agreement" with Australia, 51 *Australia JIA* (2) 231-241 (1997).
- SYMPOSIUM, July 1, 1997: Hong Kong and the unprecedented transfer of sovereignty, 19 *L LA I&CLJ* (2) 257-447 (1997).
- TREMBLAY, REETA CHOWDHARI, Nation, identity and the intervening role of the state: a study of the secessionist movement in Kashmir, 69 *Pacific Affairs* (4) 471-497 (1996).
- WESLEY-SMITH, PETER, The future of Hong-Kong: not what it used to be, 14 *Vanderbilt JTL* (3) 421-447 (1997).
- WINN, JUDY, "The ancient Chinese Secret": a comparative analysis of Chinese & American domestic relations mediation, 1 *Indiana I&CLR* (1) 151-174 (1991).
- ### 3. TERRITORY AND JURISDICTION
- ADITJONDRO, GEORGE J., *In the shadow of Mount Ramelau: the impact of the occupation of East Timor*, Leiden, Indonesian Documentation and Information Centre, 1994, 96p.
- GINSBURGS, GEORGE, The nine lives of the Russo-Chinese border problem, 22 *Review of Central and East European Law* (5) 455-494 (1996).
- JIAN, CHEN, Understanding the logic of Beijing's Taiwan policy, 27 *SecDL* (4) 459-462 (1996).
- LANTE-WALLACE-BRUCE, NII, Taiwan and Somalia: international legal curiosities, 22 *Queen's Law Journal* (2) 453-485 (1997).
- PRESCOTT, VICTOR, Pakistan: notification of straight baselines, 12 *IJMCL* (1) 105-107 (1997).
- ROQUE, H. HARRY L., China's claim to the Spratlys islands under international law, 15 *Journal of Energy and Natural Resources Law* (3) 189-211 (1997).
- VALENCIA, MARK J., *China and the South China Sea disputes: conflicting claims and potential solutions in the South China Sea*, Oxford, Oxford University Press, 1995, 75p.
- VOHRA, SAHDEV, *The northern frontier of India: The border dispute with China*, New Delhi, Intellectual Publishing House, 1993, 172p.
- ### 4. SEA AND RIVERS
- ALLAN, J.A. & MALLAT, CHIBLI (eds.), *Water in the Middle East: legal, political and commercial implications*, London, Taurus Academic Studies, 1995, 358p.
- ANAND, R.P., South East Asia and the law of the sea: problems and prospects, 28 *Proceedings of the Law of the Sea Institute Annual Conference*, 331-353 (1996).
- BAILEY, CONNER, Lessons from Indonesia's 1980 trawler ban, 21 *Marine Policy* (3) 225-235 (1997).
- BATEMAN, SAM, Prospects for Indian Ocean Cooperation, 12 *Ocean Yearbook* 306-315 (1996).
- BROEZE, FRANK, Geostrategy and navyports in the Indian Ocean since 1970, 21 *Ocean Policy* (4) 345-362 (1997).
- CROW, BEN (with LINDQUIST, ALAN & WILSON, DAVID), *Sharing the Ganges: the politics and technology of river development*, New Delhi, Thousand Oaks CA, Sage Publications, 1995, 272p.
- GOOTE, MAAS M. The Jakarta Mandate on Marine and Coastal Biological Diversity, 12 *IJMCL* (3) 377-395 (1997).
- HAMZAH, B. A. & WONG, JENNY L.P., Current issues of marine and coastal affairs in Malaysia, 12 *IJMCL* (2) 225-243 (1997).
- HUI, YU, Remarks on China's ratification of the 1982 UN Convention on the Law of the Sea, 5 *AsYIL*, 211-230 (1995).
- LODGE, MICHAEL W., The development of the Palau Arrangement for the management of the

- Western Pacific purse seine fishery, 22 *Marine Policy* (1) 1-28 (1998).
- MAGNO, FRANCISCO A., Environmental security in the South China Sea, 28 *SecDL* (1) 97-112 (1997).
- MORGAN, JOSEPH R., Chinese navies, 12 *Ocean Yearbook* 270-285 (1996).
- MURAKAMI, MASAHIRO, *Managing water for peace in the Middle East: alternative strategies*, Tokyo, United Nations University Press, 1995, 309p.
- NAKAHARA, HIROYUKI, Recent issues on coastal management in Japan, 12 *IJMCL* 1-31 (1994).
- OLSON, HAL, Marine traffic in the South China Sea, 12 *Ocean Yearbook* 137-153 (1996).
- PANE, S. ZUHDI & SULISTIYONO, Marine pollution control and abatement in Indonesia: responsibilities of the petroleum industry, 29 *Proceedings of the Law of the Sea Institute Annual Conference* 542-559 (1997).
- ROUYER, ALWYN R., The water issue in the Palestinian-Israeli peace process, 39 *Survival (London)* (2) 57-81 (1997).
- TKAHATA, TOSHIHISA, The conclusion by Japan of the United Nations Convention on the Law of the Sea (UNCLOS) and the adjustment of maritime legal regime, 39 *Japan AIL* 124-148 (1996).
- VALENCIA, MARK J., Maritime regime building in Northeast Asia: the example of environmental protection, 28 *Proceedings of the Law of the Sea Institute Annual Conference* 309-330 (1996).
- VALENCIA, MARK J. (with VAN DYKE, JON M. & LUDWIG, NOEL A.), *Sharing the resources of the South China Sea*, The Hague, Nijhoff, 1997, 280p.
- VALENCIA, MARK J., *A maritime regime for northeast Asia*, Oxford, Oxford University Press, 1996.
- ZAHAR, D., The Timor Gap Treaty, 29 *Proceedings of the Law of the Sea Institute Annual Conference* 597-603 (1997).
- ZAHAR, D., The Timor Gap Treaty's provisions on the protection and preservation of the marine environment, 29 *Proceedings of the Law of the Sea Institute Annual Conference* 604-609 (1997).
5. AIR AND SPACE
- BHATT, S., Some reflections on the law and economics of liberalisation and privatisation of airports and air transport in India, 37 *India JIL* (1) 19-26 (1997).
- HONG, SOON KIL, Legal problems and solutions for civil aviation toward the 21st century: an Asian-Pacific perspective, 20 *Annals of Air and Space Law* (1) 231-243 (1995).
- SHIN, DONG CHUN, The Aviation cooperation between the Koreans preparing for the reunification, 8 *Korean Journal of Air and Space Law* 71-82 (1996).
- SHIN, SUNG HWAN, The sovereignty over Tokyo Islets: an international air law perspective, 8 *Korean Journal of Air and Space Law* 217-230 (1996).
6. ENVIRONMENT
- BACHNER, BRYAN, Conserving a legal heritage in Hong Kong: environmental regulation after 1997, 19 *LLA I&CLJ* (2) 373-388 (1997).
- Case Concerning East Timor (Portugal v Australia): judgement of 30 June 1995, 34 *ILM* (6) 1581-1591 (1995).
- Effective and verifiable measures which would facilitate the establishment of a nuclear-weapon-free zone in the Middle East: report of the Secretary General*, New York, United Nations, 1991, 45p.
- GUPTA, SHILPI, Iraq's environmental warfare in the Persian Gulf, 6 *Georgetown Inter-*

- national Environmental Law Review* (1) 251-274 (1993).
- HEILBRONN, GARY N., *Environmental law in Hong Kong: papers presented at a series of three Twilight Seminars hosted by the Faculty of Law, University of Hong Kong, as part of the University of Hong Kong's 80th Anniversary Celebrations*, Hong Kong, University of Hong Kong, 1993, 117p.
- HULME, KAREN, Armed conflict, wanton ecological devastation and scorched earth policies: how the 1990-91 Gulf Conflict revealed the inadequacies of the current laws to ensure effective protection and preservation of the natural environment, 2 *Journal of Armed Conflict* (1) 45-81 (1997).
- LAVINE, STEPHEN D., Russian dumping in the sea of Japan, 24 *Denver Journal of International Law and Policy* (2-3) 417-450 (1996).
- OTTO, JAN MICHEL, Implementation of environmental law in Indonesia: some administrative and judicial challenges, 2 *Indonesian Law and Administration Review* (1) 32-71 (1996).
- PRAWITZ, JAN & LEONARD, JAMES F., *A zone free of weapons of mass destruction in the Middle East*, New York, United Nations, 1996, 134p.
- SHANMUGANATHAN, D., Status of sustainable development as a principle of national and international laws: the Indian approach: Vellore Citizens Welfare Forum v. Union of India & Others, 9 *Journal of Environmental Law* (2) 387-402 (1997).
- SUN, HOMER, Controlling the environmental consequences of power development in the People's Republic of China, 17 *Michigan Journal of International Law* (4) 1015-1049 (1996).
7. INTERNATIONAL CONFLICTS AND DISPUTES
- GAZZINI, TARCISIO, Some international legal aspects of the Chinese civil war (1927-1949), 1 *Journal of Armed Conflict* (2) 141-159 (1996).
- JOHNSON, CHALMERS, The Okinawa rape incident and the end of the Cold War in East Asia, 27 *California Western International Law Journal* (2) 389-397 (1997).
- LI, REX, The Taiwan Strait crisis and the future of China-Taiwan relations, 27 *SecDL* (4) 449-458 (1996).
- ROSS, ROBERT S., The 1996 Taiwan Strait Crisis: lessons for the United States, China and Taiwan, 27 *SecDL* (4) 463-470 (1996).
- United Nations Secretary General's statement regarding the People's Republic of China's military exercises against Taiwan and the response on the Republic of China Ministry of Foreign Affairs, 14 *Chinese Yearbook of International Law and Affairs* 38-40 (1995-96).
8. WAR, PEACE, NEUTRALITY AND NON-ALIGNMENT; ARMED CONFLICT AND PEACE KEEPING
- BERES, LOUIS RENE, Attrition, annihilation and the end of Israel: a strategic and jurisprudential view, 73 *University of Detroit Mercy Law Review* (3) 479-498 (1996).
- BERES, LOUIS RENE, Israel, the "Peace Process", and nuclear terrorism: a jurisprudential perspective, 18 *LLA I&CLJ* (4) 767-793 (1996).
- BUDIARDJO, CARMEL & LIONG, LIEM SOEI, *The war against East Timor*, London, Zed Books, 1984, 253p.
- HELLANEY, BRAHMA, *Nuclear proliferation: the US-Indian conflict*, New Delhi, Orient Longman, 1993.
- EL-SAYED SELIM, MOHAMMED, Reconceptualising the arms control process in the Middle East: towards a new framework, 49 *Pakistan Horizon* (4) 25-41 (1996).
- HAMADA, KOICHI, The pacifist constitution in post-war Japan: economic dividends or political burdens?, 19 *Disarmament* (3) 46-62 (1996).

- HERRING, GEORGE C., *LBJ and Vietnam: a different kind of war*, Austin, University of Texas Press, 1994, 228p.
- ISCHEBECK, OTFRIED & NEUBECK, GÖTZ (eds.), *Cooperative policies for preventing and controlling the spread of missiles and nuclear weapons: policies and perspectives in Southern Asia*, Baden-Baden, Nomos, 1996, 321p.
- MATSUDA, TAKEO, The Japan-US Security Treaty and Japanese laws, 39 *Japan AIL* 78-100 (1996).
- MORRIS, SCOTT R., Killing Egyptian prisoners of war: does the phrase "lest we forget" apply to Israeli war criminals?, 29 *Vanderbilt JTL* (5) 903-966 (1996).
- (The) Oral statements made by the delegation of Japan on the Cases Concerning the Legality of the Use of Nuclear Weapons, 39 *Japan AIL* 217-235 (1996).
- SCHOFIELD, CLIVE H., An arms race in the South China Sea?, 12 *Ocean Yearbook* 286-305 (1996).
- THOMAS, RAJU G.C., *South East Asian Security in the 1990's: the prospects of war and peace in South Asia amidst changes in the global and regional strategic environments*, London, Brassey's for the International Institute for Strategic Studies, 1993, 86p.
- Treaty on the Southeast Asia Nuclear Weapon-free Zone, Bangkok, 15 December 1995, 5 *AsYIL* 605-618 (1995).
9. INTERNATIONAL CRIMINAL LAW
- MANI, V.S., Extradition and terrorism: the Indo-British Extradition Treaty 1992, 33 *India JIL* 72-83 (1993).
- ORENTLICHER, DIANE F., International criminal law and the Cambodian killing fields, 3 *ILSA Journal of International & Comparative Law* (2) 705-711 (1997).
10. PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES
- ALDRICH, GEORGE H., *The jurisprudence of the Iran-United States Claims Tribunal*, Oxford, Clarendon Press, 1996, 590p.
- CHAUHAN, B.R., *Settlement of international and inter-state water disputes in India*, Bombay, Tripathi, 1992, 346p.
- CHEN, AN, On the supervision mechanism of Chinese arbitration involving foreign elements and its tallying with international practices, 14 *Journal of International Arbitration* (3) 39-78 (1997).
- HARPOLE, SALLY A., Arbitration in China, 52 *Dispute Resolution Journal* (1) 72-77(1997).
- HUGHES, JUSTIN, Foreign *lis alibi pendens*, non-Chinese majority tribunals and other problems of neutrality in CIETAC arbitration, 13 *Arbitration International* (1) 63-83 (1997).
- JORDAAN, JASMINE, Proposal of dispute resolution mechanisms for the Israeli-Palestinian Interim Agreement: a crucial step in establishing long-term economic stability in Palestine and a lasting peace, 23 *Brooklyn JIL* (2) 555-601 (1997).
- LAGERGREN, GUNNAR, The formative years of the Iran-US Claims Tribunal, 66 *Nordic Journal of International Law* (1) 23-32 (1997).
- SCANLAN, WILLAM E., A test case for the new World Trade Organisation's Dispute Settlement Understanding: the Japan-United States Auto Parts Dispute, 45 *University of Kansas Law Review* (2) 591-618 (1997).
- TANIGUCHI, YASUHEI, The changing attitude to international commercial dispute settlement in Asia and the Far East, 2 *The Arbitration and Dispute Resolution Law Journal* (2) 67-77 (1997).
11. DIPLOMATIC AND CONSULAR RELATIONS

[no entries]

12. INDIVIDUALS AND GROUPS OF PERSONS: HUMAN RIGHTS

- ADAMS, EDWARD L., Pathfinder on Indian religious freedom, 15 *Legal References Services Quarterly* (3-4), 15-102 (1996).
- ADELL, APRIL, Fear of persecution for opposition to violations of the international human right to found a family as a legal entitlement to asylum for Chinese refugees, 24 *Hofstra Law Review* (3) 789-816 (1996).
- AKINER, SHIRIN, *Central Asia: conflict or stability and development?*, London, Minority Group International, 1997, 52p.
- ASIA WATCH COMMITTEE, *Philippines: violations of the laws of war by both sides*, New York, Human Rights Watch, 1990, 148p.
- BARBER, KEVIN S., Xin-Chang Zhang v. Slattery: rejecting China's coercive population control policy as grounds for political asylum in the United States, 41 *Villanova Law Review* (2) 521-557 (1996).
- BARNES, R.H. & GRAY, ANDREW & KINGSBURY, BENEDICT (eds.), *Indigenous peoples of Asia*, Ann Arbor, MI, Association for Asian Studies, 1995, 539p.
- BOLING, DAVID, Mass rape, enforced prostitution, and the Japanese Imperial Army: Japan eschews international legal responsibility?, 32 *Columbian JTL* (3) 533-590 (1995).
- BOSE, SUMANTRA, *States, nations and sovereignty: Sri Lanka, India and the Tamil Eelam Movement*, New Delhi, Thousand Oaks, CA, Sage Publications in association with Book Review Literary Trust, New Delhi, 1994, 236p.
- CAREY, PETER, *East Timor: Third World colonialism and the struggle for national identity*, London, Research Institute for the Study of Conflict and Terrorism, 1996, 29p.
- CENTRE FOR HUMAN RIGHTS, *Fourth workshop on regional human rights arrangements in the Asian and Pacific Region: Report, Kathmandu, 26 -28 February 1996*, New York, United Nations, 1996, 96p.
- CHAIYARACHTA, CHARLES R., El Monte is the promised land: why do Asian immigrants continue to risk their lives to work for substandard wages and conditions?, 19 *LLAI & CLJ* (1) p173-197 (1996).
- CHAN, JOHANNES, State succession to human rights treaties: Hong Kong and the International Covenant on Civil and Political Rights, 45 *ICLQ* (4) 928-946 (1996).
- DICKER, RICHARD, South Korea labour rights violations under democratic rule, 14 *UCLA Pacific Basin Law Journal* (14) 196-242 (1996).
- EDWARDS, GEORGE E. & BYRNES, ANDREW C. (Eds.), *Hong Kong's Bill of Rights: the first year, proceedings of a seminar organised by the Faculty of Law, University of Hong Kong, 20 June 1992*, Hong Kong, University of Hong Kong 1993, 161p.
- EDWARDS, GEORGE E. & BYRNES, ANDREW C. (Eds.), *Hong Kong's Bill of Rights: two years before 1997*, Hong Kong, University of Hong Kong, 1995, 199p.
- GHOSH, PARTHA S., *Cross border population movements and regional security in South Asia*, London, Research Institute for the Study of Conflict and Terrorism, 1997, 23p.
- HAIKAL, HUSSAIN & YAHAYA, ATIKU GARBA, Muslims in Singapore: the colonial legacy and the making of a minority, 17 *Journal of Muslim Minority Affairs* (1) 83-88 (1997).
- HARDING, ANDREW, Islamic Law in Malaysia, 2 *YIMEL* 61-72 (1995).
- Hong Kong, Preserving human rights and the rule of law: a conference sponsored by the International Legal Studies Programme of the Washington College of Law, Human Rights Watch (Asia) and The Lawyers Committee for Human Rights, March 18-19 1997, 12 *American University Journal of International Law and Policy* (3) 361-508 (1997).
- HUI, WENG-TAT, Regionalisation, economic restructuring and labour migration in Singapore, 35 *International Migration* (1) 109-130 (1997).

- IWASAWA, YUJI, International human rights adjudication in Japan, in *Enforcing Human Rights in Domestic Courts* ed. by BENEDETTO CONFORTI and FRANCESCO FRANCONI, p223-293 (1997).
- KIERNAN, BEN, *The Pol-Pot regime: race, power, and genocide in Cambodia under the Khmer Rouge, 1975-79*, New Haven, Yale University Press, 1996, 477p.
- KLEIN, RICHARD, The empire strikes back: Britain's use of the law to suppress political dissent in Hong Kong, 15 *Boston University International Law Journal* (1) 1-70 (1997).
- KODERA, SAYOKO, Implementation of the Convention on the Elimination of All Forms of Discrimination against Women within Japan, 39 *Japan AIL* 149-184 (1996).
- LANDIS, CRANE STEPHENSON, Human rights violations in Japan: a contemporary survey, 5 *Journal of International Law and Practice / Detroit College of Law* (1) 53-85 (1996).
- LAU, VINCENT W., Post 1997 Hong Kong: will sufficient educational autonomy remain to safeguard academic freedom?, 20 *Boston College International and Comparative Law Review* (1) 187-226 (1997).
- LOYD ROBERTS, DAVID, Training the armed forces to respect international humanitarian law: the perspective of the ICRC delegate to the Armed and Security Forces of South Asia, 37 *International Review of the Red Cross* (319) 433-446 (1997).
- LUOJI, GUO, A human rights critique of the Chinese legal system, 9 *Harvard Human Rights Journal* (Spring) 1-14 (1996).
- MCDERMOTT, JOHN, The "Rule of Law" in Hong Kong after 1997, 19 *LLAI&CLJ* (2) 263-292 (1997).
- MOHIUDDIN, LUBNA, Human rights violations: a case study of Kashmir, 50 *Pakistan Horizon* (2) 75-97 (1997).
- MUNTARBHORN, V., Regional protection of human rights in Asia: projects, 1997 *Session d'enseignement*, Institut International des Droits de Homme 515-533 (1997).
- NANGIA, ANSHU, The tragedy of bride burning in India: how should the law address it?, 22 *Brooklyn JIL* (3) 647-693 (1997).
- NORMAN, A.B., The Rape controversy: is a revision of the Status of Forces Agreement with Japan necessary?, 6 *Indiana ICLR* (3) 717-740 (1996).
- PETERSEN, CAROL J., Values in transition: the development of the gay and lesbian rights movement in Hong Kong, 19 *LLAI&CLJ* (2) 337-362 (1997).
- Rape in Kashmir: a crime of war*, New York, Human Rights Watch, 1991, 18p.
- RÖLING, B.V.A., *The Tokyo Trial and beyond: reflections of a peacemonger*, Cambridge, Polity Press, 1993, 143p.
- SASTRY, T. SURYANARAYANA, The structure, functions and powers of the National Human Rights Commission in India, 37 *India JIL* (1) 93-104 (1997).
- STAEHR, ALLAN, *Treatment of war victims in the Middle East*, Copenhagen, International Rehabilitation Council for Torture Victims, 1993, 110p.
- TUCKER, LEE, Child slaves in modern India: the bonded labour problem, 19 *Human Rights Quarterly* (3) 572-629 (1997).
- WACKS, RAYMOND (ed.), *Hong Kong's Bill of Rights: problems and prospects, a seminar held at the University of Hong Kong on 31 March 1990*, Hong Kong, University of Hong Kong, 1990, 95p.
- WACKS, RAYMOND et al., *Police powers in Hong Kong: problems and prospects*, Hong Kong, University of Hong Kong, 1993, 138p.
- WHITEHOUSE, SAMANTHA B., Status of residents of Hong Kong after July 1, 1997, 10 *Georgetown Immigration Law Journal* (4) 799-803 (1996).

13. DECOLONISATION AND SELF-DETERMINATION

HAGUE, MOZAMMEL, Filipino Muslims' struggle for independence and the Manila-Mindanao Peace Pact, 49 *Pakistan Horizon* (4) 43-59 (1996).

HOOIJMAIJERS, MARCEL, Hong Kong and the right of self-determination, 6 *Tilburg Foreign Law Review* (2) 197-226 (1997).

HORTA, JOSÉ RAMOS, Self-determination for East Timor: implications for the region, 51 *Australia JIA* (1) 97-102 (1997).

KOMITEE INDONESIA, *Statement on East Timor to the United Nations Special Committee on Decolonizations*, Amsterdam, Komitee Indonesia, 1989, 5p.

LEIBOWITZ, ARNOLD H., *Embattled Island: Palau's struggle for independence*, Westport, CT, Praeger, 1996, 230p.

MCCORQUODALE, ROBERT, Hong Kong and the right of self-determination, 147 *NLJ* (6788) 560-571 (1997).

MENDELSON, M.H., Self-determination in Jammu and Kashmir, 36 *India JIL* (1) 1-33 (1996).

14. INTERNATIONAL ECONOMIC RELATIONS

ADAMS, NATHAN A., Monkey see, monkey do: imitating Japan's industrial policy in the United States, 31 *Texas International Law Journal* (3) 527-559 (1996).

ANDREWS-SPEED, C.P., *China's petroleum legal regime for foreign participation in upstream operations: the foreign oil company's view*, Dundee, Centre for Petroleum and Mineral Law and Policy, 1996, 40p.

BAUM, HARALD & NOTTAGE, LUKE, Annotated select bibliography of Japanese business and trade law in western languages, 27 *Victoria University of Wellington Law Review* (1) 121-174 (1996).

BEHURIA, SUTANI & KHULLAR, RAHUL, *Intermediate services and economic development: the Malaysian example*, Manila, Asian Development Bank, 1994, 28p.

BEHURIA, SUTANI, *Some aspects of land administration in Indonesia: implications for bank operations*, Manila, Asian Development Bank, 1994, 14p.

BENSON, TODD, Will this year's financial reforms qualify China for the WTO?, 10 *China Law and Practice* (8) 19-22 (1996).

CAPANNELLI, ELISABETTA & SHRESTHA, OMKAR L., *Environmental changes in the People's Republic of China and scope for bank assistance*, Manila, Asian Development Bank, 1993, 35p.

China: Liberalisation: new regulations are a step towards the eventual free conversion of Renminbi (RMB) for current items, 11 *Journal of International Banking Law* (5) N-93-N94 (1996).

China: Liberalisation: new system of foreign exchange settlement and sale, 11 *Journal of International Banking Law* (5) N-94-N-95 (1996).

CRABILL, JEFFREY V., Taiwan keeps antitrust torch burning by enacting fair trade law, 2 *Indiana ICLR* (2) 449-471 (1992).

CULLEN, RICHARD & FU, HUA LING, Fiscal reform in China: implications for Hong Kong, 19 *LLAI & CLJ* (2) 389-412 (1997).

FENG, YUSHU, *Taiwan and GATT: the political legal and economic issues raised by the possibility of Taiwan joining GATT*, 13 *The World Economy* (1) 129-143 (1990).

FRYE, DAVIS, Vietnam's contemporary battle with the United States: vying for Most Favoured Nation Trading Status, 29 *Vanderbilt JTL* (4) 777-815 (1996).

GLOWER, CARLOS J., *Interest rate deregulation: a brief survey of the policy issues and the Asian experience*, Manila, Asian Development Bank, 1994, 28p.

- HUNT, M.W., *Mineral Investment in the Asia-Pacific region (with emphasis on the changing investment environment and mining laws of the pacific rim)*, Dundee, Centre for Petroleum and Mineral Law and Policy, 1994.
- HICKS, MATTHEW R., Japanese motor products v. BBS: a threat to exacerbate US-Japanese trade relations?, 19 *LLA I&CLJ* (2) 479-505 (1997).
- JALAL, K.F., *Sustainable development and poverty nexus*, Manila, Asian Development Bank, 1993, 24p.
- KONING, MARTINE DE, Why the coercion-based GATT approach is not the only answer to international piracy in the Asia-Pacific region, 19 *European International Property Review* (2) 59-77 (1997).
- KONING, MARTINE DE, APEC: seven years of progress in trade liberalisation in the Asia Pacific, 25 *Australian Business Law Review* (1) 258-285 (1997).
- LEE, EUN SUP, Regulation of foreign trade in Korea, 26 *Georgia Journal of International and Comparative Law* (1) 135-161 (1996).
- OTTO, J., *The international competition for mineral investment: implications for the Asia Pacific*, Dundee, Centre for Petroleum and Mineral Law and Policy, 1994.
- OTTO, J. & BAKKER, P., *Mineral investment conditions in Asian regions: a checklist for success*, Dundee, Centre for Petroleum and Mineral Law and Policy, 1992.
- PETERS, PAUL, Recent developments in expropriation clauses of Asian investment treaties, 5 *AsYIL* 45-109 (1995).
- RANA, PRADUMNA B., *Reforms in the transnational economies of Asia*, Manila, Asian Development Bank, 1993, 29p.
- SCALISE, DAVID G., Foreign investment in the Philippines, 29 *George Washington Journal of International Law and Economics* (1) 145-195 (1995).
15. LAW AND DEVELOPMENT
- Law and Development: an Asian bibliography*, Office of the General Council, Asian Development Bank, Manila, 1996, 78p.
- Law and Development: an Asian bibliography*, Office of the General Council, Asian Development Bank, Manila, 1997, 137p.
- Law and Development: seminar proceedings, a record of the proceedings of a seminar held in Manila, Philippines on 29 April 1996 during the 29th Annual Meeting of the Board of Governors of the Asian Development Bank*, Manila, Asian Development Bank, 1996, 48p.
16. INFORMATION AND COMMUNICATION
- [no entries]
17. UNITED NATIONS AND OTHER INTERNATIONAL/REGIONAL ORGANISATIONS
- Agreement establishing the Asian Development Bank*, Asian Development Bank, 1995, 47p.
- BOWLES, PAUL, ASEAN, AFTA and the "new regionalism", 70 *Pacific Affairs* (2) 219-233 (1997).
- By-laws of the Asian Development Bank*, Asian Development Bank, 1995, 7p.
- EGLIN, MICHAELA, China's entry into the WTO with a little help from the EU, 73 *International Affairs* (3) 489-508 (1997).
- HARRISON, SELIG S. & NISHIHARA, MASASHI, *UN peacekeeping: Japanese and American perspectives*, Washington DC, Carnegie Endowment for International Peace, 1995, 178p.
- KAPLAN, JEFFREY A., ASEAN's Rubicon: a dispute settlement mechanism for AFTA, 14 *UCLA Pacific Basin Law Journal* (2) 147-195 (1996).
- KOH, PEARLIE M.C., Foreign judgements in ASEAN - a proposal, 45 *ICLQ* (4) 844-860 (1996).

- O'QUINN, ROBERT P., Bringing both China and Taiwan into the World Trade Organisation, 14 *Chinese Yearbook of International Law and Affairs* 19-37 (1995/96).
- SINGH, HARI, Vietnam and ASEAN: the politics of accommodation, 51 *Australia JIA* (2) 215-229 (1997).
- SRIVASTADA, PADMA, Nehru, United Nations and peace, 52 *India Quarterly* (1-2) 137-144 (1996).
- TAIT, A. NEIL & LI, KUI-WAI, Trade regimes and China's accession to the World Trade Organisation, 31 *Journal of World Trade* (3) 93-111 (1997).
- WANG, CHIH-KANG, Taiwan's accession to the World Trade Organisation, 50 *Studia Diplomatica* (3) 24-31 (1997).

SELECTED DOCUMENTS

JOINT COMMUNIQUE: THE THIRD ASEAN MINISTERS OF LAW MEETING

Manila, 13 September 1996

1. The Third Meeting of ASEAN Law Ministers was held in Manila on 13 September 1996.

....

5. The Ministers reaffirmed their commitment to the ASEAN Bangkok Declaration of 1967, the Declaration of ASEAN Concord of 1976, the ASEAN Ministerial Understanding on the Organizational Arrangement for Co-operation in the Legal Field, Bali, Indonesia, 1986, the Manila Declaration of 1987, the Singapore Declaration of 1992, and the Bangkok Summit Declaration of 1995, and agreed that the ASEAN Senior Law Officials Meeting (ASLOM) should continue to examine the role of law in the context of facilitating greater ASEAN co-operation.

6. The Ministers took note that the Attorneys-General of ASEAN held a Meeting in Jakarta on 24-25 July 1995 and that the Attorneys-General reached consensus in a document called the Jakarta Consensus.

7. The Ministers considered the recommendation of the ASEAN Senior Law Officials Meetings on 12-14 April 1993 in Kuala Lumpur and on 18-20 September 1995 in Bandar Seri Begawan that there would be co-operation in the exchange of legal materials and continuing legal education among ASEAN countries. The Ministers also agreed that each ASEAN Member Country shall designate its respective authority/agency as the focal point responsible for transmitting and receiving official requests for the exchange of legal materials. The cost of the legal materials, including administrative costs, shall be borne by the requesting country. A requested country may, however, waive such charge or costs. The requested country shall use its best endeavours to provide the requested legal materials.

8. The Ministers noted that the exchange of study visits by law officials of ASEAN Member Countries is to be strongly encouraged. Information on appropriate Continuing Legal Education Programmes available in ASEAN Member Countries shall be disseminated by and through the national focal points. Continuing Legal Education programmes undertaken by an ASEAN Member Country, where appropriate, are to be made available to other ASEAN Member Countries. Exchange of teachers and experts in the field of law among ASEAN Member Countries is also to be encouraged. The cost of such visits shall be borne by the requesting party. A requested country may, however, waive such charges or costs.

9. The Ministers endorsed the recommendation of the ASEAN Senior Law Officials Meeting on 11-12 September 1996 to request the ASEAN Secretariat to modify its Home

Page to provide hypertext links to the legal information database of each Member Country as and when that Member Country sets up its database in order to further the objective of establishing an ASEAN Legal Information Network System.

....

**DECLARATION ON THE ESTABLISHMENT OF THE BANGLADESH —
INDIA — SRI LANKA — THAILAND ECONOMIC COOPERATION
(BIST-EC)**

Bangkok, 6 June 1997

The Minister ... [etc.], acting on behalf of their respective Governments;

Mindful of the existence of mutual interests and common concerns among their countries and complementarities of their economies and convinced of the potential for strengthening further the existing bonds of friendship and co-operation;

Desiring to establish a firm foundation for common action to promote sub-regional co-operation in the areas of trade, investment, technological exchange and other interrelated areas in a spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in their common region;

Conscious that in an increasingly interdependent world, the cherished ideals of peace, freedom, and economic well-being are best attained by fostering greater understanding, good neighbourliness and meaningful co-operation among countries of the same sub-region already bound together by ties of history and culture;

Considering that countries share a primary responsibility for strengthening the economic and social stability of their sub-region and ensuring peaceful and progressive national development;

DO HEREBY DECLARE:

FIRST, the establishment of the Bangladesh-India-Sri Lanka-Thailand Economic Cooperation to be known as the BIST-EC.

SECOND, that the aims and purposes of the BIST-EC shall be:

1. To create an enabling environment for rapid economic development through identification and implementation of specific co-operation projects in the sectors of trade, investment and industry, technology, human resource development, tourism, agriculture, energy, and infrastructure and transportation.

2. To accelerate the economic growth and social progress in the sub-region through joint endeavours in a spirit of equality and partnership.
3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, technical and scientific fields.
4. To provide assistance to each other in the form of training and research facilities in the educational, professional and technical spheres.
5. To cooperate more effectively in joint efforts that are supportive of and complementary to national development plans of Member States which result in tangible benefits to the people in raising their living standards, including through generating employment and improving transportation and communication infrastructure.
6. To maintain close and beneficial co-operation with existing international and regional organizations with similar aims and purposes.
7. To co-operate in projects that can be dealt with most productively on a sub-regional basis among the BIST-EC countries and that make best use of available synergies.

THIRD, the BIST-EC will observe the following principles in all its activities:

- (a) Annual Ministerial Meetings, which shall be hosted by the Member States on the basis of alphabetical rotation.
- (b) Senior Officials Committee, which shall meet on a regular basis as and when required.
- (c) A Working Group, under the chairmanship of Thailand and having as its members the accredited Ambassadors to Thailand, or their representatives, of the other Member States, to carry on the work in between Annual Ministerial Meetings.
- (d) Specialized task forces and other mechanisms as may be deemed necessary by the Senior Officials to be co-ordinated by Member States as appropriate.

INDEX

- Abolition of Forced Labour Convention, 333
- Afghanistan
 - civil war, 402-404
 - neighbouring states, attitudes of, 437
 - UN premises, breach of inviolability of, 406
 - UN representation, 485
- Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, 322
- Agreement on the Importation of Educational, Scientific and Cultural Materials, 323
- Air transport
 - agreements,
 - Japan-Russia, 392
 - Singapore-US, 393
 - North Korean air space, 393
 - US-Asian open skies talks, 392
- Aliens
 - Japan, in,
 - local government, participation in, 393
 - tuna boats, crew members of, 393
 - visa requirements, 393
 - Singaporean military, attacks on in Australia, 393
- Antarctica
 - Treaty, 322
- Anti-dumping
 - Asian textiles, duties on, 447
 - EU policies, 447
 - World Trade Organization investigation, 490
- Arbitration
 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, participation in, 322
- Armed conflict
 - Convention for the Protection of Cultural Property in the Event of Armed Conflict, 323
 - humanitarian law, participation in treaties, 329
 - victims, protection of, 330
- Arms control
 - chemical weapons convention, 411
 - Chinese supply of advanced nuclear and missile technology, US efforts to control, 410
 - Comprehensive Test Ban Treaty, 409
 - nuclear weapons, Chinese attitude to, 410
 - rejections of 1998 target date for certification regime, 410
 - Sino-US de-targeting agreement, failure to conclude, 410
- Arms sales
 - Asia, military spending in, 394
 - EU ban on sales to China, 476
 - India, to, 394
 - Iran, to, 394-395
 - North Korea, exports from, 394
 - South Korea, to, 394
 - South Korean submarine, development of, 394
 - Taiwan, to, 395
 - Thailand, to, 395
- ASEAN (Association of South East Asian Nations)
 - China as dialogue partner to, 397
 - Declaration,
 - role of, 268
 - treaty, whether, 267
 - East Timor, issue of, 399
 - Free Trade Area, 399
 - Gas Pipe System, 451
 - India, consultations with, 398
 - informal summit meetings, 398

- ASEAN, *cont'd*
 Myanmar, membership of, 397-398
 Protocol on Dispute Settlement Mechanism, 399
 South China Sea areas, attitude to Chinese claims in, 480
 third Ministers of Law meeting, joint communique, 531
- Asia-Pacific Economic Cooperation Forum
 Business Advisory Council, 397
 information technology products, proposed elimination of tariffs, 397
 investment rules, 396
 Manila meeting, 1996, 396
 membership, 396
- Asia-Pacific region
 sub-regional institutions in, 264
- Asia-Pacific Telecommunity
 Constitution, 341
- Asian and Pacific Development Centre,
 Charter of, 323
- Asian Development Bank
 Administrative Tribunal,
 Board of Directors, reviewability of decisions of, 226
 case-law, 218-228
 cases before, 215-218
 conditions of employment, alteration of, 220-221
 contract of employment, cases on, 221-222
 disciplinary decisions, reviewability of, 226
 discretionary power, justiciability of, 224-228
 discrimination cases, 227-228
 dissenting opinions, 217
 equal treatment, decisions on, 218, 220
 establishment of, 201, 211, 214
 Executive Secretary, 215
 filing of applications, 223
 internal remedies, exhaustion of, 224
 interpretation by, 222
 judges of, 215, 217
- Asian Development Bank, *cont'd*
 Administrative Tribunal, *cont'd*
 jurisdiction, 223-224
 jurisdiction and competence, limitation of, 183, 184
 members, 214, 216-217
 nature of, 219
 other international organizations, relevance of practice of, 222
 principal rules of law, 219
 relief, nature of, 225
 Reports, 215
 sources of law, 218-223
 Statute and Rules of Procedure, 214-215
 tax reimbursement case, 200-204
 charter, 213
 Convention establishing, 327
 Headquarters Agreement, 213
 immunities and privileges, 213
 multilateral nature of, 213
 Personnel Policy Statement, 214
 political neutrality, 213
 staff, 213
 Tribunal decisions, 175
- Asian-African Legal Consultative Committee
 matters of common concern having legal implications before, judicial assistance, mutual cooperation in, 377-379
 proposed establishment of International Criminal Court, 377
 UN Conference on Environment and Development, follow-up to, 375-377
 UN Decade of International Law, 377
- matters referred to,
 international rivers, 349
 law of the sea, 373-375
 migrant workers, legal protection of, 349-350
 national legislation, extra-territorial application of, 350-367
 refugees, status and treatment of, 367-373

- Asian-African Legal Consultative Committee, *cont'd*
 membership and organization, 346
 national legislation, extra-territorial application of,
 dispute settlement, 358
 doctrine and practice, 350-353
 general observations, 362-367
 international community, response of, 358-362
 international law, limits imposed by, 353-358
 non-intervention, 356-358
 sovereign equality, 356
 questions under consideration by International Law Commission, 347-348
 refugees,
 asylum, 369-370, 382
 burden sharing, 371-373
 compensation, right to, 382
 definition, 368-369, 381
 expulsion and deportation, 384
 loss of status, 382
 minimum standard of treatment, 382
 obligations, 384
 right to return, 382
 solutions, 370-371
 status and treatment of, 367-373, 381-387
 trade law matters before,
 legislative activities of UN and other organizations, 379
 World Trade Organization, 379-380
- Australia
 Singaporean military, attacks on, 393
- Bangladesh
 creation, questions raised by, 101
 emergence of state, crisis of, 83
 Euron project in, 425
 geographical separation from Pakistan, 87-88
 insurgents, 430-431
 nationalist movement, 84
- Bangladesh, *cont'd*
 prevailing rule of self-determination as exception to, 102
 recognition of,
 Biafra distinguished, 100
 effect of, 98-100
 India, by, 98
 lawfulness of acts leading to creation, effect on, 99
 secession from Pakistan,
 Indian military action, 89, 93-94, 102
 internal matter of Pakistan, as, 95-96
 international peace and security, affecting, 96-97
 lawfulness of, 101
 military force, use of, 89
 Pakistani sovereignty, as affront to, 88
 police action, right to, 97-98
 questions raised by, 84
 support for, 99
 self-determination,
 claim to, 86-87
 factors in, 88
 merits of case, 87-89
 separatist movement, curbing, 88
 statehood, Bangla claim to, 86-87
- Bank for International Settlements
 expansion of membership, 463
- Banks
 Asian central banks co-operation, 463
- Bhutan
 ethnic Nepalis from, 461-462
- Biafra
 Bangladesh situation distinguished, 100
- Bibliography, 511-527
- BIMST-EC
 aims and purposes of, 265, 268
 basis of, 264
- Declaration,
 content and structure of, 265-266
 legal validity, 268
 text of, 532-533
 treaty, whether, 267

- BIMST-EC, *cont'd*
 geographical limitation, 263
 implementation of objectives, 266
 inauguration of, 263
 institutional mechanisms, 266
 mutually beneficial co-operation,
 sectors for, 264
 original idea of, 263
 participants, 263
 principles of, 266
 structure, 267
 technical/secretarial support, 267
 terms of reference, 263
- BIST-EC. See BIMST-EC
- Book reviews, 495-510
- Borders
 Myanmar-Indonesia, closure in
 Borneo, 401
 Myanmar-Thai incidents, 401
 Sino-Indian agreement to prevent
 conflict, 400
 Sino-Russian border troops, reduction
 of, 400
- Borneo
 Myanmar-Indonesia border, closure
 of, 401
- Broadcasting
 Democratic Voice of Burma, 402
 Radio Free Asia, 401-402
- Cambodia
 stolen artefacts, return of, 406
- Children
 child labour, prohibition, 454-455
 Convention on the Rights of the
 Child, 329
- China
 ASEAN, as dialogue partner to, 397
 British navy visit, 459
 China Airlines, office of, 414
 coastline, 243
 contacts with Taiwan, 413
 direct shipping links, 412
 economic and social rights in, 62
 egocentric world view, 31
 enforcement of judgments,
 foreign, 273-274
- China, *cont'd*
 enforcement of judgments, *cont'd*
 municipal, 272
 EU ban on arms sales to, 476
 exclusive economic zone,
 establishment of, 243
 limits of, 243
 FBI office, refusal of permission to
 open in Beijing, 454
 foreign oil industry, investment in,
 426
 France, relations with, 459
 government procurement, US demand
 for fair share of, 450
 hijackers, exchange of, 414
 Hong Kong SAR court judgments,
 enforcement of, 269-278.
 See also Hongkong
 human rights record, 428
 human rights violations, 25
 inter-state relations. See Inter-state
 relations
 Iran, arms sales to, 395
 Japanese chemical weapons in, 492
 joint oil and gas exploration with
 Taiwan, 412
 Korean reunification, attitude of
 China to, 417
 landmines ban, against, 486
 MacDonalds store, closure of, 424
 most-favoured nation status in US,
 450
 Myanmar, military co-operation with,
 460
 nuclear facility, planned sale to Iran,
 465
 nuclear weapons, attitude to, 410
 Philippines, exchange of military
 attachés, 408
 pollution of seas,
 enforcement provisions, 257
 future prospects, 257-260
 legislation and practice, 253-256
 oil, from, 245
 sources of, 244
 Russian destroyers, purchase of, 395
 seas on which bordering, 244

- China, *cont'd*
- Sino-Indian agreement to prevent conflict on common border, 400
 - Sino-Japanese continental shelf, 405
 - Sino-Russian border troops, reduction of, 400
 - Sino-US de-targeting agreement, failure to conclude, 410
 - Sino-US nuclear co-operation, 466
 - super-computers exported to, 419
 - superpower, as, 31
 - supply of advanced nuclear and missile technology, US efforts to control, 410
 - textile trade violations, retaliation to US penalty, 449
 - Thailand, arms sales to, 395
 - US Joint Defense Conversion Commission, 459
 - US naval agreements, 459
 - World Trade Organization, issue of admission to, 486
 - yuan, convertibility, 464
- Civil service
- corruption in, 4
- Civil war
- Afghanistan, in, 402-404
 - Tajikistan, in, 404
- Civilization
- definitions, 29
 - European expansion, associated with, 49
 - human rights, approach to, 27-31
 - ideological abuse, minimizing, 30
 - international, 30
 - transnational perspective, 30
- Climate change
- Framework Convention, 326
- Continental shelf
- Sino-Japanese, 405
- Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 332
- Convention against Discrimination in Education, 328
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 329
- Convention concerning the Protection of the World Cultural and Natural Heritage, 323
- Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 334
- Convention for the Protection of Cultural Property in the Event of Armed Conflict, 323
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 340
- Convention on assistance in case of a Nuclear Accident or Radiological Emergency, 336
- Convention on Biological Diversity, 326
- Convention on Civil Liability for Nuclear Damage protocol to amend, 337
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 327
- Convention on Early Notification of a Nuclear Accident, 336
- Convention on Nuclear Safety, 336
- Convention on Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 342
- Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons, 342
- Convention on Psychotropic Substances, 335
- Convention on Registration of Objects Launched into Outer Space, 337
- Convention on Road Signs and Signals, 338
- Convention on Road Traffic, 338
- Convention on Supplementary Compensation for Nuclear Damage, 337
- Convention on the Conflicts of Law Relating to the Form of Testamentary Obligations, 327

- Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal, 325
- Convention on the High Seas, 338-339
- Convention on the Marking of Plastic Explosives and the Purposes of Detection, 331
- Convention on the Nationality of Married Women, 328
- Convention on the Political Rights of Women, 328
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 331
- Convention on the Prevention and Punishment of the Crime of Genocide, 331
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and other matter, 325
- Convention on the Privileges and Immunities of the Specialized Agencies, 338
- Convention on the Rights of the Child, 329
- Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 332
- Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 332
- Convention on Wetlands of International Importance especially as Waterfowl Habitat, 325
- Copyright
 - Vietnam-US treaty, 431
- Corruption
 - active bribery, 10-11
 - civil service, in, 4
 - extra-territoriality, 11-12
 - foreign government officials, payments to, 8-9
 - human society, in, 4
 - Inter-American Convention Against, 9-10
 - judicial. See Judicial corruption
- Corruption, *cont'd*
 - OECD Convention, 10-11
 - transnational bribes, 10
 - US legislation, 8
- Crimes
 - international, participation in treaties, 330-331
- Cruel and inhuman punishments
 - Sharia, mandated by, 67
- Cultural matters
 - Cambodian artefacts, return of, 406
 - participation in treaties, 322-323
 - Thai agreements, 405
- Cultural property
 - participation in treaties, 323
- Culture
 - concept of, 29
 - differences in, relationship with human rights, 26-27
 - human rights, in relation to, 29
- Customary rules
 - reservations to treaties, and, 131-134
- Customs
 - Regional Intelligence Liaison Unit, headquarters, 406
- Developing countries
 - human rights violations in, 36
 - importance of human rights, emphasising, 62
 - means of violence, monopoly on, 61
 - non-intervention, principle of, 62
 - pursuit of well-being as human rights, aggressive characterization of, 65
 - religions and cultures in, rationalization of human rights violations by reference to, 67
- Developing nations
 - victimization, sense of, 23-25
- Development
 - participation in treaties, 323-324
- Diplomatic and consular immunities
 - German embassy in Tehran, demonstrations against, 407
 - Japanese consulate in Hongkong, forceful entry into, 407

- Diplomatic and consular immunities, *cont'd*
 - Japanese embassy in Peru, occupation of, 407
 - UN premises, breach of inviolability of, 406
- Diplomatic and consular relations
 - Hongkong, consulates in, 408
 - India, expulsion of US diplomats, 408
 - India-Pakistan, 407
 - Iran-European, 408
 - Malaysia-Holy See, 408
 - Sino-Philippine, 408
 - South Africa-Taipei, 414
 - Taiwan, with, 415
 - US, expulsion of India diplomats, 408
- Disarmament
 - Comprehensive Test Ban Treaty, 409
- Disasters
 - co-operation in responding to, 419
- Discrimination (Employment and Occupation) Convention, 333
- Dispute settlement
 - participation in treaties, 324
- Dissidents
 - Myanmar, call for sanctions against, 411
- Double taxation
 - Thai-US agreement, 478
- East Asian nations
 - economic development, 26
 - social stability, 26
- East Timor
 - conference on, 445
 - diplomatic asylum, refusal of, 399
 - EU action, 477
 - issue of, 399
 - Nobel Peace Prize, 477
- Economic activities
 - transnationalization and sovereign state system, conflict between, 22-23
- Economic development
 - human rights, relationship with, 21
- Economic power
 - intellectual/information hegemony, discrepancies with, 25-27
- Employment Policy Convention, 334
- Environment
 - flora and fauna, 324-326
- Equal Remuneration Convention, 333
- Europe
 - ideas and institutions originating in, universal use of, 47-48
- European Court of Human Rights
 - European Convention, interpretation of, 163-164
 - Vienna Convention, application of, 164
- European Court of Justice
 - interpretation of treaties by, 167
- Exclusive economic zone
 - China, of. See China
 - marine environmental protection in, 243
 - protection of environment, 245-246
 - vessel-source pollution, control of, 243
 - enforcement provisions, 257
 - future prospects, 257-260
 - issue of, 243
 - jurisdiction over, 259
 - regional co-operation, 258
 - UNCLOS, provisions of, 247-252
- Family
 - participation in treaties, 326-327
- Finance
 - participation in treaties, 327
- Fisheries
 - annual Japanese-Russian negotiations, 422
 - illegal, 422
 - Japanese fishermen, arrest by Russia, 422
 - Taiwan-Japan talks, 422
- Five Powers Defence Arrangement, 460
- Forced Labour Convention, 333
- Foreign investment
 - Bangladesh, Euron project in, 425
 - Chinese, in foreign oil industry, 426
 - global investment pact, 424
 - India, Euron investment project, 423
 - Indian attitude to, 425

- Foreign investment, *cont'd*
- Indonesian natural gas exploitation, 422
 - Iran, Malaysian participation in, 424
 - Korean acquisition of French company, obstruction of, 424
 - MacDonalds store, closure of, 424
 - Myanmar, in, 423
 - Philippine, national priority, 425
 - US-Hongkong investment promotion and protection accord, 424
- Freedom
- suppressive regimes, demand for respect from, 24
- Freedom of Association and Protection of the Right to Organise Convention, 333
- Ganges River
- Indo-Bangladesh sharing of water from, 473
- Gas. See also Natural gas
- Central Asia pipelines, 468-470
- Good governance
- basic principles and constitutive practices of, 7
 - independent, fair and impartial judiciary, need for, 8
 - multinational financial institutions, requirements of, 12
 - requirements of, 8
- Government
- judicial department, corruption in. See Judicial corruption
- Health
- participation in treaties, 327
- High Seas
- Conventions, 338-339
- Hongkong
- consulates in, 408
 - container terminal facilities, agreement on, 426
 - dual nationals, 426
 - enforcement of judgments, agreement on, 277
 - economic implications, 270-272
- Hongkong, *cont'd*
- enforcement of judgments, *cont'd*
 - mainland China, in, 269-270, 275-278
 - ethnic minorities, nationality status, 426
 - external economic relations, 271
 - financial transactions with mainland, 270
 - human rights and civil liberties laws, 426
 - international jurisdiction over, 427
 - Japan, visa policy, 426
 - Japanese consulate, forceful entry into, 407
 - judicial system, 269
 - provisional legislature, British objection to, 427
 - relationship of SAR courts and mainland courts, 274-275
 - right of abode in, 427
 - Special Administrative Region, transformation to, 269
 - Taiwan, sea trade with, 427
 - Taiwanese intelligence agents in, 415
 - US-Hongkong investment promotion and protection accord, 424
- Huangyan Island
- Chinese fishermen, arrest of, 481
- Human dignity
- global quest for, 23-25
- Human rights
- absolutism, 65
 - abstract humanity, based on, 32
 - Asian way, 47
 - assessment,
 - Amnesty International Report, 39
 - civil and political rights, of, 45
 - economic, social and cultural rights, of, 44
 - Freedom in the World report, 40-41
 - Human Rights Watch Report, 39
 - indexes of, 75
 - major NGOs, by, 38-42
 - methods of, 41-42
 - socio-economic figures, 75

Human rights, *cont'd*

- assessment,
 - World Human Rights Guide, 42-46, 75
- autonomous individuals, basis of, 58
- Bangkok Declaration, 79
- benefits, bringing about, 27
- Chinese government, violations by, 25
- Chinese record, 428
- civil and political,
 - economic, social and cultural rights, relationship with, 52
 - emergence of ex-colonies, effect of, 51
 - equated with, 49
 - individual-centrism, liberation from, 57-60
 - nature of, 50
 - positive protection of, 52
 - primacy, challenge to, 51
- civil rights, as, 50
- collective, 58-60
- comprehensive standards, need for, 73-77
- conditions, grades of, 45
- definition, 31
- developing countries, emphasis on importance in, 62
- development of mechanism of, 28
- development, right to, 78
- differences in culture, and, 26-27
- early mechanisms for protection of, 36-37
- Eastern civilization, compatibility with, 67
- economic development, relationship with, 21
- economic, social and cultural,
 - civil and political rights, relationship with, 52
 - conceptual clarity, need for, 74
 - data related to, 74
 - importance of, 51, 53
 - nature of, 50
 - perfectionism, avoiding, 75
 - positive protection of, 53-54

Human rights, *cont'd*

- economic, social and cultural, *cont'd*
 - US attitude to, 68
- entitlement to, 32
- expansion of, 48
- fetishism, 65
- global scale, acceptance on, 36
- groups of, 50
- health, attainment of highest standard of, 43
- Hongkong laws, 426
- human, notion of, 57
- human, qualifications of, 31
- ideological nature of, 34
- individual versus collective, 78
- individual-centric view of, 59
- intercivilizational,
 - basis of perspective, 80
 - current instruments, nature of, 79-80
 - decisions for actions, perspective for, 71
 - interstate or intergovernmental nature, overcoming, 78
 - modification of norms, 70-81
 - religions and cultures as ground for, 66-70
 - spiritual and material well-being of humanity, realization of, 63-66
- intercivilizational approach to, 27-31, 64
- intercivilizational standards and frameworks, conditions for, liberty-centrism, liberation from, 49-57
- Westcentrism, liberation from, 46-49
- interdependence and indivisibility of, 55-56
- international controversy, as object of, 21
- international instruments, nature of, 76
- international law, foundation of, 85
- international mechanism for protection of, attitude of states to, 33

Human rights, *cont'd*

- international norms,
 - comprehensive standards, need for, 73-77
 - critical transnational and interciv-
lizational perspectives, need for, 77-81
 - modification by intercivilizational
perspectives, 70-81
 - non-derogable, 77
 - political aspects of, 77-78
 - rule of general international law,
as, 77
 - significance of, 70-73
- international standards, reluctance to
accept, 68
- judicial enforcement of, 54-55
- jurisdiction of State, matters within,
63
- legalization, 28
- liberty-centrism,
 - deep-rooted, 74
 - liberation from, 49, 81
 - meaning, 49
- multilateral conventions, importance
of, 71-73
- Myanmar, in, 427-428
- new classifications of, 56-57
- non-intervention, principle of, 62
- non-Western civilizations, in, 37
- normative character of, 65
- participation in treaties, 328-329
- political purposes, abuse for, 35
- prioritization, 76
- protection, categories of, 42
- pursuit of well-being as, 64
- rating of countries, 40-41
- religions and cultures as ground for,
 - Buddhism, interpretation of, 67
 - Confucianism, interpretation of, 67
 - criteria for selection, 69-70
 - developing countries, in, 67
 - Japan, in, 67
 - living, legitimation of rights by,
69-70
 - original or traditional teachings,
reversion to, 69

Human rights, *cont'd*

- religions and cultures as ground for,
cont'd
 - pro- and anti-human rights
teachings, 69
 - reinterpretation, 66-69
 - tensions with, 66
 - scrutiny and reconceptualization of,
81
 - self-determination, to, 78
 - Third World, in, 48
 - treaties, reservations, 136-138
 - uneven treatment of, 50-51
 - universality,
 - people of color, claimed by, 32-33
 - range of, 31-33
 - universality vs. relativity of,
 - universal origin, problematics of
theory of, 35-37
 - Western and non-Western nations,
reversals in position of, 33-35
 - universalization, historical perspec-
tive, 61-63
 - violations,
 - developing countries, in, 36
 - international attitudes to, 63
 - non-state actors, by, 50, 54
 - publications analysing, 38
 - Westcentrism, 35, 46
 - liberation from, 46-49
 - prominence of, 47
 - Workshop on Regional Human Rights
Arrangements in the Asian and Pa-
cific Region, 428
- Immigration
- Japan, to, illegal, 429
- India
- ASEAN, consultations with, 398
 - Euron investment project, 423
 - foreign investment, attitude to, 425
 - import barriers, phase-out, 451
 - India-Pakistan diplomatic relations,
407
 - judicial decisions, 281-284
 - life, right to, 281-282
 - missile production, shelving, 462

- India, *cont'd*
 privacy, right to, 282-284
 Russian jet fighters, 394
 Sino-Indian agreement to prevent
 conflict on common border, 400
 US diplomats, expulsion of, 408
- Indonesia
 comfort women in WWII, aid to, 492
 F-16 sale, cancellation, 475
 Myanmar-Indonesia border, closure in
 Borneo, 401
 national car policy, 487
 natural gas exploitation, 422
 US training programme, withdrawal
 from, 460
- Insurgents
 Bangladesh, in, 430-431
 Philippines, in, 429-430
- Intellectual property
 participation in treaties, 330
- Inter-American Development Bank
 Administrative Tribunal, establish-
 ment of, 211
- Inter-state relations
 Afghanistan, developments in, 437
 Asia-Europe Foreign Ministers
 Meeting, 441
 Cambodia-Korea, 435
 Cambodia-Thailand, 436
 Cambodia-Vietnam, 440
 China-EU, 443
 China-ICRC, 433
 China-India, 439
 China-Japan, 438
 China-Japan-US, 437
 China-Pakistan, 439
 China-Russia, 440-441
 China-South Africa, 431
 China-South Korea, 433-435
 China-US, 431-433
 China-Vatican, 440
 India-Afghanistan, 443
 India-Pakistan, 436
 Iran-Europe, 443
 Iran-Russia-US, 441
 Iran-Turkey, 440
 Iran-US, 443
- Inter-state relations, *cont'd*
 Japan-China-Korea, 436
 Japan-France, 438
 Japan-Latin America, 435
 Japan-Russia, 435
 Japan-Southeast Asia, 441
 Japan-US, 435
 Malaysia-Singapore, 442
 Myanmar, sanctions against, 434
 Myanmar-US, 434
 Nepal, Chinese state visit to, 440
 North Korea, Japanese women living
 in, 443
 North Korea-Russia, 438
 Pakistan-Russia-Ukraine-India, 442
 Philippines-Singapore, 443
 policies on Myanmar, 434
 South Korea, Chinese visit to, 440
 South Korea-Japan, 439
 South Korea-Vietnam, 439
 US forces in Asian region, 442
 Vietnam-US, 442
- International administrative tribunals
 appeal, not providing, 175
 Asian Development Bank, of. See
 Asian Development Bank
 correctness of decisions, 176
 creation of, 211-212
 effect of awards, 181
 finality of judgments, 175
 purpose and effect of, 179-183
 financial institutions, of, 206-207
 interests of staff members, protection
 of, 185
 internal disputes, settlement of, 175
 international character of proceedings,
 212
 International Labour Organisation, of.
 See International Labour Organisa-
 tion international law, in context of,
 209-212
 jurisdiction, 212
 jurisdiction and competence, limita-
 tion of, 183-186
 proposals for future of, 205
 recommended procedures, 207
 requirement of, 207

- International administrative tribunals
 appeal, not providing, *cont'd*
 review of judgments, future of, 204-207
 review process, provision for, 186
 revision of judgments, no provision for, 181
 specialized functions, 178
 supervisory function, no provision for, 185
 task of, 175
 types of, 206
 United Nations, of. See United Nations Administrative Tribunal
 World Bank, of. See World Bank
- International Convention for the Prevention of Pollution from Ships Protocol, 325
- International Convention on Load Lines Protocol, 340
- International Convention on the Elimination of All Forms of Discrimination against Women, 329
- International Convention on the Elimination of All Forms of Racial Discrimination, 329
- International Convention on the suppression and Punishment of the Crime of Apartheid, 331
- International Convention on Tonnage Measurement of Ships, 339
- International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 324
 substances other than oil, Protocol relating to, 325
- International Court of Justice
 advisory opinions, access for, 200
 effect of awards, opinion on, 181
 supervisory jurisdiction,
 access, provision for, 200
 ADBAT tax reimbursement case, 200-204
 former legal regime of UNAT, under, 195-200
- International Court of Justice, *cont'd*
 supervisory jurisdiction, *cont'd*
 International Labour Organisation Administrative Tribunal, over, 188-191
 meaning, 176
 UN Administrative Tribunal, statute of, 176-177
 United Nations Administrative Tribunal, over, 192-195
- International Covenant on Civil and Political Rights, 328
 Optional Protocol, 329
- International Covenant on Economic, Social and Cultural Rights, 328
- International economic relations G-15 attitude, 448
- International Labour Organisation Administrative Tribunal,
 challenge to decisions of, 188-191
 establishment of, 211
 reconstitution, 187
 supervisory mechanism, 188
 unacceptable decision of, 187
 UNAT distinguished, 197
 unilateral modification of contracts, complaint as to, 186-187
 Staff Regulations, 186
- International law
 codification, 405
- International Monetary Fund
 Administrative Tribunal, establishment of, 211
 conditions, Pakistan accepting, 455
- International Opium Convention, 334
- International organizations
 administrative tribunals. See International administrative tribunals
 civil servants, protection of rights of, 210
 immunities and privileges, 179
 internal disputes, settlement of, 179
 jurisdictional immunities, 209
 law governing, 209
 political independence, 209

- International organizations, *cont'd*
 staff disputes, 179
 settlement of, 210
 staff members, status of, 204-205
- International representation
 participation in treaties, 332
- International trade
 Iran-German/Europe trade, 450
 Japanese report on, 450
- International trade, *cont'd*
 least developed countries, of, 449
 participation in treaties, 332
- Iran
 chemical weapons technology,
 sanctions on sale of, 476
 Chinese arms sales, 395
 European countries, diplomatic relations with, 408
 German embassy in Tehran, demonstrations against, 407
 German/Europe trade, 450
 involvement in crimes, German court verdict, 453
 Malaysian participation in investment, 424
 nuclear facility, planned sale by China, 465
 Pakistan, refinery in, 451
 petrochemical plant, 452
 Russian submarine, delivery of, 394
 US sanctions against, 474
- Japan
 aliens,
 interpreter, costs of, 285
 local government, participation in, 393
 tuna boats, crew members of, 393
 visa requirements, 393
 voting rights, 286
 annual Japanese-Russian fisheries negotiations, 422
 anti-missile defense project with US, 460
 chemical weapons in China, 492
 comfort women in WWII, actions by, 491
- Japan, *cont'd*
 deregulation, demands for, 448
 dumping, alleged, 489
 fishermen, arrest by Russia, 422
 fishing,
 adoption of straight baselines, effect of, 287-289
 Soviet-occupied territory, in, 285
 Hongkong passports, visa policy, 426
 illegal immigration to, 429
 imported goods, dispute over access, 490
 insurance market, Japan-US dispute, 446
 inter-state relations. See Inter-state relations
 international trade, report on, 450
 ivory trade, position on, 421
 Japan-Russia aviation agreements, 392
 judicial decisions, 284-289
 Koreans in, 461
 liquor tax, 489
 military forces, increased deployment of, 451
 Myanmar, aid to, 419
 non-governmental organizations, 418
 North Korean famine, attitude to, 419-420
 nuclear waste, shipment of, 467
 oil spill, 421
 Okinawa, US bases on, 457
 photographic film and paper market, 488
 prisoners of war, compensation for, 286-287
 role of, 484
 Russia, island dispute with, 482
 Russian navy visit, 460
 shipping practices, 489
 Sino-Japanese continental shelf, 405
 southern Sakhalin, waiver of claim to, 482
 Soviet-Japanese Treaty on Consular Relations, competence of consul under, 284

- Japan, *cont'd*
 Taiwan-Japan fisheries talks, 422
 Taiwan, treatment of representatives of, 485
 US defense guidelines, 457-458
 waste, dumping, 420
- Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 336
- Joint ventures
 Iranian petrochemical plant, 452
 Iranian refinery in Pakistan, 451
 Kazakh-Iranian oil co-operation, 452
 Kazakh oil, transport of, 452
 Laos, hydropower project in, 452
 trans-ASEAN Gas Pipe System, 451
- Judges
 corruption. See Judicial corruption
- Judicial and administrative co-operation
 participation in treaties, 332
- Judicial assistance
 Bofors arms case, 453
- Judicial corruption
 causes and conditions of,
 compensation of judges, 13-14
 complexity of legal system, 12-13
 public perception of judiciary,
 14-15
 civil service, as reflection of corruption in, 4
 consequences of, 5
 context of, 3
 criminal law, violation of, 6
 institutions of government, weakening, 7
 legal system, impact on, 5-6
 legitimacy of government, effect on, 7
 moral reform, need for, 4
 personal and moral problem, as, 4
 problem of, 3
 reduction of mitigation, strategies for, 3
 reform, personal leadership in, 18-19
 regulation and control of,
 administrative supervision, 17
 court reporting, methods of, 18
- Judicial corruption, *cont'd*
 regulation and control of, *cont'd*
 finality of judgments, provision for, 18
 judicial compensation, upgrading, 16
 recruitment strategies, 16
 training, 16-17
 vacuum, not existing in, 15
- Judiciary
 corruption. See Judicial corruption
 independent, fair and impartial, need for, 8
- Jurisdiction
 FBI office, refusal of permission to open in Beijing, 454
 Iran-US dispute, in, 455
 Iranian involvement in crimes, German court verdict, 453
 US Drug Enforcement Agency, Pakistani citizen employed by, 454
- Kazakhstan
 Kazakh-Iranian oil co-operation, 452
 oil, transport of, 452
- Korea
 inter-state relations. See Inter-state relations
 joint venture enterprise, 415
 peace talks, 417
 Red Cross officials, meeting of, 418
 reunification, attitude of China to, 417
 submarine incident, 415-416
- Korean War
 alleged US POWs, 454
 temporary peace accord, 454
- Labour
 child labour, prohibition, 454-455
 participation in treaties, 333
 rights, US and EU pressure on, 454
- Landmines
 ban, 486
- Laos
 hydropower project in, 452
- Libya
 US sanctions against, 474

- Macao
Sino-Portuguese talks, 456
- Malaysia
contract, proper law of, 292-294
custody of children, jurisdiction, 312-313
divorce jurisdiction, 309-312
domicile,
 concept of, 309-312
 married woman, of, 312-313
Indonesian asylum-seekers in, 399
judicial decisions, 289-313
libel, place of, 289-290
migrant workers, 456
participation in Iran investment, 424
Singapore, water supply to, 418
trust, assets forming part of subject matter of, 290-292
UN Special Rapporteur, immunity from legal process, 294-309
Vatican, diplomatic relations with, 408
- Mekong River
co-operation, 474
- Minorities
Bhutan, ethnic Nepalis from, 461-462
Japan, Koreans in, 461
- Missile technology
India, in, 462
North Korean missile tests and proliferation, 462
South Korea, development of long-range missiles by, 462
- Montreal Protocol
amendments, 326
- Multifibre Agreement
phase-out of, 447
- Multilateral Investment Guarantee Agency
Convention establishing, 327
- Myanmar
ASEAN, membership of, 397-398
call for sanctions against, 411
China, military cop-operation with, 460
Democratic Voice of Burma, 402
eligibility for GSP, revocation, 450
- Myanmar, *cont'd*
foreign investment in, 423
human rights in, 427-428
inter-state relations. See Inter-state relations
Japanese aid to, 419
Myanmar-Indonesia border, closure in Borneo, 401
Myanmar-Thai border incidents, 401
sanctions against, 434, 474-475
Thai cultural agreements, 405
- Narcotic drugs
participation in treaties, 334-335
- Nation state
membership of, 58
- Nationality
participation in treaties, 335
- Natuna Islands
Indonesia, assertion of sovereignty by, 482
- Natural gas
consumption, production and reserves, 468
Indonesia, exploitation by, 422
Philippines gas field, 468
- Nepal
Chinese state visit to, 440
transit rights, 484
- Non-Aligned Movement
New Delhi ministerial conference, 464
- Non-interference
China-Australia, 444
China-Germany, 444
China-Vatican, 445
civil war in Afghanistan, Indo-Indian attitude to, 445
conference on East Timor, Malaysia banning, 445
Dalai Lama,
 France, meetings in, 444
 UK, in, 444
Singapore election campaign tactics, US criticism of, 445
Sino-Japanese island dispute, US involvement in, 444, 479-480

- Non-interference, *cont'd*
 Thailand on dialogue in Myanmar, 444
- North Korea. See also Korea
 air space, 393
 arms sales, 394
 barter deal, US export license, 475
 espionage charges against US citizen, 421
 famine, Japanese attitude to, 419-420
 high-level official, defection of, 417
 missile tests and proliferation, 462
 peace talks, acceptance of principle, 417
 Taiwan,
 nuclear waste pact, 467
 representative office in, 486
 US and EU aid, 420
 US presence in South Korea, acceptance of, 416
- Nuclear energy
 China, planned sale of facility to Iran, 465
 IAEA-North Korea talks, 467
 India-Russia talks, 467
 Iran, Ukraine not supplying turbines for, 467
 KEDO Agreement, implementation of, 465
 KEDO reactors, projected building of, 465
 Pakistan, second Chinese reactor for, 467
 safety, regional co-operation, 466
 Sino-US nuclear co-operation, 466
- Nuclear material
 participation in treaties, 336
- Nuclear waste
 shipment to Japan, 467
 Taiwan-North Korea pact, 467
- Nuclear weapons
 Chinese attitude to, 410
 technology, Chinese supply of, 410
 test ban treaty, 486
- Oil
 Central Asia pipelines, 468-470
- Organization for Economic Co-operation and Development
 South Korea membership, 470
- Outer space
 participation in treaties, 337
- Pakistan
 Chinese loan, 455
 IMF conditions, accepting, 455
 India-Pakistan diplomatic relations, 407
 Iranian refinery in, 451
 second Chinese reactor for, 467
- Papua New Guinea
 mercenaries, use of, 456
 Taiwan UN membership, attitude to, 413
- Paracel Islands
 Chinese monument, 479
- Peru
 Japanese embassy, occupation of, 407
- Philippines
 China, exchange of military attaches, 408
 Communist insurgents, government talks with, 430
 cultural attitudes in, 5
 gas field, 468
 investments, national priority, 425
 judges,
 administrative supervision, 17
 levels of payment, 13-14
 recruitment, 16
 training, 16-17
 judicial corruption. See Judicial corruption
 judicial reform, personal leadership in, 18-19
 Marcos regime, revolution against, 4
 Moro Islamic Liberation Front, truce with, 430
 Muslims, peace deal with, 429
 port, renewed US use of, 460
 public perception of judiciary, 14-15
 Special Zone for Peace and Development, 429

Philippines, *cont'd*

- Supreme Court,
 - cases in, 12-13
 - court reporting, methods of, 18
 - supervisory jurisdiction, 17
- Vietnamese refugees, admission of, 470

Pollution

- Fund Convention, 230
- greenhouse gases, 420
- marine,
 - categories of, 244
 - definition, 244
 - MARPOL, 230
- oil,
 - coastal state, rights of, 246-247
 - flag-state jurisdiction, 245
 - international legislation, 245
 - Public Law Convention, 246
- vessel-source,
 - Chinese legislation and practice, 253-256
 - Chinese legislation and practice, 253-256
 - coastal state, rights of, 246-247
 - conventions, 229-230
 - elements of, 244
 - exclusive economic zones, in. See Exclusive economic zone
 - future prospects, 257-260
 - international legislation, 244-247
 - issue of, 243
 - UNCLOS, provisions of, 247-252

Port state control

- access to port, 232
- arrangements, 236
- Asia-Pacific Region, Memorandum of Understanding in, 229
- co-operative mechanism, as, 229
- conflict of jurisdiction, 231
- departure from port, 234
- international legal issues, 231-235
- international treaties on pollution, not increasing, 229
- Memoranda of Understanding, effectiveness, 240-241

Port state control, *cont'd*

- Memoranda of Understanding, *cont'd*
 - first, 235
 - history of, 235-236
 - key points, 237
 - legal jurisdiction, 240
 - participants, 236
 - purpose of, 236
 - port state,
 - application of laws by, 232-233
 - authority of, 235
 - flag state, versus, 231
 - purpose of, 229
 - Tokyo Memorandum of Understanding,
 - coming into effect, 229
 - detention of vessels, 240
 - inspection of vessels, standards, 239-240
 - international conventions, enforcement of, 238
 - participants, 237
 - Port State Control Committee, 237
- Privileges and immunities
- participation in treaties, 337-338
- Racial discrimination
- Committee on Elimination of, 34
 - International Convention on the Elimination of All Forms of, 329
- Railways
- Iran-Turkmenistan link, 470
 - Trans-Asian, 470
- Refugees
- Asian-African Legal Consultative Committee. See Asian-African Legal Consultative Committee
 - asylum,
 - East Timorese, refusal to, 399
 - Malaysia, Indonesian asylum-seekers in, 399
 - Chinese, eviction from Indonesia, 471
 - Myanmar Karen, 471
 - North Korean, 471
 - Pakistan, repatriation from Bangladesh to, 471

- Refugees, *cont'd*
 participation in treaties, 338
 Vietnamese,
 admission to Philippines, 470
 repatriation, 471
- Regional security
 Asean Regional Forum, 472
 Japanese-Canadian consultations, 472
 multilateral discussion of, 472
 US forces, stationing in Asia, 472
- Religion
 human rights, relation with. See
 Human rights
- Reservations to treaties
 acceptance, requirement of, 105
 admissibility, 111-115
 advance, acceptance in, 115-117, 122
 assent to, 107
 balanced considerations, 115
 bilateral treaties, to, 106
 broad interpretation of concept, 128
 compatibility test, 145-149
 concept of, 105
 conclusions, 138-139
 conditions, attaching to consent, 105
 consent, governed by principle of,
 137
 customary norms, and, 131-134
 definition, 108-111
 development of law, 105
 effect of, 107, 110
 other parties per se, on, 123
 reciprocal, 123
 reserving and accepting party,
 relationship of, 123
 reserving and objecting party,
 relationship of, 124
 establishment of, 110
 failure to object to, 120-121
 flexible system for, 112
 form of, 109
 formulation of,
 application of criteria, 112, 146-147
 limitations, 112-114
 neutrality, 121
 prohibition of, 111
 response to, 115
- Reservations to treaties, *cont'd*
 formulation of, *cont'd*
 right to, 111
 unilateral act, as, 112
 Genocide Convention, 107, 144-145,
 161
 human rights treaties, 136-138
 International Court of Justice,
 approach of, 106-107
 International Law Commission, work
 of, 149
 interpretation of treaties, relationship
 with, 110-111
 interpretative declaration distin-
 guished, 127-129
 invalid,
 external bodies, by, 135
 severability of, 134-136
 modern law, 105, 108
 multilateral treaties, to, 106
 object and purpose of treaty,
 compatibility with, 112, 114,
 129-131
 in relation to, 129-131, 144-149
 objections to,
 basis of, 119
 effect of, 106-107, 119-120
 limitation on right, 130
 reserving and objecting party,
 relationship of, 124
 sanction of, 119
 withdrawal, 125
 opposability,
 acceptance in advance, by, 115-117
 collective acceptance, by, 117-118
 individual acceptance, by, 118
 permissibility, relationship with,
 121-122
 unanimous acceptance, by, 117
 permissibility criteria, 121-122
 practice of, 108
 principle underlying, 115
 procedure, 126
 prohibition of, 111
 range of articles to which permitted,
 indication of, 116
 signing, at time of, 126

- Reservations to treaties, *cont'd*
 tacit acceptance of, 120-121
 time of, 109
 unilateral statement, as, 109
 Vienna Convention, provisions of,
 105, 108
 withdrawal, 125
 writing, in, 126
- Right to Organise and Collective Bar-
 gaining Convention, 333
- Road traffic
 participation in treaties, 338
- Russia
 annual Japanese-Russian fisheries
 negotiations, 422
 China, purchase of destroyers by, 395
 India, jet fighters to, 394
 inter-state relations. See Inter-state
 relations
 Iran, submarine for, 394
 Japan,
 island dispute with, 482
 navy visit to, 460
 Japan-Russia aviation agreements,
 392
 Japanese fishermen, arrest of, 422
 Sino-Russian border troops, reduction
 of, 400
 South Korea, supply of weapons to,
 394
- Sakhalin Island
 Japan, waiver of claim by, 482
- Scarborough shoal
 Chinese fishermen, arrest of, 481
- Sea
 participation in treaties, 338-339
- Sea traffic
 participation in treaties, 339
 passage of warships, US response to
 Chinese declaration on, 476
 Straits of Hormuz, US attitude to, 476
 Thai contiguous zone, 476
- Self-determination
 Bangladesh, emergence of. See Bang-
 ladesh
 economic colonialism, questions of,
 103
- Self-determination, *cont'd*
 entities deserving right to, 90
 evolution of norm, 84-86, 89-90
 institutionalization of factors, 103
 international law rules, 90
 liberation from foreign domination,
 as, 85
 limits of right, 92
 problem of, 83
 recognition of new state, 98-100
 right of, 84
 salt-water type, 84, 87
 secession, right to, 103
 struggle for secession, support for, 99
 territorial integrity, conflict with, 85
 third party, armed intervention by,
 Bangladesh, prior to, 91
 collective, 92
 Indian action in Bangladesh, 89,
 93-94
 legality of, 90
 precedents, 95
 1970 Declaration, 92-93
- Senkaku (Diaoyu) Islands
 dispute over, 444, 479-480
- Shipping
 foreign companies, Japanese-US
 conflict on treatment of, 449
 Japanese practices, 489
 pollution, treaties concerning, 229-
 230
 safety, 230
- Shrimps
 methods of catching, 488
- Sikkim
 Indian control of, attitude of China to,
 483
- Singapore
 Australian naval exercise, 459
 election campaign tactics, US criti-
 cism of, 445
 immovable property abroad, jurisdic-
 tion over, 314-316
 judicial decisions, 314-320
 legal proceedings in foreign jurisdic-
 tion, injunction against, 316-320
 Malaysia, water supply from, 418

- Singapore, *cont'd*
 Malaysian railroad company, land owned by, 483
 Singapore-US air agreement, 393
 UK military ties, 458
- Single Convention on Narcotic Drugs, 334
 as amended, 335
 Protocol, 335
- Sipadan and Ligitan Islands
 dispute over sovereignty, 482
- Slavery Convention, 331
 Supplementary, 331
- Social matters
 participation in treaties, 340
- Social welfare
 Asian ministers meeting, 477
- South Africa
 Taipei, diplomatic relations, 414
- South Asian Association for Economic Co-operation (SAARC)
 Maldives, 1997 summit meeting in, 477
 principles of, 266
 role of, 264
 SAPTA, implementation of, 477
- South Centre, Agreement to establish, 324
- South China Sea
 Chinese claims, ASEAN attitude to, 480
- South Korea. *See also* Korea
 acquisition of French company, obstruction of, 424
 Chinese visit to, 440
 development of long-range missiles by, 462
 OECD membership, 470
 submarine, development of, 394
 supply of weapons to, 394
 US, military exercises with, 456, 458
 US presence, North Korean acceptance of, 416
- Sovereign state system
 capitalism, mitigation of hardship of, 64
- Sovereign state system, *cont'd*
 material well-being under, desire for, 63
 survival of, 23
 transnationalization of economics, conflict with, 22-23
- Spratly Islands
 Sino-Philippine disagreements, 480-481
- State sovereignty
 premise of, 98
 UN system, as basic pillar of, 95-96
- Statelessness
 participation in treaties, 335
- Taipei
 South Africa, diplomatic relations cut by, 414
- Taiwan
 arms sales, 395
 contacts with China, 413
 Dalai Lama in, 414
 diplomatic relations, 415
 direct shipping links, 412
 foreign minister, foreign visits by, 413
 hijackers, exchange of, 414
 Hongkong,
 intelligence agents in, 415
 sea trade with, 427
 international organizations, efforts to enter, 413
 Japan, treatment of representatives in, 485
 joint oil and gas exploration with China, 412
 mainland, investment on, 412
 North Korea, nuclear waste pact, 467
 North Korean representative office, 486
 political entity, to, 414
 reunification, refusal of, 411
 Taiwan-Japan fisheries talks, 422
 UN membership, attitude to PNG to, 413
 US, economic ties with, 485

- Tajikistan
civil war, 404
- Takeshima/Tok-do Islands
harbour facilities, request to halt
construction of, 482
- Telecommunications
orbital slots of satellites, coincidence
of, 478
participation in treaties, 341
- Textiles
EU anti-dumping duties, 447
Sino-Japanese trade, 448
trade violations, Chinese retaliation to
US penalty, 449
- Thailand
arms, plan to buy, 395
baht, speculation on, 464
contiguous zone, 476
cultural agreements, 405
Myanmar-Thai border incidents, 401
Thai-US double taxation agreement,
478
- Torture
prohibition, importance of, 26
- Transport
road, participation in treaties, 338
sea, participation in treaties, 339
- Treaties
acceptance of obligations, requirement
of, 105
codification of law, 157
inter se agreements, 149-152
interpretation, 110-111
arbitrations, in, 162
codification of law, 157
common intention of parties, of
giving effect to, 159
dynamic, 168
effect of rules, 156
emergent purpose, 165
European Court of Justice, by, 167
extreme, 164
functional, 165
fundamental issue of, 155
Granada Resolution, 157
implied powers theory, 165-166
- Treaties, *cont'd*
interpretation, *cont'd*
International Court of Justice, by,
160-161
International Law Commission,
formulation of rules by, 157-158
legal doctrine and experience of,
156
letter of treaty, going beyond, 166
methods of, 155
object and purpose, relating to, 155
plurilingual treaties, 169-170
purpose or aims, establishing, 156
step by step technique, 162
teleological, 164-169
text of treaty, limited by, 158-160
interpretative declaration, 127-129
material breach, 170-173
multilateral,
breach of, 173
participation, ensuring, 106
mutuality of consent as essence of,
137
object and purpose of,
conclusion of treaty, at, 158
confines of, 158-164
determination of, 141, 173-174
duty not to defeat, 142
entry into force, obligation not to
defeat prior to, 152-155
general rules, in, 152-173
human rights courts, invocation
before, 163-164
inter se agreements, 149-152
International Court of Justice, use
of terms by, 143
interpretation, 155-164
introduction of notion, 157
Iran-US Claims Tribunal, view of,
163
relevance of, 142
reservations, in relation to, 129-
131, 144-149
rules directly or indirectly relating
to, 142
separate notions, as, 163

- Treaties, *cont'd*
- object and purpose of, *cont'd*
 - several, having, 172
 - silent treaties, 141, 144-152
 - terminology, 142-144
 - Vienna Convention, provisions of, 141-142, 152
 - violation and remedies, in relation to, 173
 - participation of Asian states in, generally, 321
 - reservations. See Reservations to treaties
 - signatory state, temporary status of, 153
 - silent,
 - inter se agreements, 149-152
 - meaning, 141
 - reservations, 144-149
 - suspension of operation, 171
 - unanimity rule, 117
 - unilateral termination, 170-173
- UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 335
- UN Convention on Contracts for the International Sale of Goods, 332
- UN Convention on the Law of the Sea, 339
- Implementation of Part XI, Agreement relating to, 339
 - vessel-source pollution, provisions on, 247-252
- United Nations
- Afghanistan, representation of, 485
 - challenges to, 83
 - codification of law, 405
 - right to veto, motivation for, 485
 - Security Council seat, competition for, 485
 - Special Rapporteur, immunity from legal process, 294-309
 - system, 83
- United Nations Administrative Tribunal
- challenge to decisions of, 192-195
- United Nations Administrative Tribunal, *cont'd*
- Committee on Applications for Review of Judgements, 195
 - establishment of, 211
 - former legal regime, role of ICJ as appellate court, 195-200
 - ILOAT regime distinguished, 197
 - jurisdiction, 206
 - review authority, scope of, 198
 - review procedure, 177-178, 191-192
 - revision of judgments, no provision for, 181
 - supervisory jurisdiction over, 176-177
- United States
- China, export of super-computers to, 419
 - Indian diplomats, expulsion of, 408
 - inter-state relations. See Inter-state relations
 - international influence of, 25
 - Japan, defense guidelines, 457-458
 - mechanism for protection of, attitude to, 34
 - ratification of human rights instruments by, 68
 - Singapore-US air agreement, 393
 - Sino-US de-targeting agreement, failure to conclude, 410
 - Sino-US nuclear co-operation, 466
 - Thai-US double taxation agreement, 478
 - trade deficit with China and Japan, 447
 - US-Asian open skies talks, 392
 - Vietnam-US copyright treaty, 431
- Vatican
- Malaysia, diplomatic relations with, 408
- Vienna Convention on Consular Relations, 338
- Vienna Convention on the Law of Treaties, 341
- Vietnam
- former South Vietnamese debts, assumption of, 477

- Vietnam, *cont'd*
oil exploration in disputed areas, 483
US links, 460
Vietnam-US copyright treaty, 431
World Bank aid for, 419
- Waste. See also Nuclear waste
Japan, dumping by, 420
- Weapons
participation in treaties, 341-342
- World Bank
Administrative Tribunal,
establishment of, 211
need for, 210
loans in 1996 fiscal year, 455
Vietnam, aid for, 419
- World Court
Iran-US dispute, jurisdiction in, 455
role and composition of, 484
- World Semiconductor Council, 445-446
- World Trade Organization
anti-dumping, investigation of, 490
China, issue of admission of, 486
First Ministerial Conference, 491
ILO Director general, rejection of
address by, 491
Indonesian national car policy, 487
Information Technology Agreement,
490
issues to be dealt with, disagreements
as to, 490
quadrilateral meeting, agreements at,
487

GENERAL INFORMATION

Editorial address:

ASIAN YEARBOOK OF INTERNATIONAL LAW

c/o Dr. Karin Arts, Institute of Social Studies

P.O. Box 29776, 2502 LT The Hague, The Netherlands.

Fax: 31-70-4260799 ; *E-mail:* ARTS@ISS.NL

or:

c/o Professor Ko Swan Sik,

52 Cesar Franckrode, 2717 BE Zoetermeer, The Netherlands.

Fax: 31-79-3211195 ; *E-mail:* KOSS@XS4ALL.NL

Contributions to the Yearbook

The *Yearbook* invites contributions in the form of:

- articles (5000 words or more) on topics of public or private international law, either with special reference to Asia or of general relevance;
- (shorter) notes and comments;
- translated versions of articles originally written in a language other than English;
- materials in the field of municipal or international state practice of Asian states and organizations, with relevance to international law;
- data on events and incidents relating to Asia and Asian countries and with relevance to international law and relations;
- information on literature and documents (in any language) either concerning international law in Asia or concerning international law in general and published or issued in Asia.

Contributors of articles and notes will receive 25 offprints free of charge. Contributors of other materials will receive 10 offprints of the *Yearbook*-section in which their materials are included.

Submission of manuscripts and other materials

The regular schedule of the *Yearbook* provides for publication in June of each year.

The final date of submission of manuscripts for articles and notes is 1 July (of the preceding year). The final date of submission of other materials is 31 August.

Submission of a manuscript should be accompanied by information whether it has been published, submitted, or accepted elsewhere, or whether it is a translation.

Submission of manuscripts implies the readiness to consider editorial suggestions for change and, as the case may be, to introduce revisions. It also implies the author's agreement with linguistic revision by native speakers so far as these services are available to the Editors.

Authors are requested to have their manuscript processed by Word or WordPerfect under Windows 95 or higher on a PC and saved as a Word (6/95 or 7/95) file, and to submit their manuscript (1) by mail on a 3.5" disk or (2) by e-mail, as an attached file. Additional hard copies are optional but much appreciated.

ANNOUNCEMENTS
FOUNDATION FOR THE DEVELOPMENT OF INTERNATIONAL LAW
IN ASIA

Errata

Due to the conversion of the manuscript from WordPerfect into Word, a number of errors have slipped into the cumulative tables of the section 'Participation in Multilateral Treaties' in Volume 6 of the *Yearbook*. These errors have been corrected in the present Volume. An explanation of these corrections is to be found in the 'Editorial introduction' to the section at p. 321.

Sata Prize

A separate announcement on the Sata Prize 2001 is to be found at p. xxx.

Translation of writings in Asian languages

In pursuing its aims the DILA Foundation invites proposals for the translation into English and the publication in the *Asian Yearbook of International Law* of essays of an outstanding character on topics of international law which are written/published in an Asian language. The Foundation has especially in mind writings of high quality whose dissemination to a wider public is to be considered of the highest interest and particularly useful for the promotion of the discussion of international law.

The writings should as a rule be estimated at no longer than 40 pages in print in the English version. The proposals need not necessarily come from the author him/herself and are to be accompanied by a short explanation and a brief summary in English of the contents of the essay concerned.

A Translation Committee of the Foundation, including the General Editors of the *Yearbook*, will decide on the proposals.

The Foundation will take responsibility for the costs of translation and, wherever necessary, those of linguistic revision. No translated version of the original text will be published in the *Yearbook* without the consent of the author and the copyright holder.

Proposals should be sent to the Editorial address of the *Asian Yearbook of International Law*, as indicated in the General Information, *supra*.

SATA PRIZE 2001

In 1997 the Governing Board of the *Foundation for the Development of International Law in Asia (DILA)* decided to devote part of an annual grant by Tokibo Ltd., Tokyo to the Foundation, for the award of a prize of US \$ 1,500 for an original essay of excellent quality written by a young scholar of Asian nationality on a topic of public or private international law. The prize is named after the President of Tokibo Ltd., Mr. Sata Yasuhiko.

The winning essay will be published in the *Asian Yearbook of International Law*.

Essays for the 2001 Prize must be received by the General Editors of the Yearbook not later than 31 July 2001 at the following mailing address of the Yearbook:

52 Cesar Franckrode,
2717 BE Zoetermeer, The Netherlands.

Participants must not be over the age of 40 years on that date. Each essay should be accompanied by a curriculum vitae of the author. Essays must be written in English, and be of a length not less than 8,000 words and not more than 16,000 words excluding footnotes.

The Editors of the *Yearbook* will determine the winning essay and notify competitors of the result not later than 31 October 2001. They may also decide that none of the essays submitted is of a quality that would justify award of the prize. The decisions taken by the Editors will be final.